

Ferreira v Jafrog Realty, LLC
2022 NY Slip Op 33715(U)
October 31, 2022
Supreme Court, New York County
Docket Number: Index No. 155034/2020
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 155034/2020

DENYS FERREIRA,

Plaintiff,

- v -

MOTION SEQ. NO. 002, 003 & 004

JAFROG REALTY, LLC, LSC DEVELOPMENT, LLC, and RACANELLI CONSTRUCTION COMPANY INC.,

Defendants.

DECISION + ORDER ON MOTION

-----X

JAFROG REALTY, LLC and LSC DEVELOPMENT, LLC,

TP Plaintiffs,

-against-

Third-Party Index No. 595067/2021

CARANT CONSTRUCTION CORP.,

TP Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 96

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 97, 106, 107, 108, 109, 110, 111, 112, 113, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for JUDGMENT - SUMMARY

In this Labor Law action, plaintiff Denys Ferreira moves, pursuant to CPLR 3212 (mot. seq. 002), for partial summary judgment on the issue of liability on his Labor Law section 240(1) and 241(6) claims against defendants/third-party plaintiffs Jafrog Realty, LLC ("Jafrog") and

LSC Development, LLC (“LSC”) and defendant Racanelli Construction Company, Inc. (“RCC”). Jafrog, LSC, and RCC oppose the motion.

RCC moves, pursuant to CPLR 3212 (mot. seq. 003), for summary judgment dismissing the plaintiff’s claim pursuant to Labor Law section 240(1) and his claim pursuant to Labor Law section 241(6) as predicated on sections 12 NYCRR 23-5.1, 23-1.16, and 23-5.18(g) of the New York State Industrial Code (“the Industrial Code”). Plaintiff opposes the motion.

Jafrog and LSC move, pursuant to CPLR 3212 (mot. seq. 004) seeking an order: 1) granting them summary judgment dismissing plaintiff’s common law negligence claim, as well as his claims pursuant to Labor Law sections 200, 240(1), and 241(6); and 2) granting them summary judgment on their contractual indemnification claims against RCC. Plaintiff opposes the branch of the motion seeking dismissal and RCC opposes the branch of the motion seeking summary judgment against it.

After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on February 19, 2020, in which plaintiff, an employee of third-party defendant Carant Construction (“Carant”), was injured at a work site located at 622 West 51st Street in Manhattan (“the premises” or “the site”) when a scaffold he was climbing onto tilted and both he, his co-worker, and the scaffold fell to the ground. Plaintiff was injured while creating the exterior walls from the perimeter edge of a new commercial building. The premises were owned by Jafrog, which leased them to nonparty 622 West 51st Street Holdings,

LLC (“622 West 51st”). LSC and RCC were the developer and general contractor at the site, respectively.¹

Plaintiff commenced this action by filing a summons and complaint against Jafrog, LSC, and RCC on July 6, 2020. Doc. 1. In his complaint, plaintiff alleged that he was injured due to the negligence of the defendants, as well as their violations of Labor Law sections 200, 240(1), and 241(6), as predicated on violations of Industrial Code sections 23-1.5, 23-1.16, 23-5.1, and 23-5.18(a), (b) and (g). Doc. 1.

RCC joined issue by its answer filed September 4, 2020, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and asserted cross claims against Jafrog and LSC. Doc. 6.

LSC joined issue by its answer filed September 24, 2020, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and asserted cross claims against Jafrog and RCC for contribution and common law and contractual indemnification. Doc. 9.

Jafrog joined issue by its answer filed November 24, 2020, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and asserted cross claims against RCC for contribution and common law and contractual indemnification. Doc. 21.

On January 25, 2021, Jafrog and LSC commenced a third-party action against Carant seeking, inter alia, contribution and common law and contractual indemnification. Doc. 25.

In his bills of particular against RCC, Jafrog, and LSC, plaintiff reiterated his claims that he was injured due to the negligence of the defendants, as well as their violations of Labor Law sections 200, 240(1), and 241(6), as predicated on violations of Industrial Code sections 23-1.5,

¹ RCC subcontracted with nonparty Ridgeline Construction Associates, LLC (“Ridgeline”) for drywall, acoustics, and carpentry work and Ridgeline contracted with Carant to perform interior and exterior framing.

