Mejia v 625 Madison Ave., Inc.
2022 NY Slip Op 33827(U)
November 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 501632/13
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of November, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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OSCAR MEJIA and SANDRA MEJIA,

Plaintiff,

-against- Index No.: 501632/13

625 MADISON AVENUE, INC., 625 GROUND LESSOR, LLC, NEWARK KNIGHT GLOBAL MANAGEMENT SERVICES, LLC., SLG 625 LESSEE LLC and CANALI RETAIL, INC.,

Defendants.

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625 GROUND LESSOR, LLC, SLG 625 LESSEE LLC and CANALI RETAIL INC.,

Third-Party Plaintiffs

-against-

CAPITAL IMPROVEMENT SERVICES, LLC, Individually and d/b/a TEAM CIS, and NEW YORK MARINE and GENERAL INSURANCE COMPANY,

Third-Party Defendants,

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CAPITAL IMPROVEMENT SERVICES, LLC, Individually and d/b/a TEAM CIS,

Second Third-Party Plaintiff,

-against-

LISAR USA CORP.

Second Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	228-256,262-286,293-303,305-336
Opposing Affidavits (Affirmations)	288-292, 337-340, 342-343
Affidavits/ Affirmations in Reply	304, 345, 346, 347-349 .
Other Papers:	

Upon the foregoing papers, plaintiffs Oscar Mejia and Sandra Mejia move (M.S. 9) for an order awarding them summary judgment on the issue of liability against defendants 625 Madison Avenue, Inc., 625 Ground Lessor, LLC., SLG 625 Lessee LLC (collectively 625 Madison) and Canali Retail, Inc. (Canali) under Labor Law §§240 (1) and 241 (6). Third-party defendant/second third-party plaintiff Capital Improvement Services, LLC, individually and d/b/a Team CIS (CIS), cross-moves (M.S.10) for an order, pursuant to CPLR 3212, dismissing plaintiffs' claims against the first party defendants and dismissing the third-party complaint against it. Second third-party defendant Lisar USA Corp. (Lisar) moves (M.S.11) for an order severing the second third-party action pursuant to CPLR 603.625Madison and Canali cross-move (M.S.12) for an order: (1)dismissing plaintiffs' complaint against them; (2) awarding them contractual indemnification against CIS on their third-party claims; (3) declaring that they qualify as additional insureds on a primary, non-contributory basis under the third-party defendant New York Marine and General Insurance Company's (Marine) liability policy covering CIS; and (4) declaring that Marine is required to defend and indemnify them..

Background

On February 19, 2013, plaintiff Oscar Mejia sustained injuries while working on a construction project on the ground floor of a building located at 625 Madison Avenue in Manhattan. The premises was owned by 625 Madison and leased by Canali. Canali intended to renovate the premises in order to open a retail clothing store in the space. Accordingly, Canali hired plaintiff's employer, CIS, to perform demolition work and the initial "build out" of the premises. Among other things, this work involved installing ceilings, walls, and mechanical systems. The contract between Canali and CIS for the performance of the work is dated February 19, 2013 - the date of the accident. Further, it is undisputed that this contract was not signed by CIS until several hours after the accident.

Under the terms of the contract, CIS agreed to indemnify 625 Madison and Canali for any claims arising out of the work, "but only to the extent caused by the negligent acts or omissions of [CIS], a Subcontractor, or anyone directly or indirectly employed by them." In addition, prior to entering into the contract with Canali, CIS entered into a "Provider's Agreement" with 625 Madison dated August 13, 2012, whereby CIS agreed to indemnify 625 Madison for claims "arising out of or in connection with or relating to acts or omissions in connection with this agreement." Finally, Canali directly hired Lisar to install furniture, displays, cabinetry, fixtures, and otherwise "finish out" the retail space.

At the time of the accident, plaintiff had been working as a carpenter at the premises for approximately two weeks and was supervised by CIS employees whom he identified as "Basil" and "Hilario." On the day of the accident, plaintiff was directed by Basil to install pieces of plywood in the ceiling of the premises. In order to perform this work,

plaintiff stood on a Bakers scaffold that had lockable wheels on each of its four legs which enabled the apparatus to be moved to different parts of the premises as the work required. According to plaintiff's deposition testimony, the scaffold had a plywood platform measuring two and one-half feet by five feet which he stood on while performing the work. Plaintiff further testified that the platform was approximately five feet above the floor. In addition, plaintiff testified that, although the scaffold lacked railings, metal bars from the scaffold structure extended approximately 18 inches above the scaffold platform on the long sides of the scaffold. Finally, plaintiff testified that he locked the wheels of the scaffold prior to performing any work on the scaffold platform.

