

**Sylla v FPG Clinton Acquisition, LLC**

2022 NY Slip Op 33929(U)

November 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 510111/2014

Judge: Debra Silber

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At an IAS Term, Part 9 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 21<sup>st</sup> day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,  
Justice.

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BIRAHIMA SYLLA,  
  
Plaintiff,  
  
-against-

**DECISION / ORDER**

Index No.: 510111/2014  
Mot. Seq. # 8, 9, 10

FPG CLINTON ACQUISITION, LLC, FPG CLINTON ACQUISITION NY, LLC, FORTIS PROPERTY GROUP, LLC., WONDER WORKS CONSTRUCTION CORP., and WONDER WORKS CONSTRUCTION & DEVELOPMENT CORP.,  
  
Defendants.

-----X

FPG CLINTON ACQUISITION, LLC, FORTIS PROPERTY GROUP, LLC, and WONDER WORKS CONSTRUCTION CORP.,  
  
Third-Party Plaintiffs,

-against-

LORECONCRETE, LLC and CONTACT PLUS ELECTRICAL CORPORATION,  
  
Third-Party Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

|   |       |  |
|---|-------|--|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | _____ | <u>196-208., 233-243, 244-257</u>      |
| Opposing Affidavits (Affirmations)                                  | _____ | <u>209-218, 231, 262-274, 275, 276</u> |
| Affidavits/ Affirmations in Reply                                   | _____ | <u>229-230, 259, 283, 285-286</u>      |
| Other Papers:   | _____ | _____                                  |

Upon the foregoing papers, third-party defendant Loreconcrete, LLC, (Loreconcrete) moves, in motion (mot.) sequence (seq.) 8, for an order, pursuant to CPLR 3212, awarding it summary judgment dismissing plaintiff Birahima Sylla's (plaintiff) complaint against defendants/third-party plaintiffs FPG Clinton Acquisition, LLC (FPG), Fortis Property Group, LLC (Fortis), and Wonder Works Construction Corp. (WWCC) (collectively, the defendants).<sup>1</sup> Loreconcrete also moves for summary judgment dismissing the defendants' third-party action against it. Plaintiff moves, in mot. seq. 9, for partial summary judgment against the defendants under his Labor Law §§ 240 (1) and 241 (6) causes of action. The defendants move, in mot. seq. 10, for summary judgment dismissing plaintiff's complaint against them. The defendants also move for summary judgment on their contractual indemnification, common-law indemnification, and breach of contract claims against Loreconcrete.

### ***Background Facts and Procedural History***

The instant action arises out of a construction site accident that occurred on March 25, 2014, at 540 West 49<sup>th</sup> Street (and 545 West 48<sup>th</sup> Street) in Manhattan. In a written contract dated September 28, 2012, FPG, which owned the premises, hired WWCC to serve as the general contractor on the project, which involved the construction of a new eight-story apartment building. Thereafter, WWCC hired various subcontractors to carry out different aspects of the work, including Loreconcrete, which was hired to perform concrete work, and third-party defendant Contract Plus Electrical Corporation (CPEC), which was

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<sup>1</sup> One defendant, Wonder Works Construction and Development Corp. with a name similar to the other Wonder Works defendant, has (Doc 47), been discontinued from the case.

hired to perform electrical work. The record before the court does not specify the nature of Fortis' relationship to the building or the project. However, it is represented by the same law firm as the owner (FPG) is, and none of the motions address this defendant as a party distinct from the two FPG entities.

At the time of the accident, plaintiff was employed by Loreconcrete and worked as a laborer on the construction project. Plaintiff's work included constructing the temporary framework/forms into which concrete was poured to form the floors of the building. Once the concrete had sufficiently cured, the framework/forms would be removed (i.e., "stripped") and plaintiff and his co-workers would move up one level and repeat the process of constructing the framework/forms and pouring concrete in order to form the next floor. The concrete floors themselves were reinforced with rebar which was laid down prior to pouring the concrete. In addition to the rebar, pipes which would be needed for electrical wiring were laid down prior to pouring the concrete. According to plaintiff, while performing their work, he and his co-workers were supervised by a Loreconcrete foreman named "Richie."

The framework/forms themselves apparently consisted of "main" beams and smaller secondary beams. Once the beams were in place, plywood forms were placed on top of the beams and concrete was poured into the forms. In his affidavit, Loreconcrete's managing member Vlad Lybarsky states that main beams could weigh up to seventy pounds, depending on their size, and secondary beams weighed between 9.5 and 13.7 pounds.

On the day of the accident, plaintiff and three Loreconcrete co-workers were constructing temporary framework/forms on the sixth floor of the building that would ultimately be used to form the seventh floor. In order to carry out this work, one worker brought the beams to plaintiff, who then passed them up to his co-worker “Sancari” who was standing near the top of an eight-foot A-frame ladder. After he received the beam from plaintiff, Sancari placed the beam on top of a support beam. According to plaintiff, the fourth Loreconcrete co-worker then secured the newly added beam as the other workers performed their tasks. At his deposition, plaintiff testified that the accident occurred when he passed a main beam weighing 70 to 75 pounds up to Sancari on the ladder. In particular, he alleges that after he passed the beam to his co-worker, Sancari lost his grip on the beam and the beam began to fall toward plaintiff. Plaintiff then stepped backward in an effort to avoid being struck by the beam, but he tripped and fell, and the beam struck plaintiff on his left hand. When asked at his deposition what caused him to trip, plaintiff testified that he tripped on an installed plastic pipe that protruded from the concrete floor. However, plaintiff also testified that there was “debris” on the floor and around the pipe.

Following the accident, plaintiff partially filled out and signed an “Incident Report By Employee.”<sup>2</sup> With respect to what caused the accident, the report states “[h]e was receiving secondary beams from worker and his finger get hit with it.” The report further states that the object that caused the accident was a “5’7” secondary aluminum beam.” When questioned about the report at his deposition, plaintiff testified that it was inaccurate

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<sup>2</sup> Plaintiff testified that he filled out his name on the incident report and signed the report, but his supervisor Richie filled out the remainder of the report.

inasmuch as he was struck by a main beam, not a secondary beam. In addition, plaintiff testified that he was passing the beam to his co-worker, not receiving the beam. When asked why he signed the report when it contained inaccuracies, plaintiff testified that he cannot read English.

By summons and complaint dated October 28, 2014, plaintiff brought the instant action against FPG, Fortis, and WWCC alleging causes of action sounding in violations of Labor Law §§ 240 (1), 241 (6), 200, as well as common-law negligence. On or about May 20, 2016, FPG, Fortis and WWCC commenced a third-party action against Loreconcrete seeking common-law and contractual indemnification as well as damages for breach of contract to procure liability insurance. On March 9, 2020, FPG, Fortis, and WWCC commenced a second third-party action against third-party defendant Contact Plus Electrical Corporation (Contact Plus) seeking common-law and contractual indemnification and damages for breach of contract to procure liability insurance.<sup>3</sup> The Note of Issue is not due until June of 2023.

### *Plaintiff's Labor Law § 240 (1) Claim*

Loreconcrete and the defendants separately move to dismiss plaintiff's Labor Law § 240 (1) claim. At the same time, plaintiff moves for summary judgment against the defendants on this cause of action. In support of this branch of their respective motions,

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<sup>3</sup> However, instead of styling it as a second third-party action, what the third-party plaintiffs actually did was to amend their first third-party complaint to add a second third-party defendant without leave of court. None of the parties have objected and all of the subsequent papers list just one third-party action. Loreconcrete did not treat the 2020 third-party complaint as replacing the 2016 one, [Doc 182] and did not file an amended answer to it. Contact Plus answered the third-party complaint, and therein asserts cross-claims against Loreconcrete [Doc 303]. Loreconcrete then filed a document containing cross-claims against Contact Plus [Doc 316].

Loreconcrete and the defendants note that plaintiff was injured when he tripped over an installed pipe protruding from the concrete floor. According to Loreconcrete and the defendants, under well-established caselaw, a trip and fall accident is not covered under Labor Law § 240 (1), even if it occurs at an elevated level. In addition, Loreconcrete and the defendants maintain that no hoisting device was required for the work being carried out at the time of the accident since plaintiff and Mr. Lybarsky testified that such equipment was not used or needed to pass beams to the worker on the ladder. Further, at oral argument before the court on the record, Loreconcrete pointed to the incident report signed by plaintiff which states that he was struck by a secondary beam. Loreconcrete further points to Mr. Lybarsky's aforementioned affidavit, which indicates that secondary beams only weighed between 9.5 and 13.7 pounds.

In opposition to this branch of Loreconcrete and the defendants' motions, and in support of his own motion for summary judgment under Labor Law § 240 (1), plaintiff initially notes that, as the respective owners and general contractor on the construction project, FPG/Fortis and WWCC are subject to liability under the statute. Plaintiff further maintains that the uncontroverted evidence before the court demonstrates that the defendants violated Labor Law § 240 (1) and that this violation caused his injuries. In particular, plaintiff points to his own deposition testimony, which indicates that he was injured when his co-worker, who was standing at the top of an 8-foot ladder, lost his grip on and dropped a 75-pound beam that fell and struck plaintiff. According to plaintiff, this accident was clearly gravity-related, and the defendants violated the statute by failing to

provide adequate hoisting and securing devices that would have protected him from the risks associated with the falling beam.

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]). In falling object cases, “a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]), “or that the falling object required securing for the purposes of the undertaking” (*Simmons v City of New York*, 165 AD3d 725, 727 [2018], quoting *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2013]).

Turning first to Loreconcrete and the defendants’ motions to dismiss plaintiff’s Labor Law § 240 (1) claim, there is no merit to their argument that the underlying accident is not covered under the statute inasmuch as plaintiff merely tripped and fell. In particular, this argument ignores the fact that plaintiff testified at his deposition that the falling beam struck him on his left hand, thereby causing injuries. Furthermore, while it is true that, as a general rule, trip and fall accidents are not covered under Labor Law § 240 (1), the Appellate Division, Second Department has long held that injuries sustained by a worker while attempting to avoid a gravity-related accident, such as falling from a ladder, are covered under the statute (*Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 704 [2022]; *Lacy v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]). Here, plaintiff testified that he tripped and fell while attempting to avoid being struck by the falling beam. Finally, if credited by the trier of fact, plaintiff’s testimony that the beam weighed between 70-75 pounds would be sufficient to establish that the failure to provide a hoisting device to lift the beam or a securing device to prevent the beam from falling constituted a violation of Labor Law § 240 (1) (*Gutierrez v Harco Consultants Corp.*, 157 AD3d 537 [2018]).

Accordingly, Loreconcrete and the defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

With respect to plaintiff's motion for summary judgment against the defendants, there is conflicting evidence regarding the weight of the beam involved in the accident, which raises a triable issue of fact regarding whether or not the accident was caused by a Labor Law § 240 (1) violation. In particular, as previously noted, plaintiff testified that he was struck by a main beam that weighed between 70 and 75 pounds. However, plaintiff signed an incident report immediately after the accident which states that he was hit by a 5' 7" aluminum secondary beam. In this regard, while it is true that plaintiff testified that he was unable to read this incident report, this presents an issue of credibility as parties are generally presumed to be aware of the contents of documents they sign (*see Golden Stone Trading, Inc. v Wayne Electro Sys., Inc.*, 67 AD3d 731, 732 [2009]). Further, Mr. Lybarsky states in his affidavit that such secondary beams weigh 13.9 pounds. If the jury ultimately determines that the beam only weighed 13.9 pounds, it could further determine that no Labor Law § 240 (1) safety device was required, given the beam's relatively light weight and the fact that plaintiff was close enough to his co-worker on the ladder that he could pass him the beam by hand. Accordingly, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim against the defendants is denied.

***Plaintiff's Labor Law § 241 (6) Claim***

Loreconcrete and the defendants separately move to dismiss plaintiff's Labor Law § 241 (6) cause of action. At the same time, plaintiff moves for summary judgment against the defendants under his Labor Law § 241 (6) claim. In support of their respective motions,

Loreconcrete and the defendants argue that all of the New York State Industrial Code provisions which plaintiff alleges were violated are either too general to support a Labor Law § 241 (6) claim or are inapplicable given the circumstances of the accident. In opposition to these motions, and in support of his own motion for summary judgment under the statute, plaintiff argues that the defendants violated 12 NYCRR 23-1.7 (e) (2), which mandates that floors where workers work or pass be kept free from accumulations of dirt and debris, scattered tools, and materials. In this regard, plaintiff points to his deposition testimony wherein he stated that he tripped on debris while attempting to avoid being struck by the beam. In opposition to this branch of plaintiff's motion, and in further support of their own motions to dismiss plaintiff's Labor Law § 241 (6) claim, Loreconcrete and the defendants argue that 23-1.7 (e) (2) is not applicable since the plaintiff did not trip on debris. In particular, movants maintain that the pipe that caused plaintiff to trip was installed in the floor and was integral to the construction work.

Plaintiff's pleadings allege violations of 12 NYCRR 23-1.5, 23-1.7, 23-1.16, 23-1.21, 23-1.32, 23-2.1, 23-2.3, 23-6.1, 23-6.2, 23-6.3, and 23-5. With the exception of the alleged violation of 23-1.7 (e) (2), Loreconcrete and the defendants have made a prima facie showing that these Industrial Code provisions are inapplicable or are not specific enough to support a Labor Law § 241 (6) claim. In any event, inasmuch as plaintiff's papers only discuss the alleged violation of 23-1.7 (e) (2), plaintiff has abandoned his reliance on the other Industrial Code provisions which are set forth in his bill of particulars (*see Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [2012]).

12 NYCRR 23-1.7 (e) (2), which pertains to tripping hazards, “requires owners and general contractors to keep ‘[t]he parts of floors, platforms and similar areas where persons work ... free from accumulations of dirt and debris ... insofar as may be consistent with the work being performed’” (*Cody v State of New York*, 82 AD3d 925, 928 [2011], quoting 12 NYCRR 23-1.7 [e][2]). It is well-settled that when the condition that caused a worker to trip is integral to the work being performed, this regulation does not apply (*Sanchez v BBL Construction Serv., LLC*, 202 AD3d 847, 851 [2022]; *Vita v New York Law School*, 163 AD3d 605, 608 [2018]; *Cody*, 82 AD3d at 928; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2008]). Instead, by its very terms, the regulation only applies to falls caused by dirt, debris and scattered materials.

Here, the only evidence regarding what caused plaintiff to trip and fall is his own deposition testimony. However, throughout his deposition, plaintiff was equivocal when directly asked what caused him to trip. For example, when initially asked to describe how the accident occurred, plaintiff testified, “I fell, and I slip in some like plastic pipe.” When asked about the pipe, plaintiff testified:

“It’s plastic pipe. But it’s a plastic pipe that come with rebar. They have to stick rebar on the concrete to hold the pipe to tie it together. So it’s like three, four together surround us. But by the time I know the pipe and those things behind me exactly, and I already step on it and I fell.”

Similarly, when asked, “then you said that it wasn’t the beam that caused you to fall, it was you stepping on the plastic piping from the rebar. Is that correct”, plaintiff responded “yes.” However, when asked if there were any substances such as water or grease on the pipe, plaintiff responded, “[d]ebris. I step on debris, and that’s about it.” Further, when

asked, “[s]o it was initially the fall from the plastic piping that caused you to fall ...”, plaintiff responded “[a]nd whatever garbage what was around.” Thus, at various points during his deposition, plaintiff testified that his fall was caused by the installed pipe, debris, and “garbage” around the pipe. This is significant, as if it is determined that the pipe caused plaintiff to trip and fall, 12 NYCRR 23-1.7 (e) (2) would be inapplicable, since the pipe was integral to the work being performed. On the other hand, if it is determined that garbage and debris around the pipe caused the plaintiff to trip, the regulation would be applicable. Under the circumstances, because there are triable issues of fact as to whether the materials that plaintiff stepped on were integral to the work or were mere debris, Loreconcrete and the defendants’ motions to dismiss the plaintiff’s Labor Law § 241 (6) claim, as well as plaintiff’s motion for summary judgment under this statute, must be denied (*Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722-723 [2010]; *Quinn v Whitehall Prop. II, LLC*, 69 AD3d 599, 600 [2010]).

***Plaintiff’s Labor Law § 200/Common-Law Negligence Claims***

Loreconcrete and the defendants separately move to dismiss plaintiff’s Labor Law § 200 and common-law negligence claims. In support of this branch of its motion, Loreconcrete maintains that, inasmuch as plaintiff’s work involved pouring concrete on top of the pipe that protruded from the floor and caused him to fall, liability may not attach since the hazard was part of, and inherent in, the work that plaintiff was hired to perform. In addition, Loreconcrete maintains that the alleged hazard posed by the protruding pipe was an ordinary and usual condition on the jobsite where plaintiff worked. Finally, with regard to the alleged debris, Loreconcrete argues that it did not control the overall jobsite.

In support of their motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims, the defendants maintain that they had no duty to protect plaintiff against the hazard posed by the protruding pipe inasmuch as this was an open and obvious condition. In addition, to the extent that the accident was caused by the means and methods employed by plaintiff and his Loreconcrete co-workers in carrying out the work, the defendants maintain that they did not exercise any supervisory control over these means and methods. In support of this contention, the defendants point to plaintiff's own deposition testimony, wherein he stated that he was supervised solely by his Loreconcrete foreman Richie and had no familiarity with the owner of the building or WWCC.

In opposition to these motions, plaintiff argues that his accident was caused by a hazardous condition in the form of garbage and debris in the work area. Plaintiff further maintains that the moving parties have failed to meet their prima facie burden of establishing that they lacked actual or constructive notice of this condition.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe premises 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]). Specifically, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor

Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). However, no liability attaches if the underlying condition is open and obvious and not inherently dangerous (*Sanchez*, 202 AD3d at 849-850). Similarly, “[a] general contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the worksite and actual or constructive notice of the dangerous condition” (*White v Village of Port Chester*, 92 AD3d 872, 876 [2012]).

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 to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or [general] 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]).

In the instant case, plaintiff’s accident was allegedly caused by both the means and methods employed in carrying out the work as well as an allegedly dangerous premises condition at the jobsite. In particular, to the extent that plaintiff’s injuries were caused by the beam falling and striking his hand during hoisting operations, the accident was caused by the means and methods used to carry out these operations. Here, the defendants have made a prima facie showing that they did not exercise supervisory control or authority over these means and methods. Indeed, plaintiff does not contend otherwise.

To the extent that plaintiff's injuries were caused by his tripping and falling, the accident was caused by an allegedly dangerous premises condition in the form of the protruding pipe and/or debris. Although it is clear that it did not create these conditions, the owner FPG has failed to make a prima facie showing that it lacked constructive notice of these conditions by submitting evidence as to the last time it inspected the work area (*White*, 92 AD3d at 876; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 149 [2010]). The general contractor WWCC, which exercised control over the job site, has also failed to make such a prima facie showing. As a final matter, under the circumstances of this case, it cannot be said that the pipe was an open and obvious condition. In this regard, plaintiff testified that he did not have an opportunity to observe the pipe inasmuch as he was backing away from the ladder in an effort to avoid the falling beam when he tripped. In addition, Loreconcrete and the defendants have not submitted any evidence that the debris was an open and obvious condition.

Accordingly, Loreconcrete and the defendants' motions to dismiss plaintiff's Labor Law § 200 and common-law negligence causes of action are denied.

### ***Indemnification Claims Against Loreconcrete***

Loreconcrete moves for summary judgment dismissing the defendants' common-law and contractual indemnification claims against it.<sup>4</sup> At the same time, the defendants/

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<sup>4</sup> In its notice of motion, Loreconcrete moves to dismiss the entire third-party complaint, which includes a claim for breach of contract to procure liability insurance. However, Loreconcrete's affirmation in support of its motion contains no discussion regarding the breach of contract claim. Thus, Loreconcrete has failed to meet its prima facie burden with respect to this claim and that branch of Loreconcrete's motion which seeks to dismiss the breach of contract claim

third-party plaintiffs move for summary judgment on their contractual indemnification claim against Loreconcrete. In support of its motion to dismiss the contractual indemnification claims against it, Loreconcrete notes that the indemnification provision in the contract between it and WWCC only requires that it indemnify the defendants for injuries arising out of Loreconcrete's work, and only to the extent that said injuries were caused by Loreconcrete's negligence. Here, Loreconcrete maintains that plaintiff's injuries did not arise out of its work and were not caused by its negligence inasmuch as it did not install the pipe that caused plaintiff to trip or supervise the installation of the pipe. In addition, Loreconcrete maintains that WWCC may not enforce the indemnification provision against it inasmuch as WWCC's own negligence caused the accident. Finally, Loreconcrete argues that, in the absence of any negligence on its part, there is no basis for the defendants' common-law indemnification claims against it.

In opposition to this branch of Loreconcrete's motion, and in support of their own motion for contractual indemnification against Loreconcrete, the defendants contend that the indemnification provision in the contract between Loreconcrete and WWCC requires that Loreconcrete indemnify them for any accident arising out of its work. Here, the defendants maintain that the accident clearly arose out of Loreconcrete's work inasmuch as the entire accident was precipitated by plaintiff's co-worker's failure to hold onto the beam that plaintiff passed to him. In addition, the defendants argue that the indemnification

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must be denied regardless of the sufficiency of the opposition papers (*Smarkucki v Kleinman*, 171 AD3d 1118, 1119 [2019]; *Bonigiovanni v Cavagnuolo*, 138 AD3d 12, 16 [2016]).

provision is fully enforceable since the accident was not caused by any negligence on their part.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3de 925, 930 [2009]). A party seeking contractual indemnification must demonstrate that it was free of negligence, since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]).

The indemnification provision in the contract between Loreconcrete and WWCC requires that Loreconcrete indemnify the defendants for any claims “arising out of or resulting from performance of [Loreconcrete’s] work under this Subcontract . . . but only to the extent caused by the negligent acts or omissions of [Loreconcrete] [or] anyone directly or indirectly employed by them.” Here, plaintiff’s accident clearly arose out of Loreconcrete’s work under the subcontract inasmuch as plaintiff was erecting concrete framework/forms at the time he was injured. Furthermore, given plaintiff’s deposition testimony that his co-worker dropped the beam that plaintiff handed to him immediately prior to the plaintiff’s accident, there is evidence that it was the negligence of Loreconcrete’s employee which caused the accident. Accordingly, Loreconcrete’s motion for summary judgment dismissing the defendants/third-party plaintiffs’ contractual indemnification claim against it is denied. However, since there is a triable issue of fact as to whether the defendants failed to remedy a dangerous condition which they had

constructive notice of, the defendants' motion for summary judgment on their contractual indemnification claim must also be denied. In this regard, General Obligations Law § 5-322.1 precludes a party from being indemnified for its own negligence (*Cava Constr. Co, Inc., v Gaeltec Remodeling Corp.*, 58 AD3d 660, 661 [2009]).

With respect to the common-law indemnification claim, Loreconcrete has failed to demonstrate that it did not control the work that caused the accident. In particular, it is undisputed that plaintiff was employed by Loreconcrete at the time of the accident and there is evidence that another Loreconcrete worker dropped a beam on plaintiff. However, inasmuch as plaintiff was employed by Loreconcrete at the time of the accident, the defendants/third-party plaintiffs common-law indemnity claim is barred by Workers' Compensation Law § 11. In this regard, plaintiff testified that he collected Workers' Compensation benefits after the accident. Further, in reviewing plaintiff's bill of particulars, it is clear that he did not suffer a grave injury as that term is defined under the statute (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 709 [2007]).

### ***Conclusions***

Accordingly, it is

**ORDERED** that the branch of Loreconcrete's motion, in mot. seq. 8, which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1), § 200 and common-law negligence claims against the defendants is denied; and it is further

**ORDERED** that the branch of Loreconcrete's motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against the defendants is denied with regard to plaintiff's claim of a violation of 12 NYCRR 23-1.7 (e) (2) and is granted

with regard to the remaining Industrial Code violations alleged in his pleadings; and it is further

**ORDERED** that the branch of Loreconcrete's motion which seeks summary judgment dismissing the third-party complaint against it is denied with respect to the contractual indemnification and breach of contract claims and is granted with respect to the common-law indemnification claim; and it is further

**ORDERED** that plaintiff's motion, in mot. seq. 9, which seeks summary judgment against the defendants on his Labor Law §§ 240 (1) and 241 (6) causes of action is denied; and it is further

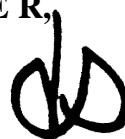
**ORDERED** that the branch of the defendants' motion, in mot. seq. 10, which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1), § 200, and common-law negligence claims against them is denied; and it is further

**ORDERED** that the branch of the defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them is denied with regard to plaintiff's claim of a violation of 12 NYCRR 23-1.7 (e) (2) and is granted with regard to the remaining Industrial Code violations alleged in his pleadings; and it is further

**ORDERED** that the branch of the defendants' motion which seeks summary judgment on their contractual indemnification claim against Loreconcrete is denied.

This constitutes the decision and order of the court.

ENTER,



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Hon. Debra Silber, J.S.C.