23-1.16, 23-5.1, and 23-5.18(a), (b) and (g). Docs. 53, 88. He further alleged, among other things, that defendants failed to provide him with “a safe, stable and adequately secured scaffold”. Docs. 53, 88.

Plaintiff’s Deposition

Plaintiff testified at his deposition that, at the time of the incident, he was employed by Carant, which owned the scaffold he used. Doc. 54 at 54, 106. On the day of the accident, his supervisor advised him that he was to be installing metal framing for the walls which were to be built on the outside of the building, which he described as metal carpentry work. Doc. 54 at 72-73, 104. He worked on the walls on the fourth floor before lunch and on the fifth floor walls after lunch. Doc. 54 at 101-102. After he and his co-worker Colombiano finished working on the fourth floor, they were told to disassemble the scaffold and bring it to the fifth floor to continue their work there. Doc. 54 at 113, 116-117, 127.

The scaffold was reassembled on the fifth floor and Colombiano, who was standing to the left side of the same, but on both metal platforms, asked plaintiff to come onto the scaffold to assist him in assembling part of the safety railing which “couldn’t fit in”. Doc. 54 at 133, 139-142, 150, 163, 166. At that time, the scaffold was standing upright and both metal platforms were attached to it. Doc. 54 at 137-139. The safety railing was the only part of the scaffold yet to be assembled. Doc. 54 at 163-164. As the plaintiff climbed up the right side of the scaffold to assist Colombiano, the latter said “wait” and the scaffold tilted and fell. Doc. 54 at 133, 146-147.² The scaffold started to tilt and fall to the ground after plaintiff put both of his feet on one

² Although plaintiff testified that Colombiano told him to “wait” when he “went up to help him”, he insisted that Colombiano did not say this until the scaffold tilted and fell. Doc. 54 at 133, 150, 166. Plaintiff adamantly denied that Colombiano warned him not to climb onto the scaffold until the safety railing was installed. Doc. 54 at 150, 166-167.

of the platforms, which was about 7 feet above the ground. Doc. 54 at 133, 160, 189. As a result of the scaffold tilting, plaintiff and Colombiano fell from the scaffold to the ground. Doc. 54 at 167, 189. Plaintiff said that he had “[n]ever heard of a counterweight that is used on a scaffold.” Doc. 54 at 158-159.

Deposition of Jerry Tudisco of RCC

Jerry Tudisco, a project manager for RCC, a general construction contractor, testified on behalf of that entity. Doc. 55 at 6-7. He stated that RCC contracted with 622 West 51st, care of LSC, to perform construction work at the project. Doc. 55 at 7-10, Doc. 91.³ Tudisco admitted that the contract deemed RCC responsible for “initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of [the] [c]ontract.” Doc. 55 at 11-12; Doc. 91 at Article 10.1. He was not familiar with plaintiff’s employer Carant. Doc. 55 at 13.

When shown photographs attached to the accident report, Tudisco testified that they depicted the mobile pipe scaffold involved in the accident. Doc. 55 at 25-26. He also noted that the scaffold had triangular extension brackets which extended beyond the side of the scaffold in order to support a platform extending beyond the side of the base of the scaffold. Doc. 55 at 26. The purpose of the extended platform was to allow an individual to “reach out further than the pipe scaffolding will allow, so men will work on the - - be able to reach out a further distance in front of the building. Doc. 55 at 26-27. However, Tudisco said that the extended platform could

³ Paragraph 8.7.1 of the contract between LSC and RCC provided that “To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless [Jafrog], LSC Development, LLC, Architect, Architect's consultants and their respective officers, directors, partners, members, agents and employees (collectively, the "Indemnitees") from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that 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), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 8.7.1.” Doc. 56.

only be used if an outrigger was placed at the bottom of the leading edge of the same side of the scaffold to provide it with stability, specifically to keep it from tipping over. Doc. 55 at 28-29. If, as here, it was not possible to use an outrigger given the position of the scaffold, counterweights could be placed at the back side of the scaffold. Doc. 55 at 29-30. Tudisco testified that he did not know whether there were counterweights at the site and did not see any in the photographs shown to him at his deposition. Doc. 55 at 28-30. Tudisco believed that there was a custom and practice of using outriggers and counterweights on the project, and that such devices should be used, but had no personal knowledge that they were actually used. Doc. 55 at 32-34.

According to Tudisco, Ted Heiselman, Vice President of LSC, visited the project 2-3 times per week to “walk the job from top to bottom”, which included checking on the status of the work and to identify any safety issues. Doc. 55 at 42-43. If Heiselman identified any safety issues, he would report them to Angel Menendez, LSC’s superintendent. Doc. 55 at 43-44. Menendez also walked the site to identify any safety problems and had the ability to stop any work he deemed dangerous. Doc. 55 at 43-44. Tudisco maintained that it was the custom and practice of RCC to generate contemporaneously prepared accident reports where, as here, a worker was injured. Doc. 55 at 17.

Incident and Investigation Reports

A “Supervisor’s Accident Investigation Form” prepared on the day of the incident reflected that “while assembling scaffolding the scaffolding tipped over. [Plaintiff] jump[ed] off I was told by the witness.” Doc. 58. The witness was identified as Yonier Paredes. Doc. 58. The cause of the accident was listed as “lack of training” and the recommendation for “preventing reoccurrence” was listed as “qualified person to assemble all future scaffolding.” Doc. 58.

An Incident Investigation Report prepared by Menendez on the day of the incident reflects that:

The 2 man team of [plaintiff] and Yonier Paredes took apart the scaffolding on the 4th floor took all parts to 5th floor, started to reassemble the scaffolding. When [plaintiff] walk[ed] out on the scaffold extensions the lack of counter weight cause[d] the scaffolding to tip over and then cause [plaintiff] to fall off.

Doc. 117.

Notice to Admit

Plaintiff served a notice to admit on Jafrog, LSC and RCC on or about October 11, 2021.

Doc. 61. In the response to the notice to admit, Jafrog and LSC admitted, inter alia, that: Jafrog owned the premises; Jafrog had a lease agreement with 622 West 51st which was in effect on February 19, 2020; and that 622 West 51st c/o LSC, as owner, entered into a contract with RCC for work at the project Doc. 61.

Plaintiff filed a note of issue and certificate of readiness in this matter on February 15, 2022. Doc. 44.

Plaintiff's Motion for Partial Summary Judgment (Mot. Seq. 002)

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment on its claims pursuant to Labor Law section 240(1) and 241(6). Docs. 45-48. In support of the motion, plaintiff argues that Jafrog, LSC and RCC, which are proper Labor Law defendants, violated Labor Law section 240(1) by failing to equip the scaffold with an outrigger or counterweight. Doc. 48 at 2. He further asserts that the defendants are liable pursuant to the statute even though his employer provided the scaffold. Doc. 48 at 5. Additionally, plaintiff maintains that neither the sole proximate cause nor recalcitrant worker defenses apply herein. Doc. 48 at 8-9. Plaintiff

also argues that defendants violated Labor Law section 241(6), as predicated on violations of Industrial Code sections 23-1.16, 23-5.1(b) and (c), and 23-5.18(g).⁴

In opposition to the motion, Jafrog and LSC argue that the plaintiff is not entitled to summary judgment on his section 240(1) claim since he failed to establish a violation of the statute. Doc. 65 at 2. Specifically, they maintain that the scaffold was in proper working condition since plaintiff admitted that his co-worker had been working on it without incident before the occurrence. Doc. 64 at 3. They further assert that, since plaintiff's co-worker told him to wait before climbing onto the scaffold, and plaintiff did not heed this warning, the plaintiff's own actions were the sole proximate cause of the occurrence. Doc. 65 at 3. Additionally, Jafrog and LSC claim that plaintiff's claim pursuant to Labor Law section 241(6) must be dismissed since he failed to establish that a violation of an applicable provision of the Industrial Code was violated and was also a proximate cause of the accident. Doc. 65 at 4.

RCC also opposes the motion, arguing that plaintiff failed to establish his prima facie entitlement to summary judgment pursuant to Labor Law section 240(1). Doc. 68 at 2. Rather, maintains RCC, plaintiff's own act of ascending the scaffold before it was completely assembled was a misuse of the equipment and the sole proximate cause of the accident. Doc. 68 at 2, 5. At the very least, urges RCC, there are issues of fact regarding what caused the occurrence. Doc. 68 at 2-3. RCC argues that, contrary to plaintiff's contention, Tudisco testified that it was custom and practice to equip scaffolds with outriggers or counterweights when a scaffold's extension platform was in use and that he never testified that the scaffold lacked counterweights and outriggers. Doc. 68 at 3-4. Finally, RCC maintains that plaintiff's claim pursuant to Labor Law

⁴ Although plaintiff previously pleaded the violation of 23-1.5 and 23-5.18(a) and (b) as well, he does not pursue summary judgment based on those Industrial Code sections and does not oppose that part of defendants' motion seeking to dismiss plaintiff's section 241(6) claim as predicated on those provisions.

section 241(6) must fail since the Industrial Code violations alleged by plaintiff are insufficiently specific, inapplicable, and/or were not violated by RCC. Doc. 68 at 8-10.

In an affidavit in opposition to the motion, Tudisco states, inter alia, that there were outriggers and counterweights “readily available for use” at the site. Doc. 70. He further represents that “it is clear” from plaintiff’s deposition testimony that “plaintiff, before the process of assembling the scaffold was completed and before either outriggers or counterweights were installed, climbed up the scaffolding platform, despite the objections of [Colombiano], and caused the partially assembled scaffolding to tip over.” Doc. 70.

In reply to the defendants’ opposition, plaintiff argues that there is no sole proximate cause defense herein because defendants fail to establish that he deliberately refused to use available safety devices. Doc. 96. He further asserts that the sole proximate cause of the accident was the defendants’ failure to provide him with a scaffold equipped with an outrigger or counterweight. Doc. 96.

RCC’s Motion for Summary Judgment (Mot. Seq. 003)

RCC moves for summary judgment dismissing plaintiff’s claims pursuant to Labor Law section 240(1) and 241(6). In support of the motion, RCC argues that the plaintiff’s claims pursuant to Labor Law sections 240(1) and 241(6) must be dismissed since his own act of climbing onto the scaffold despite knowing that it was not fully assembled was the sole proximate cause of the occurrence. Doc. 74 at 3. RCC further asserts that plaintiff’s claim pursuant to Labor Law section 241(6) must also be dismissed since RCC did not violate the Industrial Code sections alleged and, if it did, such violation was not the proximate cause of plaintiff’s injuries. Doc. 74.

In opposition, plaintiff argues, inter alia, that defendants' failure to provide the scaffold with a counterweight or outrigger violated Labor Law section 240(1). Doc. 107. He further asserts that he was not a recalcitrant worker because his accident did not result from his deliberate refusal to use available safety devices. Doc. 107. Plaintiff also maintains that defendants violated Labor Law section 241(6). Doc. 107. In an affidavit in opposition, plaintiff maintains, inter alia, that he was directed to climb the scaffold to assist his co-worker in assembling a vertical pole supporting the safety rail, as well as the safety rail itself, but neither of those pieces caused the incident. Doc. 113.

In reply, RCC argues that plaintiff fails to raise a triable issue of fact in opposition to its motion. Doc. 124. RCC further maintains that plaintiff's affidavit in opposition, written in English without a translator's affidavit, is inadmissible given plaintiff's testimony that he does not write, read, or speak English. Doc. 124. Additionally, RCC urges that plaintiff was the sole proximate cause of his own injuries since plaintiff ascended the scaffold despite being told by Colombiano to "wait" as he was doing so. Doc. 124.