The accident occurred as plaintiff was standing on the scaffold platform taking measurements in preparation for installing plywood in the ceiling. As plaintiff performed this work, a worker at ground level who was moving metal frames, measuring approximately 16" x 4', bumped into a stack of frames causing them to fall over in a "domino effect." One of the frames struck a scaffold leg, causing the apparatus to move forward approximately two to three feet. This in turn caused plaintiff to fall backward off of the scaffold platform and land on the stack of frames approximately five feet below, which resulted in plaintiff sustaining injury. At his deposition, plaintiff was unable to identify the worker who caused the frames to fall over. However, plaintiff's coworker Leszek Dudek, who witnessed the accident, testified that this worker was employed by Lisar.

Plaintiffs' Labor Law § 240 (1) Claim

Plaintiffs move for summary judgment under their Labor Law § 240 (1) cause of action against 625 Madison and Canali. At the same time, CIS and 625 Madison (which are jointly represented by counsel) and Canali separately cross-move to dismiss this claim. In support of their motion for summary judgment, plaintiffs maintain that, as the owner of the premises, 625 Madison is subject to liability under Labor Law § 240 (1). Plaintiffs further maintain that, as the tenant that hired plaintiff's employer to perform the construction/renovation work, Canali is also subject to liability under the statute. Plaintiff's deposition testimony, as well as the testimony of Mr. Dudek, establish that plaintiff was injured while performing construction work when he fell from a scaffold that lacked safety rails. Further this testimony indicates that the scaffold shifted which is what caused plaintiff to lose his balance and fall from the scaffold. According to plaintiffs, this testimony constitutes prima facie evidence of a Labor Law § 240 (1) violation as the scaffold failed to adequately protect plaintiff from the hazards associated with the force of gravity. Finally, plaintiffs contend that the fact that the scaffold was struck by the falling metal frame is not a superseding cause of the accident since it was foreseeable that these frames, which were stored in close proximity to the scaffold, would fall and strike the apparatus.

In opposition to plaintiffs' motion for summary judgment and in support of its own cross motion for summary judgment dismissing this claim, CIS maintains that the accident was not caused by the failure of the scaffold to protect plaintiff. Instead, CIS contends that the sole cause of the accident was the negligence of Lisar's employees in stacking the

frames near the scaffold and in causing the frames to fall over and strike the scaffold. CIS argues that it was not foreseeable that the frame would strike the scaffold and cause plaintiff to fall. Similarly, in support of their cross motion for summary judgment and in opposition to plaintiffs' motion, 625 Madison and Canali maintain that there is no evidence that the scaffold broke, collapsed, or malfunctioned when it was struck by the metal frame. Accordingly, 625 Madison and Canali argue that there was no violation of Labor Law § 240 (1).

Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, "[t]he duty imposed by Labor Law § 240 (1) is nondelegable and

. . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500). Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Here, it is undisputed that as the respective owner of the premises and a lessee that hired plaintiff's employer to perform the work, 625 Madison and Canali are subject to liability under the Labor Law. Further, plaintiffs have submitted the uncontroverted deposition transcripts of Mr. Dudek and plaintiff which demonstrate that plaintiff fell from a scaffold platform while performing construction work when the apparatus was struck by a metal frame and caused it to shift. Plaintiff further testified that the scaffold lacked an adequate guardrail that would have prevented him from falling. In this regard, plaintiff testified that the metal scaffold pipes were 18 inches above the scaffold platform. Accordingly, plaintiffs have made a prima facie showing of their entitlement to summary judgment under their Labor Law § 240 (1) claim against 625 Madison and Canali (*Munzon v Victor at Fifth, LLC.*, 161 AD3d 1183, 1185 [2018]; *Yaucan v Hawthorne Village, LLC*, 155 AD3d 924, 925-926 [2017]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762-763 [2006]).

In opposition, 625 Madison, Canali, and CIS have failed to meet their burden of raising a triable issue of fact regarding the Labor Law 240 (1) claim. There is no merit to

defendants' contention that the sole cause of the accident was the negligence of Lisar's employee. "An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not be reasonably attributed to them" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). Here, the accident was a foreseeable consequence of the movement and placement of the unsecured metal frames in close proximity to the legs of the scaffold (*Nimirovski*, 29 AD3d at 762; *Alomia v New York City Transit Auth*., 292 AD2d 403, 405 [2002]). Accordingly, that branch of plaintiffs' motion which seeks summary judgment under their Labor Law § 240 (1) claim against 625 Madison and Canali is granted.

Plaintiffs' Labor Law § 241 (6) Claim

Plaintiffs also move for summary judgment against 625 Madison and Canali under Labor Law § 241 (6). 625 Madison, Canali, and CIS separately cross-move to dismiss this cause of action. Plaintiffs claim that the defendants violated 12 NYCRR 23-5.18 (b) and (e), as well as 23-2.1 (a) (2), and that these violations proximately caused the accident.

In opposition and in support of their own respective cross motions 625 Madison, Canali, and CIS argue that all of the Industrial Code regulations alleged are either too general to support a claim or inapplicable given the circumstances of the accident. In particular, defendants maintain that 12 NYCRR 23-5.18 (b), which requires that manually-propelled mobile scaffolds have safety railings, was not violated because the scaffold had railings along the long sides of the apparatus. Alternatively, CIS argues that the scaffold was not required to have a safety railing as the platform was only five feet above the floor,

pointing to 12 NYCRR 23-5.1 (j), which states that safety railings are not required on scaffold platforms under seven feet in height. In addition, the defendants argue that section 23-5.18 (e), which requires that manually-propelled mobile scaffolds have casters with positive locking devices to hold them in position, was not violated since plaintiff testified that the wheels on the scaffold legs had locking mechanisms and that they were engaged at the time of the accident. Further, the defendants aver that 23-2.1 (a) (2) is inapplicable since this regulation pertains to the safe carrying capacity of scaffolds and the placement of materials close to the edge of scaffold platforms which endangers persons beneath such edge. Furthermore, plaintiffs have abandoned any claims regarding the remaining Industrial Code violations alleged since they do not discuss these regulations in their papers.

Labor Law § 241 (6) provides, in pertinent part, 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 persons employed therein or lawfully frequenting such places."

Here, plaintiffs' bill of particulars alleges a number of violations of 12 NYCRR 23 sections, however, plaintiffs' papers only discuss 23-5.18 (b) and (e) and 23-2.1 (a) (2). Accordingly, the court finds that plaintiffs have abandoned their reliance on the other Industrial Code provisions set forth in their bill of particulars (*Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [2012]).

Turning to the Industrial Code provisions which plaintiffs do address, 12 NYCRR23-2.1 (a)(2), provides that, "[m]aterial and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Although this provision is specific enough to support a Labor Law § 241 (6) claim, it is not applicable to the facts in this case. In particular, plaintiff's accident was not caused by storing materials in excess of the carrying capacity of a floor, platform, or scaffold.

Accordingly, plaintiffs' motion for summary judgment under their Labor Law § 241 (6) claim based upon a violation of this regulation is denied and 625 Madison, Canali, and CIS's respective cross motions to dismiss plaintiffs' Labor Law § 241 (6) claim is granted to the extent that the plaintiffs rely upon this Industrial Code provision.

12 NYCRR 23-5.18 (e) requires that manually-propelled mobile scaffolds have locking devices on their wheels to hold the scaffolds in position. Although this provision is sufficiently specific to support a Labor Law § 241 (6) claim, it is not applicable in this case given plaintiff's testimony that the scaffold wheels had locks and the locks were engaged at the time of the accident. Accordingly, plaintiffs' motion for summary judgment under their Labor Law § 241 (6) claim based upon a violation of this regulation is denied and 625 Madison, Canali, and CIS's respective cross motions to dismiss plaintiffs' Labor Law § 241 (6) claim is granted to the extent the plaintiffs rely upon this Industrial Code provision.

12 NYCRR 23-5.18 (b) requires that all manually-propelled mobile scaffolds "be provided with a safety railing constructed and installed in compliance with this Part [rule]." It is not disputed that this provision is specific enough to support a Labor Law § 241 (6) cause of action. Moreover, plaintiffs have shown that this provision was violated and that this violation caused plaintiff's injuries. While it is true that plaintiff testified that the bars of the scaffold were 18 inches above the scaffold platform, this did not comply with 12 NYCRR 23-1.15 (a) which requires that safety railings be "not less than 36 inches nor more than 42 inches above the walking level." Furthermore, while it is true that 23-5.1 (j) states that safety railings are not required on scaffold platforms under seven feet in height, this provision "appl[ies] to scaffolds in general; however, code provisions specifically applicable to manually propelled scaffolds require safety railings without reference to the height of the scaffold" (*Vergara v SS 133 West 21, LLC*, 21 AD3d 279, 281 [2005]). Accordingly, plaintiffs' motion for summary judgment against 625 Madison and Canali under their Labor Law § 241 (6) cause of action is granted to the extent that this claim is based upon a violation of 23-5.18 (b) and 625 Madison, Canali, and CIS's respective cross motions to dismiss this cause of action aredenied to the extent that they are based upon a violation of this Industrial Code provision.

Plaintiffs' Labor Law § 200/Common-Law Negligence Claim

625 Madison and Canali cross-move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims. CIS separately cross-moves to dismiss these causes of actions against 625 Madison and Canali. In support of this branch of their cross motion, 625 Madison and Canali maintain that the accident arose out of the

means and methods used in carrying out the work. The defendants further maintain that they did not exercise control or authority over the means and methods employed. Defendants note that plaintiff testified at deposition that he was supervised solely by CIS employees, had never heard of Canali, and did not know who owned the building. In addition, CIS's managing member, Anthony Faglione, stated that 625 Madison did not perform or supervise any of the work. Finally, 625 Madison and Canali note that Canali's financial comptroller, Carmine Noce, testified that he only visited the job site once every two weeks and had no authority to stop the work if he saw an unsafe condition or work practice. In its cross motion to dismiss this claim CIS contends that these defendants did not have any authority or control over the work performed by plaintiff. In addition, to the extent that the accident was caused by a dangerous condition, CIS maintains that 625 Madison and Canali did not create or have notice of such condition. Plaintiffs did not submit any opposition to these branches of 625 Madison, Canali, and CIS's cross motions. Liability for causes of action for common-law negligence and for violations of Labor Law § 200 are limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). On the other hand, "[w]here a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient. If the challenged means and methods of the work

are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

Here, the accident was caused by the means and methods employed in carrying out the work, including stacking and moving the metal frames in close proximity to the scaffold that plaintiff was standing on. 625 Madison and Canali have made a prima facie showing that they did not exercise any control or supervision over this work. As there is no opposition to this branch of the cross motions, 625 Madison, Canali, and CIS's respective cross motions for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against 625 Madison and Canali are granted.

Indemnification Claims Against CIS

CIS cross-moves for summary judgment dismissing 625 Madison and Canali's common-law and contractual indemnification claims against it. At the same time, 625 Madison and Canali cross-move for summary judgment against CIS under their contractual indemnification claim in the third-party action. In support of its motion to dismiss the defendants' common-law indemnification claims, CIS notes that it was plaintiff's employer, and that plaintiff was covered under its workers' compensation insurance. As such, CIS contends that all common-law indemnification claims against it are barred under Workers' Compensation Law § 11 as plaintiff did not sustain a "grave" injury" as that term is defined in the statute.

With respect to 625 Madison and Canali's contractual indemnification claims against it, CIS argues that, to the extent that the defendants rely upon the indemnification

clause in the contract between CIS and Canali, these claims are also barred by Workers' Compensation Law § 11. In particular, CIS notes that the statute specifically requires that an indemnification claim be "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer has expressly agreed to contribution to or indemnification of the claimant." According to CIS, although there was a written provision in the contract whereby CIS agreed to indemnify Canali and 625 Madison, the contract was not entered into until several hours after the accident occurred.

CIS further argues that even if the indemnification clause in the contract between it and Canali is enforceable, the obligation to indemnify was never triggered. CIS notes that the clause states that it is only obligated to indemnify to the extent that the accident was "caused by the negligent acts or omissions of [CIS], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts [CIS] may be liable." Here, CIS maintains that the accident was caused solely by Lisar and Lisar was not one of its subcontractors and CIS did not hire Lisar and did not supervise its work.

Finally, to the extent that 625 Madison relies upon the indemnification clause in the Provider's Agreement between CIS and 625 Madison, CIS maintains that its obligation to indemnify was not triggered. In particular, CIS points to the language in this clause which states that it must indemnify 625 Madison for injuries "arising out of or in connection with or relating to acts or omissions in connection with this agreement." According to CIS, since the accident was caused solely by Lisar's negligence, and not any acts or omissions on its part in performing its work under the agreement, it is not obligated to indemnify 625 Madison.

In opposition to CIS's cross motion, and in support of their own cross motion for summary judgment against CIS under their third-party contractual indemnification claims, 625 Madison and Canali point to the indemnification clause in the contract between CIS and Canali which provides that CIS will indemnify them "from and against any and all claims, damages, liability, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work." Here, since plaintiff was employed by CIS on the project, the defendants contend that his claims clearly arose out of CIS's work. In addition, the defendants argue that the obligation to indemnify was triggered because the accident was caused by the negligent acts of CIS since it owned and provided plaintiff with the scaffold that failed to protect him from the force of gravity. Alternatively, 625 Madison and Canali argue that even if the accident was caused solely by Lisar's negligence, the obligation to indemnify was triggered since CIS agreed to indemnify them for accidents caused by a negligent "contractor" and Lisar was a contractor on the project.[1] As a final matter, 625 Madison and Canali maintain that the indemnification clause is enforceable notwithstanding the fact that the contract between Canali and CIS was signed after the accident as the parties clearly intended that the indemnification clause would apply retroactively inasmuch as the contract is dated February 19, 2013 – the same day that the accident occurred.

[1] The court notes that 625 Madison does not rely on the indemnification clause in the Provider's Agreement in support of its cross motion for contractual indemnification or in opposition to CIS's cross motion to dismiss this claim.

With respect to the defendants' common-law indemnification claims against CIS, as previously noted, plaintiff was employed by CIS at the time of the accident and has collected Workers' Compensation benefits as a result of his injuries. Further, 625 Madison and Canali do not contend that plaintiff sustained a grave injury as defined under Workers' Compensation Law § 11. Accordingly, that branch of CIS's cross motion which seeks summary judgment dismissing the defendants' common-law indemnification claims against it are granted as these claims are barred under Workers' Compensation Law § 11.

Turning to CIS's cross motion to dismiss 625 Madison and Canali's contractual indemnification claims, Workers' Compensation Law § 11 mandates that indemnification claims against an employer be "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant." Furthermore, indemnity contracts are to be strictly construed, "an indemnity contract will not be held to have retroactive effect 'unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations'" (*Cacanoski v 35 Cedar Place Assocs., LLC*, 147 AD3d 810, 813 [2017], quoting *Kane Mfg. Corp. v Partridge*, 144 AD2d 340, 341 [1988]). Nevertheless, an employer moving for summary judgment dismissing a contractual indemnification claim based upon the fact that the contract containing the indemnification agreement was signed after the accident has the burden of demonstrating that the parties did not intend for the agreement to have retroactive effect (*Lorica v Krug*, 195 AD3d 1194, 1197 [2021]; *Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 902-903 [2018]; *Cacanoski*, 147 AD3d at 813). CIS has failed to make a prima facie showing that

the parties did not intend for the indemnification provision to apply retroactively when the contract was entered into. However, the court agrees with CIS's contention that it is not obligated to indemnify 625 Madison or Canali to the extent that the accident was caused by Lisar's negligence. The indemnification provision only requires CIS to indemnify "to the extent [the accident was] caused by the negligent acts or omissions of [CIS], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts [CIS] may be liable." Here, inasmuch as Lisar was not hired by CIS, it was not CIS's subcontractor. Since Canali hired Lisar, Lisar was a not a subcontractor at all.

However, given the fact that CIS owned the scaffold and supplied it to plaintiff, there is an issue of fact as to whether CIS's own negligence proximately caused plaintiff's injuries. In particular, the court has already found that the scaffold lacked guardrails required by 12 NYCRR 23-5.18 (b) and the failure to comply with this regulation constitutes "some evidence of negligence" (*Fusca v A&S Construction, LLC*, 84 AD3d 1155, 1156 [2011], *lv dismissed* 18 NY3d 837 [2011]). Moreover, although plaintiff testified that he locked the wheels on the scaffold, the fact that the scaffold moved after being struck by the metal racks is sufficient to raise an issue of fact as to whether CIS was negligent in failing to provide plaintiff with an adequate safety device for the work that he was performing. If it is ultimately determined by the trier of fact that CIS's negligence caused the accident, CIS's obligation to indemnify would be triggered.

Accordingly, that branch of CIS's cross motion which seeks summary judgment dismissing 625 Madison and Canali's contractual indemnification claims against it is denied.

Turning to 625 Madison and Canali's cross motion for summary judgment under their contractual indemnification claim against CIS, it is undisputed that the agreement to indemnify was not signed by CIS until several hours after the accident. Here, there is no language in the indemnification clause or elsewhere in the contract that indicates the obligation to indemnify applied retroactively and 625 Madison and Canali.

Nonetheless, there are issues of fact regarding whether or not the obligation to indemnify was triggered. While there is evidence that would allow the trier of fact to conclude that CIS's negligence contributed to the accident the violation of Industrial Code regulations only constitutes some evidence of negligence and a jury could still conclude that the accident was caused solely by Lisar's negligence.

Accordingly, 625 Madison and Canali's cross motion for summary judgment under their third-party contractual indemnification claim is denied.

Insurance Coverage

625 Madison and Canali cross-move for an order declaring that they qualify as additional insureds under CIS's liability policy with Marine and demands that Marine defend and indemnify them. In support of this branch of their cross motion, defendants point to the contract between CIS and Canali which requires that CIS obtain a commercial general liability insurance policy covering bodily injuries which names Canali and 625 Madison as additional insureds. 625 Madison and Canali further note that CIS's liability policy with Marine provides additional insured coverage to "[a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as

an additional insured on your policy." 625 Madison and Canali contend that the fact that the contract was executed after the accident is of no moment as the contract was in writing and existed prior to the accident. Finally, to the extent that there is an issue of fact regarding whether the agreement to indemnify existed at the time of the accident, 625 Madison and Canali argue that Marine must defend them in this action since the duty to defend is broader than the duty to indemnify. In opposition Marine argues that the additional insured endorsement in its policy specifically required that, in order for the additional insured coverage to attach, the insured (i.e., CIS) must have entered into a written agreement with the proposed additional insureds (625 Madison and Canali). Here, Marine argues that there was no written agreement between the parties at the time the accident occurred since the contract was not signed at that time.

"The party claiming insurance coverage bears the burden of proving entitlement and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy" (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570-571 [2006], [internal citations omitted]). If additional insured coverage is dependent upon the existence of a written contract, but none exists at the time of the accident underlying the claim, then no additional insured coverage is afforded (*id.*). Furthermore, "the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively has no bearing on whether there is a 'written contract' pursuant to the policy endorsement" (*National Abatement Corp.*, 33 AD3d at 571, [internal citations omitted]; *see also Cusumano v Extell Rock, LLC*, 86 AD3d 448, 449 [2011]).

Here, no agreement in writing to add the defendants as additional insured existed at the time of the accident (*National Abatement Corp*., 33 AD3d at 571; *Cusumano*, 86 AD3d at 449). Thus, to the extent that 625 Madison and Canali rely upon the insurance provision in the CIS/Canali contract, they are not covered as additional insureds under the Marine policy.

In reaching this conclusion, the court finds defendants' reliance upon *Zurich American Insurance Co. v Endurance Am. Specialty Ins. Co*. (145 AD3d 502 [2016]) to be misplaced. *Zurich* involved a purchase order containing the language, "by accepting the order, vendor hereby agrees to become bound by the terms of this agreement." Further, the purchase order did not contain signature lines (*id*. at 502). Accordingly, that branch of 625 Madison and Canali's cross motion which seeks a declaration is granted to the extent that the court declares that 625 Madison and Canali are not additional insureds under the Marine policy and Marine is not under a duty to defend and indemnify 625 Madison and Canali with respect to plaintiff's accident.

Lisar's Motion to Sever

Lisar moves for an order, pursuant to CPLR 603, to sever CIS's second third-party action against it. In support of this motion, Lisar notes that CIS waited over six years after the accident to commence its action against Lisar. Lisar maintains that CIS did not have a valid excuse in delaying the commencement of its third-party action for such an extended period of time. Lisar further argues that it has been prejudiced by CIS's delay inasmuch as all other parties in this action have been engaged in discovery since 2013 while Lisar only joined the case in 2019. In addition, Lisar notes that it timely served discovery requests on

all parties on December 11, 2019, and as of February 20, 2020, none of the parties have complied. In opposition CIS notes that the claims asserted against it and the first-party defendants share common factual and legal issues and that Lisar has failed to demonstrate that it will be prejudiced. In this regard, CIS notes that it has provided Lisar with its file which, contains all discovery responses between the parties, pleadings, court orders, medical records, and deposition transcripts. In addition, CIS argues that it did not learn of Lisar's role in the accident until Canali responded to its discovery demands in 2019, and Lisar waited nearly three years before moving to sever.

As a general rule, unless it is shown that it will cause an undue delay or prejudice the substantial rights of a party, severance is inappropriate where claims arise out of the same set of facts. Lisar was present during Mr. Dudek and Mr. Faglione's depositions and had an opportunity to examine these witnesses, both of whom testified that a Lisar employee was responsible for causing the metal frames to fall. Further, while these motions were pending, the court (Knipel, J.) issued an order extending plaintiff's time to file a note of issue to September 22, 2023. Thus, there is sufficient time to complete any needed discovery.

Accordingly, Lisar's motion to sever the second third-party action is denied.

Summary

In summary, the court rules as follows:

(1) that branch of plaintiffs' motion, in mot. seq. 9, which seeks summary judgment against 625 Madison and Canali under their Labor Law § 240 (1) cause of action is granted. That branch of plaintiffs' motion which seeks summary judgment against 625 Madison and

Canali under their Labor Law § 241 (6) cause of action is granted only to the extent that plaintiffs rely upon a violation of 12 NYCRR 23-5.18 (b);

(2) that branch of CIS's cross motion, in mot. seq. 10, which seeks summary dismissing plaintiffs' Labor Law § 240 (1) cause of action against 625 Madison and Canali is denied. That branch of CIS's cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) cause of action against 625 Madison and Canali is denied to the extent that plaintiffs rely upon a violation of 23-5.18 (b) and granted to the extent that plaintiffs rely upon the remaining Industrial Code violations alleged in their pleadings. That branch of CIS's cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims against 625 Madison and Canali is granted. That branch of CIS's cross motion which seeks summary judgment dismissing 625 Madison and Canali's common-law indemnification claim against it is granted. That branch of CIS's cross motion which seeks summary judgment dismissing 625 Madison and Canali's contractual indemnification claim against it is denied;

(3) Lisar's motion, in mot. seq. 11, to sever the second-third party action is denied;

(4) that branch of 625 Madison and Canali's cross motion, in mot. seq. 12, which seeks summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim against them is denied. That branch of 625 Madison and Canali's cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) cause of action against them is denied to the extent that plaintiffs rely upon a violation of 23-5.18 (b) and granted to the extent that plaintiffs rely upon the remaining Industrial Code violations alleged in their pleadings. That branch of 625 Madison and Canali's cross motion which seeks summary judgment

dismissing plaintiffs' Labor Law § 200 and common-law negligence claims against them is granted. That branch of 625 Madison and Canali's cross motion which seeks an order awarding them contractual indemnification against CIS is denied. That branch of 625 Madison and Canali's cross motion which seeks an order declaring that they qualify as additional insureds under CIS's Marine policy and that Marine is required to defend and indemnify them in this action is granted to the extent that the court declares that 625 Madison and Canali are not additional insureds under the Marine policy and Marine has no duty to defend and indemnify them in connection with plaintiff's injuries.

This constitutes the decision and order of the court.

E N T E R,

Hon. Karen B. Rothenberg
J. S. C.