SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 152711/2016

JOHN DEVLIN, JEANNETTE DEVLIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, CITY UNIVERSITY OF NEW YORK, STALCO CONSTRUCTION INC.,AECOM, CARVED IN STONE CONSTRUCTION, INC.,GRAMERCY GROUP INC.,SAFETY AND QUALITY PLUS, INC.,

Defendant.

MOTION DATE 11/09/2021, 01/14/2022, 01/14/2022, 01/14/2022, 01/14/2022, 01/14/2022

MOTION SEQ. NO. 006 007 008 009 010 011

DECISION + ORDER ON MOTION

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STALCO CONSTRUCTION INC.

Plaintiff,

-against-

AIM BUILDERS CORP.

Defendant.

Third-Party
Index No. 595734/2016

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 478, 479, 480, 504, 505, 506, 507, 508, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 595, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 483, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 594, 596, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 484, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 566, 567, 568, 569, 597, 640, 641, 642

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 482, 485, 488, 489, 491, 492, 493, 494, 495, 496, 497, 498, 541, 542, 581, 598, 612, 613, 633, 634, 635, 636, 652, 653, 654, 655, 656, 657

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 486, 499, 500, 501, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 599, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 643, 644, 645, 646, 647, 648, 649, 650, 651

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 487, 490, 502, 503, 526, 527, 528, 529, 530, 562, 563, 564, 565, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 600, 637, 638, 639

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, plaintiff's motion for partial summary judgment against defendants City University of New York (CUNY), Stalco Construction Inc(Stalco) and AECOM is denied; defendant AECOM's motion for summary judgment of all claims and cross-claims is granted; defendant Gramercy Group Inc.'s (Gramercy) motion for summary judgment of cross-claims against defendants CUNY and Stalco is denied; plaintiff's cross-motion for summary judgment against defendant Gramercy Group Inc.'s is denied; defendant Safety and Quality Plus Inc.'s (Safety) motion for summary judgment against plaintiff's cross-claims is granted; defendants CUNY and Stalco's motion for summary judgment of cross-claims by defendant Safety is denied; defendant AIM Builders Corp.'s (AIM) motion for summary judgment of claims and cross-claims is denied; and defendants CUNY and Stalco's motion for conditional summary judgment against defendants AIM and Gramercy Group Inc. is denied.[1]

[1] The Court would like to thank Joyce D. Campbell Priveterre, Esq. for her assistance in this matter.

Facts

On December 17, 2015, plaintiff, then an employee of defendant/masonry contractor AIM, a sub-contractor retained by defendant/general contractor Stalco to work on a pool deck at the Borough of Manhattan Community College (BMCC), a college in the defendant/owner CUNY system, was injured when he allegedly stepped on plywood that covered a hole and fell backwards into that hole. Defendant Gramercy was the demolition contractor for the project. Defendant/construction manager AECOM, which acquired URS Construction, was retained to supervise the work performed on the pool deck and AECOM entered into a contract with defendant Safety to perform safety inspections.[2] Plaintiff further alleges that he sustained serious, permanent, disabling and grave injuries from his fall.

Summary Judgment Standard

Courts have held that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978) *citing Moskowitz v. Garlock*, 23 A.D.2d 943. However, only the existence of a *bona fide* issue raised by evidentiary facts and not conclusory allegations will suffice to defeat summary judgment. *See Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 929; *Rosenberg v. Del-Mar Div., Champion Int. Corp.*, 56 A.D.2d 576, 577, 391 N.Y.S.2d 452-453.

Labor Law § 240 (1) Standard

It is well established law that an accident alone does not establish a Labor Law § 240 (1) violation or causation. (*Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S. 484 (2003), *Rudnik v. Brogor Realty Corp*., 45 A.D.3d 828, 847 N.Y.S.2d 141, *Forschner*

[2] Defendant Carved in Stone, never answering the complaint, is in default.

v. Jucca Co., 63 A.D.3d 996, 883 N.Y.S. 63 (2d Dept. 2009)). Rather, the protections afforded by this section are invoked only where plaintiff demonstrates that he was engaged in an elevation-related activity and the failure to provide him with a safety device was the proximate cause of his injuries. *See* id.