In reply, RCC reiterates its argument that it has no liability pursuant to Labor Law section 240(1) or 241(6) because plaintiff's actions, i.e., ascending a scaffold he knew was not fully assembled, were the sole proximate cause of his accident. Doc. 125.

Jafrog and LSC's Motion for Summary Judgment (Mot. Seq. 004)

Jafrog and LSC argue that plaintiff's common law negligence claim, as well as his claims against them pursuant to Labor Law sections 200, 240(1) and 241(6), must be dismissed against them. Doc. 87. They assert that the Labor Law section 200 claim must be dismissed since there was no dangerous condition which caused the incident and they did not have the authority to direct, control or supervise plaintiff's work. Doc. 87. They further assert that the contract

between LSC and RCC rendered the latter responsible for supervising, managing and directing construction at the project. Doc. 87. Further, Jafrog and LSC argue that they are not liable pursuant to Labor Law sections 240(1) or 241(6) since “[p]laintiff’s own conduct in improperly climbing the scaffold while it was still in the process of being assembled . . . was the sole proximate cause of his accident.” Doc. 94 at 16. Jafrog and LSC also maintain that they are entitled to summary judgment on their contractual indemnification claims against RCC. Doc. 94.

In partial opposition, RCC argues that Jafrog and LSC are not entitled to summary judgment on their claims for contractual indemnification against it. Doc. 99. This, RCC asserts, is because the indemnification provision is only triggered upon a showing of negligence by RCC, its subcontractor, or anyone else directly or indirectly employed by it, which has not been established. Doc. 99. RCC further maintains that Jafrog and LSC are not entitled to costs, disbursements or attorneys’ fees from it. Doc. 99.⁵

Plaintiff also opposes the motion in part asserting, inter alia, that he has established his prima facie entitlement to summary judgment pursuant to Labor law sections 240(1) and 241(6) and that his own actions were not the sole proximate cause of the incident. Doc. 115. In an affidavit in opposition, plaintiff maintains, inter alia, that he was directed to climb the scaffold to assist his co-worker in assembling a vertical pole supporting the safety rail as well as the safety rail itself, but he admits that neither of those pieces caused the incident. Doc. 121.

In reply, Jafrog and LSC argue that plaintiff’s claim pursuant to Labor Law section 200 must be dismissed since plaintiff did not oppose the branch of their motion seeking dismissal thereof. Doc. 122. They further assert that plaintiff was the sole proximate cause of his

⁵ Although Jafrog and LSC seek costs, disbursements, and legal fees in their answers (Docs. 9, 21), their motion does not seek such relief. Docs. 86-87, 102.

accident. Doc. 122. Finally, they assert that plaintiff failed to establish a violation of an applicable provision of the Industrial Code. Doc. 122.

LEGAL CONCLUSIONS

Plaintiff's Motion for Partial Summary Judgment (Mot. Seq. 002)

It is well settled that a party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*See CPLR 3212*). In deciding the motion, a court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). Once the movant meets his or her burden, the burden shifts to the non-moving party to establish the existence of a material issue of fact (*See Vega v Restani Constr. Corp.*, *supra*).

Labor Law section 240(1) provides that:

[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises].

The duty imposed by Labor Law section 240(1) is nondelegable, and an owner or contractor which breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Additionally, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge*

and Tunnel Authority, 4 NY3d 35, 39 [2004]). However, there can be no liability under Labor Law section 240(1) where there is no violation and the worker's actions are the sole proximate cause of the accident (*Id.*; see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426 [2015]).

To prevail on his motion for summary judgment pursuant to Labor Law section 240(1), plaintiff must establish that the statute was violated because the scaffold lacked appropriate safety devices and that such violation proximately caused his accident. Here, plaintiff testified that Colombiano, who was standing to the left side of the scaffold, asked him to come onto the scaffold to assist in assembling part of the safety railing which “couldn’t fit in”. At that time, the scaffold was standing upright and both metal platforms were attached to it. The plaintiff climbed up the right side of the scaffold and, after he put both of his feet on one of the platforms, the scaffold tilted and he and Colombiano fell to the ground.

In cases such as this, “involving ladders or scaffolds that collapse or malfunction for no apparent reason”, the Court of Appeals has applied “a presumption that the ladder or scaffolding device was not good enough to afford proper protection” (*Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 454 [1st Dept 2017] quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). Plaintiff's deposition testimony establishes that a proximate cause of his injury was the tipping of scaffold after he stepped onto its planks (see *Mora v Wythe & Kent Realty LLC*, 171 AD3d 426, 426 [1st Dept 2019], citing *Kristo v Board of Educ. of the City of N.Y.*, 134 AD3d 550 [1st Dept 2015]). A prima facie violation of Labor Law section 240(1) is established where, as here, a scaffold tips over and plaintiff has not been provided with any safety devices (See *Camacho v Ironclad Artists Inc.*, 174 AD3d 426, 427 [1st Dept 2019] citing *Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]).

Plaintiff has also established that Jafrog, the owner, and RCC, the general contractor, are proper Labor Law defendants. Additionally, LSC, the developer, constitutes an "owner" pursuant to the statute since it "has an interest in the property and [] fulfilled the role of owner by contracting [with RCC] to have work performed for [its] benefit" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] [citations omitted]). Therefore, plaintiff is entitled to summary judgment on his claim pursuant to Labor Law section 240(1).

Although defendants argue that plaintiff was the sole proximate cause of his accident and/or a recalcitrant worker since his fall was caused at least in part by the fact that he did not secure the scaffold, this contention is without merit (*see Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 46 [1st Dept 2016], citing *Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]). "The sole proximate cause defense does not apply where [as here] plaintiff was not provided with an adequate safety device as required by the Labor Law" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014] [citation omitted]).

"To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Quinones v Olmstead Props., Inc.*, 133 AD3d 87, 89 [1st Dept 2015], quoting *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]). Even assuming, arguendo, that this Court were to credit Tudisco's representation in his affidavit that counterweights and/or outriggers were available at the site, there is no evidence that plaintiff knew that they were present, that he was expected to use them, and/or that he unreasonably refused to use them (*see*

Smith v Picone Constr. Corp., 63 AD3d 1716, 1717 [4th Dept 2009]).⁶ Indeed, plaintiff testified that he did not know what a counterweight was. Doc. 54 at 158-159. Thus, defendants fail to raise an issue of fact that plaintiff's disregard of an instruction to use a particular safety device caused the incident (*see Jerdonek*, 143 AD3d at 46 citing *Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014]). Moreover, although defendants urge that plaintiff was the sole proximate cause of his accident because he disregarded Colombiano's directive to "wait" before coming onto the scaffold, this contention is disingenuous given that plaintiff adamantly denied that Colombiano warned him not to climb onto the scaffold until the safety railing was installed. Doc. 54 at 150, 166-167.

To the extent defendants suggest that plaintiff was negligent in failing to fully assemble and/or inspect the scaffold before he used it, or was negligent in climbing onto the scaffold before it was fully assembled, it is well settled that plaintiff's comparative negligence is not a defense to liability under Labor Law section 240 (1) (*see Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]) since defendants' failure to ensure that the scaffold provided "proper protection, and was properly secured and braced, constituted a proximate cause of the accident" (*See Collins v West 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009] [rejecting "defendants' argument that the onus is on plaintiff to construct an adequate safety device"]).

It is not necessary for this Court to address plaintiff's claim pursuant to Labor Law section 241 (6) since the granting of summary judgment as to liability on his section 240 (1) claim renders defendants absolutely liable and, thus, alternative theories of liability academic

⁶ This Court notes that, although Tudisco testified at his deposition that he did not know whether there were counterweights at the site (Doc. 55 at 29), he now submits an affidavit attesting to the fact that there were. Doc. 70. Since it is well settled that such an attempt to feign an issue of fact is improper (*see Lambert v Bonilla*, 201 AD3d 502, 503 [1st Dept 2022]) this Court declines to find that an issue of facts exists regarding the counterweights which warrants the denial of plaintiff's motion.

(See *Pimentel v DE Freight LLC*, 205 AD3d 591, 593 [1st Dept 2022], citing *Hewitt v NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept 2020]; see also *Golubowski v City of NY*, 131 AD3d 900, 901 [1st Dept 2015], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

RCC's Motion for Summary Judgment (Mot. Seq. 003)

Given that RCC is also absolutely liable pursuant to Labor Law section 240(1), its motion to dismiss the Labor Law section 240(1) and 241(6) claims against it is denied as academic (See *Pimentel*, 205 AD3d at 593; *Golubowski v City of NY*, 131 AD3d at 901).

Jafrog and LSC's Motion for Summary Judgment (Mot. Seq. 004)

Similarly, given that Jafrog and LSC are absolutely liable pursuant to Labor Law section 240(1), the branch of their motion seeking to dismiss plaintiff's common law negligence claim and Labor Law section 200, 240(1) and 241(6) claims against them is denied as academic as well (See *Pimentel*, 205 AD3d at 593; *Golubowski v City of NY*, 131 AD3d at 901).

However, the branch of the motion by Jafrog and LSC seeking contractual indemnification against RCC is granted. The indemnification provision of the contract between LSC and RCC subcontract only requires that the accident arise out of RCC's work (See *Alvarado v SC 142 W. 24 LLC*, ___AD3d___, 2022 NY Slip Op 05584, *2 [2022]; 2022 NY App Div LEXIS 5500; 2022 WL 5233278 [1st Dept October 6, 2022], citing *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 271 [1st Dept 2007]; see also *Corleto v Henry Restoration Ltd.*, 206 AD3d 525, 526 [1st Dept 2022]). Although the indemnification provision is broad, it does not run afoul of General Obligations Law § 5-322.1 because it contemplates indemnification "[t]o the fullest extent permitted by law" (Doc. 56 at par. 8.7.1) and does not seek indemnification by Jafrog and LSC for their own negligence (see *Alvarado, supra*, citing *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). "The extent to which [Jafrog and LSC] are entitled to indemnification

from [RCC] will depend on the extent to which [their negligence] is determined to have contributed to plaintiff's accident" (*see Alvarado, supra*).

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the branch of the motion by plaintiff Denys Ferreira seeking summary judgment as to liability, pursuant to CPLR 3212, on his Labor Law section 240(1) claim against defendants/third-party plaintiffs Jafrog Realty, LLC and LSC Development, LLC and defendant Racanelli Construction Company Inc. (mot. seq. 002) is granted; and it is further

ORDERED that the branch of the motion by plaintiff Denys Ferreira seeking summary judgment as to liability, pursuant to CPLR 3212, on his Labor Law section 241(6) claim against defendants/third-party plaintiffs Jafrog Realty, LLC and LSC Development, LLC and defendant Racanelli Construction Company Inc. (mot. seq. 002) is denied as academic; and it is further

ORDERED that the motion by defendant Racanelli Construction Company Inc., pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's claim pursuant to Labor Law section 240(1) and his claim pursuant to Labor Law section 241(6), as predicated on sections 12 NYCRR 23-5.1, 23-1.16, and 23-5.18(g) of the New York State Industrial Code (mot. seq. 003) is denied; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs Jafrog Realty, LLC and LSC Development, LLC, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common law negligence claim and claims pursuant to Labor Law sections 200, 240(1), and 241(6) (mot. seq. 004) is denied; and it is further

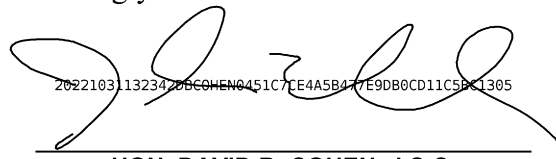
ORDERED that the branch of the motion by defendants/third-party plaintiffs Jafrog Realty, LLC and LSC Development, LLC, pursuant to CPLR 3212, for summary judgment on their claims for contractual indemnification against defendant Racanelli Construction Company, Inc. (mot. seq. 004) is granted; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk shall enter judgment accordingly.

10/31/2022
DATE



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HON. DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: