At an IAS Term, Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of October, 2022.

P R E S E N T:

HON. ROBIN S. GARSON,

Justice.

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NATHANIEL COLLINS

DECISION & ORDER

Index No: 502088/2018
Mot. Seq. 8 & 9

Plaintiff,

- against -

LEIGHTON GREEN CORP., FRANK CURBELO GUILLARD, FARRINGTON REALTY, LLC, and CENTURY DEVELOPMENT GROUP, LLC,

Defendants.

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FARRINGTON REALTY, LLC,

Third-Party Plaintiff,

- against -

TRIBOROUGH CONSTRUCTION SERVICES, INC.,

Third-Party Defendant.

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TRIBOROUGH CONSTRUCTION SERVICES INC.,

Fourth-Party Plaintiff,

- against -

MERENGUE LIMO AND CAR SERVICE, INC.,

Fourth-Party Defendants.

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The following papers considered on this motion	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	171-205; 212-222
Opposing Affidavits (Affirmations)	229-231; 233-234; 235-237; 239-244
Reply Affidavits (Affirmations)	245-247; 248

Third-party defendant/fourth-party plaintiff Triborough Construction Services, Inc. (Triborough) moves pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff Nathaniel Collins' (Collins) claims pursuant to Labor Law § 241 (6) and dismissing defendant/third-party plaintiff Farrington Realty, LLC's (Farrington) claims for contractual indemnification, common-law indemnification, contribution, and breach of contract.

Farrington and defendant Century Development Group, LLC (Century) jointly move to extend the time to move for summary judgment and upon such extension, granting them summary judgment dismissing Collins' complaint.

Upon the foregoing cited papers and after argument, the motion and cross-motion are granted to the extent as follows:

Background

On June 23, 2017, Collins was employed by Triborough in connection with the development and construction of a commercial building (construction project) at 134-37 35th Avenue, Queens, New York (construction site). Collins was working as a flagman, directing traffic at the intersection of 35th Avenue and Prince Street, to permit unencumbered ingress and egress for dump trucks to access the construction site in furtherance of excavation work being performed. On the aforementioned date, at 11:57 a.m., Collins was standing behind a parked motor vehicle on the side of the east bound lane of 35th Avenue, when he was struck by a motor vehicle owned by defendant Leighton

Green Corp. (Leighton) and operated by defendant Frank Curbelo Guillard (Guillard). Collins was pinned between the two motor vehicles. At the time of the accident, Collins was not actively directing traffic.

The real property constituting the construction site was owned by Farrington, which was developing the land for commercial purposes. In September 2015, Farrington retained Triborough to serve as the general contractor for the construction project. Specifically, on September 8, 2015, Triborough and Farrington entered into an agreement concerning, among other responsibilities and obligations, the work to be performed, indemnity, and the procurement of insurance (construction contract).

Collins commenced the instant action on February 1, 2018, asserting claims against Leighton, Guillard, Farrington, and Century. Collins asserts common-law negligence claims against. Guillard and Leighton and claims sounding in Labor Law §§ 200 & 241 (6) against Farrington and Century. Pursuant to an amended verified bill of particulars, Collins' Labor Law § 241 (6) claim is predicated on the Industrial Code of the State of New York, 12 NYCRR 23-1.5, 23-1.7, 23-1.21, 23-1.16 and 23-1.29 (a) & (b). The defendants appeared respectively by serving answers. Subsequently, Farrington commenced a third-party action against Triborough, asserting causes of action for negligence, contractual indemnification, common-law indemnification, and contribution. Triborough thereafter served an answer and commenced a fourth-party action against fourth-party defendant Merengue Limo & Car Service, Inc. (Merengue). Merengue appeared with the service of a notice of appearance.

After engaging in discovery and various motion practice, Collins filed the note of issue on June 21, 2021, seeking a trial by jury on all issues. Triborough then filed its summary judgment motion (mot. seq. no. 8) on August 20, 2021, seeking dismissal of Collins' Labor Law § 241 (6) claim and the third-party complaint brought by Farrington. On November 2, 2021, Farrington and Century moved (in mot. seq. no. 9) for an order extending the time to move for summary judgment and summary judgment dismissing Collins' Labor Law §§ 241 (6) and 200 claims.

The Parties' Positions

Triborough's Motion

Supporting its motion, Triborough proffers, among other evidence, the affidavits of the construction project foreman, Terrance Brown (Brown), and professional engineer Michael Cronin, P.E. (Cronin) and the deposition testimonies of Collins, Guillard, George Xu, the principle of Farrington and Century (Xu), Joseph Chung (Chung), the president of Triborough, and Jose Martinez, a witness to the accident (Martinez). Additionally, Triborough presents the construction contract, certificate of insurance, insurance policies, and police reports and investigation documents. Based upon the foregoing, Triborough maintains that it is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, predicated upon, among other alleged Industrial Code violations, 12 NYCRR 23-1.29 (b) and dismissal of Farrington's indemnification and contribution claims. Collins does not contest the dismissal of his Labor Law § 241 (6) claim to the extent it is predicated on 12 NYCRR 23-1.5, 23-1.7, 23-1.21, 23-1.16 and 23-1.29 (a), and as such, plaintiff's

reliance upon those code provisions is deemed abandoned (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Concerning Collins' allegations that a violation of 12 NYCRR 23-1.29 (b) occurred, Triborough insists that this code, which details the necessary instruments and directives for designated persons controlling public traffic for construction work, is inapplicable. Triborough presents that the testimony of Collins demonstrates that at the time of the accident, he was not actively directing traffic, but rather standing off to the side of the flow of traffic. Triborough maintains that as Collins was not actively engaged in controlling traffic, he may not seek recovery based upon the allegation the provision was violated. Supporting this contention, Triborough directs the court's attention to the expert affidavit of Cronin. Cronin avers that "Section 23-1.29 (b) is inapplicable because at the time of the accident [Collins] was not actively engaged in flagging" (NY St Cts Elec Filing [NYSCEF] Doc No. 175, Cronin aff para 26). Accordingly, Triborough contends that it demonstrated its entitlement to summary judgment dismissing Collins' Labor Law § 241 (6) claim.

Alternatively, Triborough argues that regardless of the applicability of section 23-1.29 (b), the obligations promulgated were complied with and no violation occurred. Relying on the testimony of Martinez, Collins, and the affidavit of Brown, Triborough explains that Collins was provided, and had in his possession at the time of the accident, a fluorescent orange flag, as required by the Industrial Code. Further, they highlight that

Collins was also provided a neon green vest, an additional safety measure, not required by the provision. Brown averred that:

> "As foreman for Triborough, I conducted a two-hour, on-site flagging training for all Triborough workers during their first day at a new job. Before anyone was permitted to flag, I verbally explained and physically demonstrated to them what they would need to flag, when to flag, how to flag and what to do between flagging. These instructions included extending the flag away from the body to stop traffic and to retreat to an area out of traffic where they felt safe when not flagging" (NYSCEF Doc No. 174. Brown aff para 6).

Additionally, Cronin provides that "[c]onsistent with Collins' testimony . . . [Collins] was holding a flag at the time of the accident. . . . Based on [Collins'] deposition testimony . . [Collins] was wearing a brightly colored safety vest at the time of his accident, which is in compliance with both the Site Safety Plans for the construction project and industry safety standards" (NYSCEF Doc No. 175, Cronin aff paras 26-27). Finally, Cronin asserts that despite Collins denying ever receiving any flagging training, based upon the affidavit of Brown, Cronin's opinion is that " Collins received appropriate instructions to stand out of traffic when he was not flagging and that his actions were consistent with such instructions, even if he denies receiving them" (*id.* at para 30). Therefore, Triborough represents that regardless of 12 NYCRR 1.29 (b)'s applicability, it complied with those requirements.

Finally, Triborough maintains that beyond its arguments concerning applicability of, and compliance with, the relevant Industrial Code provision, that Collins' Labor Law § 241 (6) claim nevertheless must be dismissed as the sole proximate cause of his injuries was the conduct of Guillard. It points to Martinez's deposition testimony wherein he

averred that Guillard was operating his car, not paying attention or looking ahead. He specifically testified that, "[Guillard] kept looking at me until he got the hit and then he turned around and that's how the accident happened" (NYSCEF Doc No. 192, affirmation of Triborough's counsel, Martinez deposition tr at 19, lines 18-20). Triborough asserts that it is under no obligation to prevent third-party conduct unless the intervening act is normal and a foreseeable consequence of the situation created by its negligence. It maintains that the evidence demonstrates that Guillard's failure to comply with Vehicle and Traffic Laws resulting in Collins being struck while he was not actively flagging, but rather standing off to the side of the roadway, is neither a normal or foreseeable consequence of its negligent conduct; nor could any of its alleged negligent conduct be considered a proximate cause of Collins' injuries. Further,Cronin provides that the relevant organizations, rules and regulations, such as the "American Traffic Safety Services Association (ATSSA), Manual of Uniform Traffic Control Devices (MUTCD) and New York City Flag Regulations. . . . did not provide any training or instruction on how a flagger should react or respond to circumstances outside of the flaggers control where a driver violates the rules of the road and unexpectedly turns into the parking lane of a roadway" (NYSCEF Doc No. 175,. Cronin aff para 31). He also opines that "[t]hese courses do not teach evasive tactics to avoid reckless or errant drivers when the individual worker is already standing out of traffic in an otherwise safe locations. . . . It is my opinion, to a reasonable degree of site safety and engineering certainty, that any action or inaction by Triborough such as the alleged failure to supervise or train Collins was not a contributing cause of the accident" (*id.* at 33).

Triborough emphasizes that merely furnishing the possibility of an accident is insufficient to find that a defendant's conduct was a proximate cause of a resulting accident. Accordingly, Triborough asserts that the evidence demonstrates that its conduct cannot be deemed a proximate cause to the occurrence of the accident and Collins injuries.

Addressing Farrington's third-party claims for contractual indemnification, common-law indemnification, and contribution, Triborough argues that such claims necessarily fail based upon it demonstrating that its conduct was neither negligent nor the proximate cause of Collins injuries. Triborough proffers the construction contract which contains the following indemnity provision:

> "To the fullest extent permitted by law, the Contractor and/or Subcontractor shall indemnify and hold harmless the Owner, agent, and employee of either of them from and against claims, damagers [sic], losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance and of the Contractor and/or Subcontractor's Work, provided such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), including loss of use resulting there from, cause in whole or in part by negligent acts or omissions of the Contractor . . ." (NYSCEF Doc No. 200, affirmation of Triborough's counsel, exhibit Y, at 9).

Triborough insists that a finding of negligence against it is a necessary element for Farrington's contractual indemnification claim against it, as well as its claims for common law indemnification and contribution. Triborough maintains that since it has demonstrated that it did not violate the Industrial Code, and was not the proximate cause of Collins'

injuries, these third-party claims fail as a matter of law. Accordingly, Triborough seeks dismissal of the third-party complaint.

In opposition, Collins argues that Triborough failed to establish its prima facie case and that material questions of fact exist requiring denial of its summary judgment motion as to his Labor Law § 241 (6) claim. He contends that Triborough's moving papers demonstrate that, at a minimum, there is a question of fact as to whether it provided instructions and appropriate training prior to directing him to manage traffic. Additionally, Collins asserts that Triborough's contention that 12 NYCRR 23-1.29 (b) is inapplicable is wholly unavailing and unsupported by both fact and law. He presents that at the time of the accident, he was serving as a flagman and the Industrial Code provision directly governs the equipment, protocols, and instructions required for safe execution of the task. Collins contends that his own deposition testimony, as presented by Triborough, rebuts Brown's assertions that he was properly trained. Additionally, he asserts that Brown's affidavit is unspecific and amorphous, failing to establish, as a matter of law, that he ever trained him (Collins) or that he (Collins) ever received any training. Similarly, he argues that Cronin's expert affidavit is conclusory in nature, likewise failing to establish, as a matter of law, that the obligations under 12 NYCRR 23-1.29 (b) were met by Triborough.

Further, Collins rejects Triborough's position that, as a matter of law, the court can determine that its violation of the Industrial Code was not a proximate cause. He concedes that though in some instances undisputed facts may permit a court to determine whether another party's negligence merely furnished a condition for an accident to occur while not

being a proximate cause, here the facts necessitate the denial of summary judgment, as a reasonable juror could determine Triborough's violation of the Industrial Code was a proximate cause of. Collins' injuries.

Finally,Collins also proffers the expert affidavit of professional engineer Joseph J. McHugh (McHugh). McHugh averred that based upon his review of relevant materials, Collins "should have been instructed that, when not flagging and whenever possible, he should be stationed completely off the roadway.... Had [Collins] been properly instructed to be, and actually been stationed and positioned off the roadway, in compliance with Industrial Code Rule 23-1.29 (b), then this accident would not have occurred" (NYSCEF Doc No. 231, aff of McHugh para 10). He also opines that the failure to properly instruct was a proximate cause of the accident (*id.* at para 13). Accordingly, Collins contends that Triborough failed to establish its prima facie case, and, alternatively, that questions of fact preclude the entry of accelerated judgment.

Leighton and Guillard proffer their attorney's affirmation, who insists that the record demonstrates numerous questions of fact exist as to the culpability of all parties and that accelerated judgment is inappropriate. He references Collins' deposition testimony wherein he testified that he was standing partially on the roadway at the time of the accident and that he did not know how to flag; nor was he given any instructions on how to perform the activity. Thus, Leighton and Guillard assert questions of contributory negligence by Collins and the liability of all other defendants remain, requiring jury determination and denial of the motions.

Farrington and Century's Motion

As part of their relief, Farrington and Century seek an extension of time to move for summary judgment, asserting that the tardiness of the motion was a consequence of circumstances beyond their control, but maintaining that no prejudice resulted from the dilatory practice. They effectively concede that the motion is 72 days late, by acknowledging it was filed on November 2, 2021. It is undisputed that the note of issue was filed on June 21, 2021, thus the deadline to timely move for summary judgment expired on or about August 20, 2021. Nevertheless, they argue they have a reasonable excuse for the delay. They present that during the period that a timely motion for summary judgment should have been prepared, the handling attorney, as well as another partner, were both diagnosed with COVID-19, causing work difficulties and personal ailments. Further, counsel states that attempts to file a motion more expeditiously were complicated by the death of an associated attorney who was retained to prepare the moving papers. Thus, Farrington and Century urge the court to grant an extension of time to move for summary judgment and consider the merits of their motion.

As to the merits of their motion, and in partial opposition to Triborough's motion, Farrington and Century argue that the evidence supports a determination that the sole proximate cause of the accident was the conduct of Guillard. Relying on the deposition testimony of Chung and the affidavit of Brown, they maintain Collins received proper training and was provided with the necessary equipment to direct public traffic as required by the statute. They further present that neither Farrington nor Century performed any

independent acts of negligence which caused Collins' injuries. Thus, they argue that Collins' Labor Law § 241 (6) claim must be dismissed.

Addressing Collins' Labor Law § 200 claim, Farrington and Century highlight Xu's testimony, wherein he testified that "everything was controlled by Triborough, how the trucks going in and out, what the details of the logistics is" (NYSCEF Doc No. 194, affirmation of Triborough's counsel, exhibit S, Xu deposition tr at 46, lines 17-20). They argue that to be liable under Labor Law § 200, as the owner, there either must be a defective condition at the premises or that it controlled and supervised the work of the plaintiff. They present that the sole allegations concern the manner in which Collins performed his work. Thus, to be liable pursuant to Labor Law § 200, Farrington must have supervised and controlled Collins work, which they maintain did not occur here. Accordingly, they insist that they are entitled to summary judgment dismissing Collins' Labor Law § 200 claim. Alternatively, Farrington and Century posit that should the court find that accelerated judgment is unwarranted, Triborough's summary judgment motion seeking dismissal of their third-party claims must likewise be denied, and an order in its favor granting indemnification and contribution must be granted.

Farrington and Century further assert that the evidence likewise demonstrates that Century had no involvement in the construction project, the construction site, or any other elements of the present action. Bolstering this claim, they refer to Xu's testimony wherein he attests that Century was not the owner of the construction site or construction project (*see* NYSCEF Doc No. 194, affirmation of Triborough's counsel, exhibit S, Xu deposition

tr at 22, lines 4-16). Additionally, Farrington and Century, proffer the indemnity contract and certificate of insurance, which reflect that Farrington is the owner of the construction project and real property, and listed as the only additional insured and certificate holder (*see* NYSCEF Doc No. 220, affirmation of Collins' counsel, exhibits F and G).

Collins opposes Farrington and Century's motion, initially asserting that the motion is untimely. Though sympathetic to the circumstances befalling defendants' counsel, he maintains that good cause for extending the time to move for summary judgment has not been established, as the affirmation merely demonstrates that minor portions of the time to move for summary judgment were encumbered by the difficulties attested to by counsel. Alternatively, Collins argues that should the court consider Farrington and Century's motion as a cross-motion, thus timely, the motion should be limited to only those issues also presented in Triborough's timely motion for summary judgment, i.e. Collins' Labor Law § 241 (6) claim. Addressing the merits, Collins insists that the evidence demonstrates numerous questions of fact as to the liability of the defendants. Collins, however, does not present any opposition to the extent the moving defendants assert Century was uninvolved in the construction project.

Leighton and Guillard assert substantially similar opposition to the merits of Farrington and Century's motion as Collins. Their ultimate position is that questions of fact preclude the entry of summary judgment, as the testimony of Collins raises issues of whether he was properly trained and instructed to direct traffic. Additionally, they raise concerns regarding Collins' personal conduct, asserting he failed to use reasonable care to

avoid the oncoming car. Thus, Leighton and Guillard contend questions of fact require denial of both motions for summary judgment.

Triborough and Farrington/Century's Replies

In reply, Triborough rejects the contentions of the other parties. Addressing Collins' opposition, it insists that it complied with the Industrial Code provision. Further, regardless of whether Collins was properly instructed to direct traffic, such potential negligence was not the proximate cause of the accident. Triborough emphasizes the evidence clearly establishes that the sole proximate cause of Collins' injuries was the negligent conduct of Guillard.

Turning to Farrington and Century, Triborough argues that they failed to rebut its showing that it is entitled to dismissal of the third-party complaint in totality. It argues that none of the evidence establishes that it was negligent in any capacity, and accordingly, the contractual indemnification, common law indemnification, and contributions claims necessarily fail. Similarly, it asserts that in their moving papers, Farrington and Century failed to establish their prima facie case against Triborough compelling indemnification and contribution. Finally, addressing Leighton and Guillard's opposition, Triborough asserts that such opposition is inexact and fails to specifically address the merits of its motion. Beyond this, Triborough maintains that the only submission in opposition was the affirmation of counsel, which is insufficient to raise triable issues of fact, and accordingly, fails to rebut its prima facie showing entitling it to dismissal of Collins' Labor Law § 241 (6) claim.

Farrington and Century's reply reassert their contentions presented in their initial moving papers. They re-emphasize that the evidence clearly demonstrates that the sole proximate cause was the conduct of Guillard. Relying on precedent, they argue where the facts present the possibility of only one conclusion as to the cause of an accident, it is appropriate for a court to determine the question of proximate cause. They insist that the facts presented in the instant matter permit only a single conclusion -- that the sole proximate cause of Collins' injuries was the negligence of Guillard. Finally, Farrington and Century again assert that Triborough is obligated to indemnify it in the present action.

Discussion

Extending Time to Move

As a preliminary matter, the court shall address that branch of Farrington and Century's motion seeking an extension of time to move for summary judgment. CPLR 3212 permits tardy motions for summary judgment "with leave of the court on good cause shown." As noted in *Brill v City of New York* (2 NY3d 648, 652 [2004]), a party demonstrates "good cause," by providing a "satisfactory explanation for the untimeliness." "Absent a satisfactory explanation for the untimeliness constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Dojce v 1302 Realty Co., LLC*, 199 AD3d 647 [2d Dept 2021]; *see also Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]). The underlying public policy concerns are that:

> "t]he failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of

> claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]).

Nevertheless, the court has "'board discretion'" in determining whether good cause was shown warranting an extension of time to move for summary judgment (*Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 283 [1st Dept 2006], quoting *Fahrenholz v Sec. Mut. Ins. Co.*, 32 AD3d 1326, 1328 [4th Dept 2006], citing *Burnell v Huneau*, 1 AD3d 758, 760 [3d Dept 2003]; *see also Alvarez v Eviles*, 56 AD3d 500 [2d Dept 2008]). Among those circumstances that the Appellate Division has recognized as good cause shown are: a) illness of moving counsel where such delay was *de minimis* (*see Popalardo v Marino*, 83 AD3d 1029, 1030 [2d Dept 2011]), b) scheduling errors due to reliance on court records (*see Adika v Dramitinos*, 74 AD3d 848, 849 [2d Dept 2010]), c) substantive developments in the case that created issues not existing at the time a timely motion could have been filed (*see Bullard v St. Barnabas Hosp.*, 27 AD3d 206, 206 [1st Dept 2006] [the institutional defendants could not have moved on the grounds of issue preclusion and law of the case until a court order was issued, which was entered subsequent to the deadline to move for summary judgment]), and d) significant discovery remained outstanding (*Alvarez*, 56 AD3d at 500). When the court has confronted and considered the excuse of law office failure, the Appellate Division has routinely found that such excuse is not deemed to be good cause where such excuse is merely perfunctory (*see Lanza v M-A-*

C Home Design and Constr. Corp., 188 AD3d 855, 856 [2d Dept 2020]; *Quinones v Joan and Sanford I. Weill Med. Coll. and Graduate School of Med. Scis. of Cornell Univ.*, 114 AD3d 472, 474 [1st Dept 2014]; *Baldessari v Caines*, 61 AD3d 904, 905 [2d Dept 2009]; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506 [1st Dept 2008]).[1]

Here, although Farrington and Century's motion is untimely by a measure of 72 days, the totality of the circumstances demonstrates good cause shown to consider the motion on its merits and extend time to move for summary judgment. While the delay in filing the instant motion cannot be deemed *de minimis*, the history provided by counsel concerning his COVID-19 diagnosis, as well as his partner's diagnosis, during the time period in which a timely motion could have been prepared, the efforts undertaken to prepare the motion sooner, and the death of the retained attorney assisting in the matter, provides sufficiently detailed good cause. Rothkrug, Farrington and Century's counsel, averred:

> "I contracted Covid-19 in early August, 2021 [sic] and was in quarantine for virtually the entire month. Although I was not hospitalized, I lost taste and smell, and had high fever and other adverse conditions from August 14, 2021 to August 21, 2021. During such time, I was unable to be in my office and had little ability to work. During such time, my law partner also tested positive for Covid-19 and also had to be quarantined. . . . When

[1] "'[A]n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds'" (*Homeland Ins. Co. of New York v Natl. Grange Mut. Ins. Co.*, 84 AD3d 737, 738 [2d Dept 2011], quoting *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). Where a timely motion for summary judgment seeks to dismiss a cause of action based upon a specific Labor Law provision and an untimely motion seeks to dismiss a cause of action based upon a different and distinct Labor Law provision, the motions are not deemed to be brought on nearly identical grounds (*see Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013] [wherein a timely motion for summary judgment concerning an allegation of a violation of Labor Law § 240 [1] was not nearly identical to issues raised in an untimely motion addressing an allegation of a violation of Labor Law § 200]).

> I returned to work on August 30, 2021, I had urgent need to catch up with the numerous matters that urgently needed attention during my absence. As a result, I was compelled to retain the services of Stuart Kitchner, Esq., an experienced litigation attorney who worked in my office building, to assist with the preparation of the motion papers. Kitchner began work on the papers, but then he tragically got sick and Kitchner passed away on October 24, 2021. The combination of my illness and attorney Kitchner's passing resulted in the motion not being filed [timely]" (NYSCEF Doc No. 213, aff of Farrington and Century's counsel ¶¶ 4 – 9).

Additionally, Rothkrug noted that at the time of filing the instant motion, no opposition to the timely filed motion had been served. Further, a review of the court record demonstrates that shortly after the filing of the note of issue, Triborough moved for an order, among other relief, compelling certain discovery and an extension of time for all parties to move for summary judgment due to outstanding discovery. The order resolving that motion was not issued until August 4, 2021, which denied the extension with leave to renew, but also compelled certain outstanding disclosure. While the pendency of the discovery motion does not stay or extend time to move for summary judgment, the circumstances unique to this matter and the details presented in Rothkrug's affidavit provide a satisfactory explanation for the untimeliness of Farrington and Century's motion. Accordingly, the time to move for summary judgment is extended and the motion shall be considered on its merits.

Summary Judgment

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub.*

Accountants, LLP, 164 AD3d 864, 865 [2d Dept 2018]). "Summary judgment is a drastic remedy not to be used if there is any doubt that a triable issue of fact exists" (*Cunningham v Gen. Elec. Credit Corp.*, 96 AD2d 502, 502 [2d Dept 1983]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

Century is Not a Proper Party

It is axiomatic that to be liable to an injured person under Labor Law §§ 200 or 241, the alleged tortfeasor must be either an owner of the property or contracted to perform work at the premises. The evidence presented demonstrates that Century has no involvement in either the construction project or the construction site. Xu testified that Farrington, not Century, purchased the construction site (*see* NYSCEF Doc No. 194, Xu deposition tr at 21, lines 12-22). Additionally, Xu unequivocally stated that Century had no role in the project or site at all (*see id.* at 22, lines 9-16). Corroborating and further supporting Xu's

testimony and the position of Century and Farrington, is the construction contract and the relevant certificate of insurance which denote Farrington as the owner of the construction site and the sole entity listed as the additional insured (*see* NYSCEF Doc No. 200, affirmation of Triborough's counsel, exhibit Y at 9 ["A[greement] made as of the 8th Day of September In [sic] the year of 2015 [between] the Owner: Farrington [] and the Contract: Triborough[]"]; NYSCEF Doc No. 202, affirmation of Triborough's counsel, exhibit AA at 1). Critically, no party presents any contrary evidence creating questions of fact as to whether Century was involved in any capacity with the construction site or project, and there are no allegations that Century and Farrington are acting as a single entity. Accordingly, Century is not a proper party to this action and the complaint is hereby dismissed as against it.

Labor Law § 200

Labor Law § 200 "codifies landowners and general contractors common-law duty to maintain a safe workplace" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993] [internal quotation marks omitted]). There are two broad categories of conduct which could result in the imposition of liability on a landowner, pursuant to Labor Law § 200. The first, if the resulting injuries occurred due to the manner in which the work is being performed, in this instance. the landowner "must have had authority to exercise supervision and control of the work" (*DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014] [internal quotations marks and citations omitted]). The second, if the resulting injuries occurred due to a dangerous condition at the premises, the landowner must have

had actual or constructive notice of the dangerous condition (*see Guaman v 178 Ct. St., LLC*, 200 AD3d 655 [2d Dept 2021] [internal citations omitted]). "When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*Hamm v Review Assoc., LLC*, 202 AD3d 934, 938 [2d Dept 2022] [internal citations omitted]).

> "Defendants moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 and common-law negligence must examine the plaintiff's complaint and bill of particulars to identify the theory or theories of liability, in order to properly direct proof to premises issues, or means and methods issues, or both, as may be indicated on a case-by-case basis. The property owner is entitled to summary judgment only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52 [2d Dept 2011]).

Here, Farrington has demonstrated its entitlement to summary judgment dismissing Collins' Labor Law § 200 claim. Based upon the pleadings, bills of particulars, and the arguments presented by all parties, Collins' sole theory to impose liability under Labor Law § 200 is based upon the manner in which his work was performed. Thus, liability may only be imposed on Farrington, as the owner of the construction site, based upon its respective control and supervision of the work being performed by Collins. The evidence presented to the court establishes that Farrington had no control or supervisory power over

Collins or the work being performed at the construction site (*see* NYSCEF Doc No. 194, affirmation of Triborough's counsel, exhibit S, Xu deposition tr at 46, lines 17-20). Brown averred that he, in his capacity as a Triborough foreman, supervised Collins and had general control over the work being performed by him, including providing necessary equipment and training (*see* NYSCEF Doc No. 174, Brown aff paras 5-10). Similarly, Collins testified that he had never heard of Farrington (NYSCEF Doc No. 191, affirmation of Triborough's counsel, exhibit P, Collins deposition tr at 62, lines 4-9), and on the date of the accident, he worked for Triborough (*see id.* at 11, lines 12-23). Finally, the construction contract dictates that Triborough was to perform all the work concerning the construction project, "except as specifically indicated in the Contract Documents" (NYSCEF Doc No. 200, affirmation of Triborough's counsel, exhibit Y, at 3). Nowhere in the contract documents is there any indication that Farrington had any role in supervising or controlling any aspect of the daily operation of the construction project. Thus, the proffered evidence demonstrates Farrington's prima facie entitlement to summary judgment dismissing Collins' Labor Law § 200 claim.

In opposition, no party presents evidence rebutting this showing or creating a question of fact that Farrington was involved in any supervisory aspect of the construction project or controlled the work being performed by Collins. Rather, the arguments presented, and evidence proffered by all parties, demonstrate that Farrington's sole involvement in the construction site and project was owning the premises and retaining

Triborough to serve as the general contractor. Accordingly, Farrington's motion dismissing Collins' Labor Law § 200 claim is granted.

Labor Law Labor Law § 241 (6)

Labor Law § 241 (6) provides that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

As explained by the Second Department more plainly, the provision:

> ""requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Pereira v Quogue Field Club of Quogue*, 71 AD3d 1104, 1105 [2d Dept 2010], quoting *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]).

The legislative intent of section 241 is "to place the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998] [internal quotation marks and citations omitted]). To be entitled to dismissal of a

claim brought under Labor Law § 241 (6), a moving defendant must demonstrate that either a) they are exempt under the statute (*see Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]), b) that alleged Industrial Code provision is inapplicable (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), c) that they complied with the relevant Industrial Code provision (*see Lucas v KD Dev. Const. Corp.*, 300 AD2d 634, 635 [2d Dept 2002]), or d) that the violation of the Industrial Code provision was not the proximate cause of the alleged injuries (*see Misirlakis v E. Coast Entertainment Properties, Inc.*, 297 AD2d 312, 312 [2d Dept 2002]). "Generally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2d Dept 2011] [internal citations omitted]). "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts. . . . Although the issue of proximate cause is generally for the jury, liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" (*Canals v Tilcon New York, Inc.*, 135 AD3d 683, 684 [2d Dept 2016] [internal quotation marks and citations omitted]). Critically, "there may be more than one proximate cause of an accident" (*Kalland*, 84 AD3d at 889).

12 NYCRR 23-1.29 (b) provides:

> "Every designated person authorized to control public vehicular traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary,

> by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand."

Defendants demonstrate compliance with this provision by instructing the designated person to act as a flagman and by providing the individual with an appropriate fluorescent flag (*see Lucas*, 300 AD2d at 635). Importantly, 12 NYCRR 23-1.29 has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*see Lamuraglia v New York City Tr. Auth.*, 299 AD2d 321, 324 [2d Dept 2002] [court found violation of section 23-1.29 to be a potential proximate cause in causing an accident leading to injuries to a plaintiff]).

Here, accelerated judgment dismissing Collins' Labor Law § 241 (6) claim is unsupported by the proffered evidence, requiring the trier of fact to determine liability. Dispositive to the denial of Triborough and Farrington's motion is the deposition testimony of Collins who attests that prior to serving as the flagman at the construction site, he received no directions or training from his employer. Specifically, Collins testified, "I was obligated to flag and I was just doing my job. They told me to – I didn't know how to flag, I didn't know nothing about the flagging, I wasn't given any instructions on how to flag" (NYSCEF Doc No. 191, affirmation of Triborough's counsel, exhibit P, Collins deposition tr at 31, lines 23-25; at 32, lines 2-3). He also testified that he had never flagged prior to that day and that he never received any training or directions from his supervisor (*see id.* at 32, lines 9-18). Collins' testimony conflicts with Brown's affidavit, wherein he averred that "[b]efore anyone was permitted to flag, I verbally explained and physically

demonstrated to them what they would need to flag, when to flag, how to flag and what to do between flagging. These instructions included extending the flag away from the body to stop traffic and to retreat to an area out of traffic where they felt safe when not flagging" (NYSCEF Doc No. 174, Brown aff para 6). Beyond these questions of fact, the competing expert evidence presented by both parties in the form of the expert affidavits of Messrs. Cronin and McHugh require the trier of fact to consider credibility (*see generally Martinez v Coca-Cola Refreshments USA, Inc.*, 187 AD3d 1170 [2d Dept 2020]). Thus, at a minimum, questions of fact and issues of credibility preclude a summary judgment determination as to liability of the parties and whether a violation of 12 NYCRR 23-1.29 (b) occurred.

The moving defendants' contentions concerning proximate cause is equally unavailing at this stage of the litigation. While determining the issue of proximate cause is permitted at the summary judgment stage, it is only appropriate "where only one conclusion may be drawn from the established facts" (*Canals*, 135 AD3d at 684 [internal quotation marks and citations omitted]). Here, the facts clearly require the trier of fact to determine which acts/conduct, if any, of the parties was a sufficiently contributory factor in causing Collins' accident. Further, as aforementioned, the Appellate Division has found that a violation of 12 NYCRR 23-1.29 can be a proximate cause of injuries (*see Lamuraglia*, 299 AD2d at 324 [2d Dept 2002]). The proximate cause (or causes) of Collins' injuries must be determined by the trier of fact as the evidence permits various conclusions being drawn, rather than a single, undeniable conclusion. Accordingly, those

branches of the motions seeking summary judgment dismissing Collins' Labor Law § 241 (6) claim, predicated on 12 NYCRR 23-1.29 (b) are denied.

Breach of Contract for Failure to Procure Insurance

Triborough's motion for summary judgment to the extent it seeks to dismiss Farrington's claim for breach of contract is granted. At the outset, the third-party complaint does not expressly assert a breach of contract for failure to procure insurance claim. However, to the extent the complaint could be read as asserting such a claim, the court shall consider such relief. Farrington's third-party complaint, its partial opposition to Triborough's motion for summary judgment, and its moving papers effectively concede that Triborough procured insurance (*see* NYSCEF Doc No. 20, Third-Party Complaint, at 4-5, ¶¶ 6-12; *see also* NYSCEF Doc No. 248, reply affirmation of Farrington's counsel in further support of motion for summary judgment at ¶ 11 ["It is not disputed that Farrington and Triborough had a written contract, and that pursuant to that contract Triborough obtained insurance for the benefit of Farrington"]). Further, Farrington does not expressly oppose that branch of Triborough's motion nor assert that the sought relief is improper or that there is no such claim as breach of contract for failing to procure insurance. Notwithstanding Farrington's concessions and the peculiar circumstances of the requested relief, Triborough established its prima facie case by proffering the construction contract, the insurance policy, and certificate of insurance in accordance with the insurance provisions of the construction contract. Even in the scenario where the insurer disclaimed coverage, such disclaimer would not constitute a breach to procure insurance (*see generally*

Augustine v Halcyon Constr. Corp., 71 Misc 3d 715, 718 [Sup Ct, Bronx County 2021, Walker, J.], citing *Arner v RREEF Am., L.L.C.*, 121 AD3d 450, 451 [1st Dept 2014]; *see also 77 Water St., Inc. v JTC Painting & Decorating Corp.*, 148 AD3d 1092, 1097 [2d Dept 2017]).

Common-Law Indemnification and Contribution

"'The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party'" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 929 [2d Dept 2009], quoting *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008]). "'Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious'" (*Board of Mgrs. of 125 North 10th Condominium v 125Noth10, LLC*, 150 AD3d 1063, 1064 [2d Dept 2017], quoting *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2d Dept 2007]). "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Board of Mgrs. Of Olive Park Condominium v Maspeth Props., LLC*, 170 AD3d 645, 647 [2d Dept 2019]). "'[T]o establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor was

responsible for [the] negligence that contribute to the accident" (*Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 756 [2d Dept 2018], quoting *Wahab v Agris & Brenner, LLC*, 102 AD3d 672, 674 [2d Dept 2013]; *see also McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-378 [2011]). Where a party's liability "would be based on its actual wrongdoing, not its vicarious liability" common-law indemnification is inapplicable (*American Ins. Co. v Schnall*, 134 AD3d 746, 749-750 [2d Dept 2015]).

Finally, "[t]o sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries" (Marquez v L & M Dev. Partners, Inc., 141 AD3d 694, 699 [2d Dept 2016] [internal quotation marks and citations omitted]).

Here, in light of the triable issues of fact as to whether Triborough was negligent in the happening of Collins' accident, those branches of its motion seeking summary judgment dismissing Farrington's contribution and common-law indemnification third-party claims are denied (*see Martin v Huang*, 85 AD3d 1132, 1133 [2d Dept 2011]; *Shea v Putnam Golf, Inc.*, 79 AD3d 1013, 1015 [2d Dept 2010]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]; *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 738 [2d Dept 2008]; *Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 685 [2d Dept 2005]).

Contractual Indemnification

"The right to contractual indemnification depends upon the specific language of the contract" (*Alfaro v 65 West 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]). "A party seeking contractual indemnification must prove itself free from negligence" (*Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1100 [2d Dept 2009]). A contract imposing indemnification "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Associates, Ltd v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989] [emphasis added]). Thus, to be entitled to summary judgment on the issue of contractual indemnification, a movant must proffer sufficient evidence of an indemnification provision in the contract, satisfaction of the contractual prerequisites entitling it to indemnification, and that it is free from negligence (*see Alfaro*, 74 AD3d at 1255-1256; *see also Tarpey*, 68 AD3d 1100).

Here, pursuant to the construction contract between Farrington and Triborough, the latter's duty to indemnify is triggered by a finding that its "negligent acts or omissions" caused "in whole or in part" Collins' injuries (NYSCEF Doc No. 200, affirmation of Triborough's counsel, exhibit Y, at 9). As noted above, there are issues of fact as to Triborough's negligence, and thus whether the indemnity provision has been triggered herein. Accordingly, that branch of Triborough's motion to dismiss Farrington's contractual indemnification claim is also denied (*see Bahrman v Holtsville Fire Dist.*, 270 AD2d 438, 439 [2d Dept 2000]). Accordingly, it is

ORDERED that Triborough's motion for summary judgment, mot. seq. no. 8, is granted only to the extent that Farrington's third-party claim sounding in breach of contract for failure to procure insurance is dismissed as against it; and the remainder of Triborough's motion is denied; and it is further,

ORDERED that Farrington and Century's motion for summary judgment, mot. seq. no. 9, is granted to the extent that a) all causes of action as asserted against Century are hereby dismissed and b) Collins' Labor Law § 200 claim as against Farrington is hereby dismissed; the remainder of Farrington and Century's motion is denied.

To the extent not specifically addressed herein, parties' remaining contentions have been considered and found to be either meritless and/or moot.

This constitutes the decision and order of the court.

E N T E R,

10-3-22 J. S. C.

HON. ROBIN S. GARSON
A.J.S.C.