Labor Law § 241 (6) Standard

For a plaintiff to recover for a cause of action alleging a violation of Labor Law § 241 (6), he must establish the violation of an Industrial Code provision which alleges specific safety standards. (*Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 883 N.Y.S.2d 63 (2009)). Moreover, the regulation alleged to have been breached must be a specific and applicable to the facts at bar. (*Rizzuto v L.A. Wenger Contr. Co.,* N.Y.2d 343, 670 N.Y.S. 816 (1998)).

Motion Seq. 9: Plaintiff's motion for summary judgment against defendants CUNY, AECOM and STALCO

Plaintiff contends that although he warned a Stalco supervisor about debris strewn all over the worksite in the pool area to which he was assigned, nothing was done to clean the area. *See* NYSCEF Doc. No. 321 at page 100, lines 7-18. Plaintiff also contends that on the date of his accident, he did not see any openings on the flooring, and he had to step over sheets of plywood planks which gave way. *See* NYSCEF Doc. No. 321 at page 127, lines 2-5. Plaintiff testified that he fell approximately 25 feet. *See* NYSCEF Doc. No. 321 at page 133, lines 2-3. He did not see any warnings not to walk over the plywood nor were there any barricades that restricted access. *See* NYSCEF Doc. No. 321 at page 135, lines 18-23.

A witness on behalf of defendant Stalco acknowledged that no blockade had been placed around the hole and a witness on behalf of defendant AECOM testified that the sheet of plywood which gave way had been there for approximately a month but was neither bolted nor secured. *See*

NYSCEF Doc. No. 551 at page 74, lines 3-14 and *See* NYSCEF Doc. No. 557 at page 57, lines 16-25 and page 72, lines 14-16, respectively.

Plaintiff also contends, *inter alia*, that defendant AECOM, as the construction manager, and the party who retained defendant Safety to inspect the subject location, was contractually obligated to establish and maintain safe conditions for plaintiff. Plaintiff asserts that AECOM was a statutory agent under the Labor Law because AECOM had the ability to enforce safety regulations and stop unsafe work practices.

Defendants CUNY and Stalco contend that there are facts in the record that preclude summary judgment, namely whether plaintiff was authorized to be in the pool deck area where he was injured. *See* NYSCEF Doc. No. 405 at page 176, lines 4-10. The defendants also claim that the record is unclear about whether the plywood had been secured to the flooring before plaintiff's injury. *See* NYSCEF Doc. No. 407 at page 65, lines 10-24. Moreover, defendants claim that inconsistencies in the record concerning how the accident occurred constitute material issues of fact concerning the proximate cause of plaintiff's injury. They cite to plaintiff's deposition testimony that he fell as he walked to retrieve plywood planks to cover a hole in the flooring and to the Employee Claim form signed by plaintiff on December 21, 2015, which states that plaintiff was lifting plywood when his accident occurred. *See* NYSCEF Doc. No. 466 at page 118, lines 18-2, page 127, lines 17-19. *See also* NYSCEF Doc. No. 476 at page 2, paragraph D. Plaintiff has denied that he was lifting plywood and testified that he did not write the words "LIFTING PLYWOOD" on the Employee Claim. *See* NYSCEF Doc. No. 466 at page 207, lines 17-20, page 208, lines 5-9.

The record supports defendants CUNY and Stalco's contention that plaintiff cannot meet his burden of proof that no triable issues of fact exist concerning their liability under Labor Law §

240 because the evidence adduced at bar is unclear as to whether plaintiff was the sole proximate cause of his injury, or whether defendants' failure to provide a safety device was the proximate cause of his injury.

Accordingly, with respect to Labor Law §240 (1), the Court finds that plaintiff's motion for summary judgment is denied as to CUNY, Stalco and AECOM[3].

Defendants CUNY and Stalco's opposition and cross-motion to plaintiff's Labor Law §241(6) claims

Defendants CUNY and Stalco argue that plaintiff's reliance on Industrial Code 12 NYCRR 23-1.7 (b) is misplaced where the evidence at bar indicates that plaintiff believes that he fell between 20-25 feet, but the depth of the tank located below the flooring upon which plaintiff stood is measured at 13 feet 3 inches. *See* NYSCEF Doc. No. 275 at page 3. Defendants also contend that if 12 NYCRR 23-1.7 (b) is inapposite where the record includes contradictory statements about whether the opening was actually covered by bolted plywood, whether plaintiff was authorized to be in the area where he fell and whether plaintiff was contributorily negligent in lifting plywood. *See* NYSCEF Doc. No. 405 at page 176, lines 4-10, 19-23. Lastly, defendants argue that 12 NYCRR 23-1.33 is a general, not mandated, safety standard.

Plaintiff contends that he suffered the exact harm that Industrial Code 12 NYCRR 23-1.7 (b)(1), pertaining to falling hazards and hazardous openings, seeks to prevent. He further alleges that defendants violated 12 NYCRR 23-1.15, regarding a requirement to provide hand railing for hazardous openings, and 12 NYCRR 23-1.33, concerning the requirement to provide reasonable and adequate protection.

[3] Plaintiff's motion is dismissed as against this defendant for the reasons set forth on pages 10-11 of this decision.

Defendants' argument that inconsistencies in the record concerning the depth of the opening plaintiff fell through bars recovery under 12 NYCRR 23-1.7 (b). However, caselaw does not define the term "hazardous opening" and caselaw provides that any opening which a plaintiff could fall through can trigger the statutory protections. *See Messina v. City of New York*, 300 A.D.2d 121, 752 N.Y.S.2d 608 (1st Dept. 2002). However, inconsistencies in the record concerning whether or not the hole was covered, which would implicate 12 NYCRR 23-1.7 (b)(1) *and* 12 NYCRR 23-1.15, are of import where deposition testimony differs. 12 NYCRR 23-1.33 does not mandate a specific safety standard. Consequently, there are triable issues of fact concerning plaintiff's Labor Law § 241 (6) claims that preclude summary judgment.

Defendants CUNY and Stalco cross-move and contend that plaintiff's Labor Law §241(6) claims should be dismissed against them because plaintiff has not asserted any Industrial Code regulations which are applicable to the facts at bar.

Initially, defendants claim that plaintiff's reliance upon 12 NYCRR 23-1.7(b)(1)(2), pertaining to hazardous openings, is misplaced because his testimony differs from other evidence elicited concerning the depth of plaintiff's fall. *See* NYSCEF Doc. No. 275 at page 3. The record further demonstrates that accounts differ concerning how the opening through which plaintiff fell could have been securely covered, which could invoke the protections of 12 NYCRR 23-1.15. *See* NYSCEF Doc. No. 407 at page 65, lines 10-24, page 68, lines 4-7. Lastly, defendants argue that 12 NYCRR 23-1.33 does not mandate compliance regarding a specific safety regulation and, thus, cannot support a Labor Law §241(6) claim of liability.

Plaintiff asserts that defendants CUNY and Stalco have incorrectly imputed a 15 feet height requirement to 12 NYCRR 23-1.7(b)(1)(2) when, he argues, the statute merely addresses the need

to protect workers from hazardous openings. Plaintiff also argues that Sections 12 NYCRR 23-1.15 and 12 NYCRR 23-1.33 are sufficiently specific to be applicable to his case.

Defendants CUNY and Stalco cannot be heard to amplify inconsistencies in the record and yet argue that the cited sections of the Industrial Code are inapplicable.

In support of their argument that Industrial Code 12 NYCRR 23-1.7(b)(1)(2) does not apply to the facts at bar, defendants cite to *Hernandez v. Columbus Ctr.*, LLC, 50 A.D.3d 597, 857 N.Y.S.2d 84 (1st Dept. 2008) for the proposition that no liability will attach under this section where a plaintiff falls less than 15 feet. However, plaintiff testified that he fell 20-25 feet through the opening. *See* NYSCEF Doc. No. 321 at page 133, lines 2-3. Plaintiff responded to the question of how he quantified his fall by estimating that he had fallen two stories. *See* NYSCEF Doc. No. 321 at page 133, lines 4-6. Plaintiff also testified that a very long ladder was used for him to climb out of the opening. *See* NYSCEF Doc. No. 321 at page 162, lines 4-12. Given plaintiff's statements, there is a triable issue of fact concerning whether plaintiff can sustain a claim under 12 NYCRR 23-1.7(b)(1)(2).

Next, defendants argue that if 12 NYCRR 23-1.7(b)(1)(2) is inapplicable then 12 NYCRR 23-1.15 is also inapplicable. However, the deposition testimony has adduced evidence that plaintiff fell through an opening which was covered by a plywood plank. A witness on behalf of defendant Gramercy, Vincent Calise, testified that Gramercy cut the opening in the flooring and that there would have been no need to bolt the plywood because it did not present a tripping hazard. *See* NYSCEF Doc. No. 346 at page 43, lines 22-25, page 44, lines 2-4. However, the same witness opined that a fiberglass covering may have proven more secure than the plywood. *See* NYSCEF Doc. No. 346 at page 64, lines 10-25, page 65, lines 2-11. Even if Industrial Code 12 NYCRR 23-

1.33 does not mandate compliance to a specific safety rule, the record demonstrates that plaintiff has raised triable issues of fact that prevent summary dismissal of its §241(6) claims.

Accordingly, defendants CUNY and Stalco's cross-motion for summary judgment of plaintiff's Labor Law §241(6) claims is denied.

Motion Seq. 8: Defendant CUNY and Stalco's motion for summary judgment against AIM and Gramercy

If found liable, CUNY and Stalco seeks contractual indemnification from AIM insofar as plaintiff was employed by AIM, which was contracted by Stalco to perform masonry work. CUNY and Stalco also seek contractual indemnification from Gramercy because it was retained by Stalco to provide demolition services that included creating the opening and placing the plywood planks that plaintiff fell through. *See* NYSCEF Doc. No. 305 at pages 20-21. *See also*, NYSCEF Doc. No. 421 at page 15.

As an initial matter, Gramercy opposes the motion on the basis that it denies any liability for plaintiff's injury. Additionally, Gramercy charges that CUNY and Stalco have not satisfied their burden to establish they are free of negligence and, thus, cannot be granted a conditional order for summary judgment.

AIM also opposes the motion, arguing that Stalco's own negligence precludes indemnification.

This Court finds that CUNY and Stalco's motion for conditional judgment on the issue of contractual indemnity is denied as premature. It is well-settled that where issues of negligence exist, summary judgment based upon contractual indemnification should not be granted. *See, George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 878 N.Y.S.2d 143 (2d Dept. 2009). A defendant seeking contractual indemnification has a *prima facie* burden to establish there are no issues of

fact concerning its own negligence. In the absence of such, summary judgment is premature. *See, Alexander v. New York City Tr.*, 34 A.D.3d 312, 824 N.Y.S.2d 262 (1st Dept. 2006). Accordingly, defendants CUNY and Stalco's motion is denied with leave to renew.

Motion Seq. 11: Defendant AECOM's motion for summary judgment against plaintiff

Defendant AECOM asserts that plaintiff cannot sustain its Labor Law §§ 240 (1) and 241(6) claims against it in the absence of any evidence that, in its capacity as construction manager, AECOM exercised supervision or control over plaintiff's activities or the authority to stop an unsafe activity. Defendant AECOM also proffers deposition testimony in support of its argument that plaintiff did not take instructions about how to perform his work from AECOM nor was AECOM was an agent of the owner or general contractor.

Plaintiff responds that AECOM cannot avoid liability merely based upon its designation as project construction manager because labels alone are not determinative of whether a contractor is subject to Labor Law requirements. *See, Kulaszewski v. Clinton Disposal Servs.*, 272 A.D.2d 855 (S.D.N.Y. 2008). Plaintiff further asserts that a contractor cannot escape liability where the authority and duty to enforce safety standards is conferred by contract. *See Carollo v. Tishman Constr. & Research Co.*, 109 Misc. 2d 506, 440 N.Y.S.2d 437. Plaintiff then argues that he does not have to demonstrate that AECOM controlled, directed or supervised his work to establish a Labor Law 240(1) claim. *See, Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993).

It is axiomatic that a construction manager without the authority to control the activity which brought about plaintiff's injury cannot be considered an agent of the owner under Labor Law § § 240(1). *See e.g., Myles v Claxton*, 981 NYS2d 447 [2d Dept 2014]. Plaintiff's own testimony demonstrated that he only received instruction on how to perform his work from his

AIM supervisor. *See* NYSCEF Doc. No. 403 at page 97, lines 17-23. The record is bereft on any evidence to the contrary. Further, there is no evidence to suggest that AECOM acted as an agent of the project's owner or general contractor and, as such, had authority to supervise the work being done by plaintiff at the time of his injury. Accordingly, in the absence of either, defendant AECOM is entitled to summary judgment dismissal of plaintiff's claims. *See, Delahaye v. Saint Anns School*, 40 A.D.3d 679, 836 N.Y.S.2d 233 (2007).

Motion Seq. 10: Defendant Gramercy's motion for summary judgment of claims and cross-claims against it

Defendant asserts that plaintiff cannot sustain its Labor Law §§200, 240(1) and 241(6) claims against Gramercy because it was a project contractor, not an owner nor general contractor and, therefore, exercised no authority to control plaintiff's work. Additionally, Gramercy claims that it cannot be held liable because plaintiff cannot establish that Gramercy was a statutory agent of the owner or general contractor. Lastly, defendant avers that it cannot be held liable under common-law negligence because Gramercy owed plaintiff no duty. Gramercy posits that evidence at bar demonstrates it had already completed its demolition work and was no longer present on the project by the date of plaintiff's accident, December 17, 2015. *See* NYSCEF Doc. No. 443 at pages 10-23. Therefore, Gramercy moves for summary judgment of all claims and cross-claims against it.

Plaintiff responds that defendant Gramercy is liable under Labor Law §§ 240 (1) and 241(6) claims because Gramercy was delegated duties as a subcontractor which conferred the concomitant duty to supervise and control plaintiff's work.

Plaintiff, both in opposition to Gramercy's motion and in support of its own cross-motion for summary judgment, argues that common-law negligence should attach to defendant because Gramercy, the demolition contractor who cut the hole in the flooring, created the dangerous

condition which, plaintiff claims, precipitated the accident. *See* NYSCEF Doc. No. 346 at page 42, lines 2-17.

Defendants CUNY and Stalco also oppose Gramercy's motion for summary judgment claiming that deposition testimony adduced from a witness on behalf of Gramercy established that defendant was responsible for securing the planking that covered the hole it had cut in the flooring. *See* NYSCEF Doc. No. 346 at page 53, lines 23-25, page 54, lines 4-5. Defendants argue that Gramercy could be held liable if a jury concluded that the demolition contractor had not properly secured the planking and, thus, summary judgment in favor of Gramercy should be denied as premature.

In its Reply, defendant Gramercy further alleges that plaintiff has filed a dispositive motion, disguised as a cross-motion, too late and that it should be denied because it has been surprised and prejudiced by the untimely filing. Plaintiff has the burden of establishing good cause for his delay. *See* CPLR 3212 (a). However, as his cross-motion is bereft of any cause for consideration it must be denied as untimely. *See Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013].

However, the Court is persuaded that there are triable issues of fact that preclude summary judgment in favor of Gramercy. Defendants CUNY and Stalco's contention that because Gramercy created the opening, then *ipso facto*, Gramercy could be held liable for Labor Law negligence. However, caselaw has established that statutory negligence will only attach where the contractor exercised the authority to supervise plaintiff's work. *See, Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981). There is nothing in the record to suggest that Gramercy supervised plaintiff. However, this Court is persuaded that triable issues of fact exist regarding whether Gramery could be held liable for common-law negligence based upon whether

the planking it placed over the opening it made was improperly fastened, and whether that created an unreasonable risk to plaintiff. *See, Mendez v. Union Theol. Seminary*, 17 A.D.3d 271, 793 N.Y.S.2d 420 (1st Dept. 2005).

Accordingly, defendant Gramercy's motion for summary judgement of cross-claims asserted by defendants CUNY and Stalco is denied and plaintiff's cross-motion for summary judgment against defendant Gramercy is denied as untimely.

Motion Seq. 7: Defendant Safety's motion for summary judgment against plaintiff

Defendant Safety contends that plaintiff cannot sustain its Labor Law claims because Safety owed no duty to plaintiff and because Safety was not a general contractor or contractor, nor agent thereof, such that Safety controlled or supervised his work.

The facts at bar establish that Safety was retained to check for safety conditions and violations. *See* NYSCEF Doc. No. 340 at page 24, lines 9-15. Safety created reports concerning site conditions, but its witness testified that other than supervisors for defendants Stalco and AECOM, he did not recall interacting with any other trades. *See* NYSCEF Doc. No. 340 at page 31, lines 21-24, page 33, lines 20-22. Even if, *arguendo*, the Safety inspector saw a violation, Safety had no authority to stop work. *See* NYSCEF Doc. No. 340 at page 124, lines 17-20.

In support of his opposition to Safety's motion, and in support of its own cross-motion against Safety, plaintiff avers that a Safety inspector had the authority to stop unsafe practices at the project. Additionally, plaintiff claims that Safety was derelict in its duties inspect an identify an unsafe condition.

In support of its opposition to Safety's motion, defendants CUNY and Stalco argue that Safety, retained by AECOM, took no effort to inspect the area where plaintiff was working when

he was injured from less than 60 feet away and made no complaints to either Stalco or AECOM about protecting the hole.

The facts at bar demonstrate that Labor Law §§ 240 (1) and 241(6) liability cannot be imputed to Safety because this contractor did not have authority to control or supervise plaintiff's work which is a predicate for statutory liability. *See, Urbina v. 26 Court St. Assocs.*, LLC, 12 A.D.3d 225, 784 N.Y.S.2d 524 (1st Dept. 2004). As for common-law negligence, the Court finds no evidence of triable issues of fact concerning whether Safety owed a duty to plaintiff with whom Safety had no contractual relationship. Similarly, Safety had no contractual relationship with Stalco and owed no duty to Stalco concerning its performance at the project.

Accordingly, defendant Safety's motion for summary judgment of plaintiff's cross-motion is granted and defendants CUNY and Stalco's cross-claims against Safety are denied.

Motion Seq. 6: Defendant AIM's motion for summary judgment

AIM asserts that plaintiff cannot establish common-law or statutory negligence because plaintiff did not suffer a grave injury. Additionally, AIM argues that it has no contractual duty to indemnify defendant Stalco where the latter's own negligence caused plaintiff's injury.

Defendants CUNY and Stalco counter that the facts at bar do not establish that Stalco was solely responsible for plaintiff's injuries. They point to inconsistencies between documentary evidence, namely the Employee Claim form which states that plaintiff was lifting plywood when he fell backwards, and plaintiff's own testimony denying that he wrote the words "LIFTING PLYWOOD" on the same form. *See* NYSCEF Doc. No. 466 at page 118, lines 18-2, page 127, lines 17-19. *See also* NYSCEF Doc. No. 476 at page 2, paragraph D. *See also* NYSCEF Doc. No. 466 at page 207, lines 17-20, page 208, lines 5-9.

Moreover, CUNY and Stalco cite plaintiff's own claims of having suffered a traumatic brain injury resulting from his accident. *See* NYSCEF Doc. No. 465 at page 1. *See also* NYSCEF Doc. No. 506 at page 80.

Plaintiff responds that AIM has proffered no evidence to challenge that he sustained a traumatic brain injury and cannot premise its summary judgment motion on a bald denial that plaintiff sustained a grave injury. Additionally, plaintiff argues that the record differs concerning whether and to what extent defendant Stalco would be held liable for plaintiff's Labor Law and common-law claims such that indemnification would be precluded. *See, Bink v. F.C. Queens Place Assoc., LLC*, 27 A.D.3d 408, 813 N.Y.S.2d 94 (2d Dept. 2006).

The Court finds that triable issues of fact exist regarding the cause of plaintiff's accident and the extent of his injury. Accordingly, defendant AIM's motion for summary judgment of all claims and cross-claims is denied.

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants CUNY and Stalco's motion for summary judgment pursuant to Labor Law §241(6) claims pursuant to Industrial Code Sections 23-1.5, 23-1.7, 23-1.33 is denied; and it is further

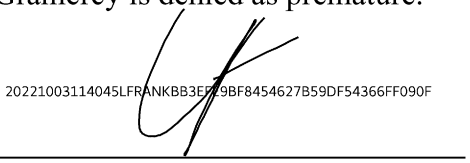
ORDERED that defendant AECOM's motion for summary judgment of all claims and cross-claims is granted; and it is further

ORDERED that defendant Gramercy's motion for summary judgement of cross-claims asserted by defendants CUNY and Stalco is denied and plaintiff's cross-motion for summary judgment against defendant Gramercy is denied as untimely; and it is further

ORDERED that defendant Safety's motion for summary judgment of plaintiff's cross-motion is granted and defendants CUNY and Stalco's cross-claims against Safety are denied; and it is further

ORDERED that defendant AIM's motion for summary judgment of all claims and cross-claims is denied; and it is further

ORDERED that defendants CUNY and Stalco's motion for conditional judgment on the issue of contractual indemnity against defendants AIM and Gramercy is denied as premature.



9/30/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE