Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **KARINA E. ALOMAR** IA PART 23
Justice

----------X

ENRIQUE SAN INOCENCIO, Index No.: 720864/21

Plaintiff, Motion Seq. Nos. 2,3,4,5

-against-

FEDERAL REALTY INVESTMENT TRUST, SOLAL REALTY LTD PARTNERSHIP, UNCLE GUISEPPE'S MELVILLE, INC. AND ARKEN, INC.,

Defendants.

----------X

SOLAL REALTY LTD PARTNERSHIP,

Third-Party Plaintiff,

-against-

MACCARONE PLUMBING, INC.,

Third-Party Defendant.

----------X

The following numbered papers read on these motions by plaintiff and defendants for summary judgment on the issue of liability.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits-Opposition-Reply.....	ECF Nos. 5-32
Notice of Motion-Affidavits-Exhibits-Opposition-Reply.....	ECF Nos. 33-60
Notice of Motion-Affidavits-Exhibits-Opposition-Reply…….	ECF Nos. 61-92
Notice of Motion-Affidavits-Exhibits-Opposition-Reply…….	ECF Nos. 93-231

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment under Labor Law §240(1), third-party defendant Maccarone Plumbing, Inc.'s motion pursuant to CPLR 3212 for an order dismissing the third-party action against them on the grounds that the third-party claims are barred by the Workers' Compensation Law, defendant SOLAL's motion pursuant to CPLR 3212 granting summary judgment and dismissing plaintiff's negligence and Labor Law §200, §240(1) and 241(6) claims and all cross claims in their entirety and granting SOLAL summary judgment on its contractual and insurance cross claims against defendant Uncle Giuseppe's, and defendants Federal Realty Investment Trust and Uncle Giuseppe's Melville, Inc.'s motion for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint and all cross-claims against them are decided as follows:

BACKGROUND

Plaintiff Enrique San Inocencio "Inocencio" commenced the instant action to recover for injuries he allegedly sustained on October 26, 2017, while working as a journeyman steamfitter for third-party defendant Maccarone Plumbing, Inc. ("Maccarone") on a construction project located at Uncle Giuseppe's supermarket located at 890 Walt Whitman Road, Melville, New York. Plaintiff claimed that he was injured while he was working on an A-frame ladder. The plaintiff alleged that at the time of the occurrence, plaintiff was standing on the steps on the A-frame ladder in question and "felt the ladder kick" away from him. Plaintiff further alleged that as he fell from/with the ladder and in an attempt to stop himself from falling, he grabbed the metal grid of the drop ceiling with his left hand and ultimately pulled it down with him as he fell.

Defendant, Solal Realty Ltd Partnership ("Solal Realty") is and/or was the owner of the premises know as the "Melville Mall." At the time of the occurrence, the premises is and/or was leased from Solal Realty to Federal Realty Investment Trust ("Federal Realty"). The store where the accident occurred, "Store 5," within the premises is and/or was subleased from Federal Realty to Uncle Giuseppe's Melville, Inc. Defendant, Arken, Inc. ("Arken") never appeared in this action and is in default.

Plaintiff's Testimony

Plaintiff testified that prior to the accident on October 26, 2017, he worked for Maccarone Plumbing as a steamfitter, journeyman for approximately three or four months. He stated that he has been a member of 638 Steamfitters for twenty-four years and continues to be a member. Plaintiff explained that his duties as a steamfitter consist of work related to fire sprinklers, heating, new attic tubing, welding, solder, and brazing. He further testified that to be a steamfitter he completed a five-year apprenticeship and OSHA training and received a certificate.

Inocencio stated that he was hired by Paul Rivera at Maccarone and knew him for approximately fifteen years prior to staring work with Maccarone. He averred that Paul Rivera was his immediate supervisor and was also a steamfitter. The plaintiff stated that when he started working for Maccarone, he worked with Dan Swanson, his partner, and had worked with him previously.

Plaintiff testified that he began working at the Uncle Giuseppe's project approximately two weeks prior to the accident. He further explained that while working for Maccarone, he used his own vehicle, and they did not supply him with any tools other than a gang box. When he started the Uncle Giuseppe's job, there were other Maccarone employees working on the site, namely Paul Rivera and his partner Ronnie. He averred that when he arrived at the Uncle Giuseppe's job site, he was only provided with a gang box, did not receive any prior instructions, plans or drawings and was only advised that the job entailed work on the sprinkler system. Plaintiff testified that once at the job site, Paul Rivera instructed him to relocate the sprinkler heads. Additionally, he was instructed to add sprinkler heads as well to make sure the facility had proper coverage, relocate piping and install new piping. He further averred that for the two weeks he was working at the job site, Paul Rivera was present at the job site every day. Plaintiff testified that in addition to

Maccarone, there was other types of work on-going at the site such as plumbing, electrical, HVAC, and erecting a loading dock. Inocencio stated that no one other than Paul Rivera would instruct him as to his work duties.

Prior to the accident, the plaintiff stated that he used the ladder at the job site for a couple of days to install new piping at the loading dock outside of the building. He advised that he used the house ladder which the plaintiff defined as a common ladder that is on site that everybody can use. He further testified that there were more than five house ladders at the site, and they were all A-frame ladders. In his trade, the plaintiff stated that they used scissor lifts to get up to the deck since the ceiling inside the building was approximately 25 to 30 feet high. On the date of the accident, plaintiff averred that he was working in the kitchen and utilized an eight-foot A-frame ladder. Inocencio testified that when he first saw the ladder in question, it was in the kitchen, and no one was using it. He stated that prior to the date of the accident he used that specific eight-foot ladder for approximately two or three days. The plaintiff testified that at the time of his accident there were no other workers that were working in the kitchen area. With respect to the ladder, the plaintiff stated that the first day he was working in the kitchen area his partner used the ladder and the ladder was moved to various locations within the kitchen. He further averred that the first day he started working in the kitchen area the electricians and HVAC workers used that same A-frame ladder. On the first day he was using the ladder, he explained that no one made any complaints regarding the ladder. Inocencio averred that he did not notice that the ladder was worn or in a state of disrepair before the accident. He further testified that Dan did not make any complains either with respect to the ladder.

Plaintiff testified that at the time of the accident, he was drilling holes in sheet rock inside the kitchen area and was approximately at a height of ten feet on top of the ladder. He further averred that each time he bored holes he would have to move the ladder. He stated that he did not notice anything wrong with the ladder when he used it the day prior to the accident. Inocencio averred that while boring the holes the day before the accident, he was able to put the ladder flush on the floor and made sure that it was in a locked position. He further testified that on the date of the accident, he continued to move the ladder as he continued to bore holes. He explained that at the time of the incident, his right foot was on the seventh step, he was still holding his drill, and was looking to see that he had a clean hole. Inocencio averred that while he was doing this work, there was no one else standing around or overseeing him. He testified that at the time of the accident, he had his right hand on the drill and his land hand on the ladder, he felt the ladder shake and slide away from him, grabbed the ceiling grid and fell. He confirmed that before he went up the ladder before the accident, the ladder was in the locked position.

Deposition testimony of Jeffrey H. Gansberg (Partner of Solal)

Gansberg testified that he works for AVR Realty Company as the COO and is a partner of the Solal Realty Limited Partnership. He confirmed that Solal Limited Partnership is care of AVR Realty Company. He testified that he became a partner in the early 2000's. He also stated that Solal Realty owns a shopping center also known as the Melville Mall. Gansberg acknowledged that Federal Realty Investment Trust is a tenant of Solal. He further testified that he was unaware that Federal was going to lease out to Uncle Giuseppe's. Gansberg explained that AVR is a real estate development company that is involved in a variety of different types of development, and it hires

contractors to perform work at various locations. He explained the subtenant non-disturbance and attornment agreement to be if a lender requires it in the event of a default, Solal will recognize the lease under certain circumstances. For example, he averred, if Federal defaults on their obligation to the bank, Solal would step into the position of Federal and maintain the lease. If they ended up taking over the Melville Mall because Federal was gone, the tenant's lease would be recognized. He testified that presently Solal is only involved only in the master lease agreement with Federal.

Gansberg acknowledged that the lease between Solal and Federal has a provision that if the tenant is going to do any work, it has to be done in accordance with all applicable legal requirements and in a workman like manner. He further acknowledged that AVR and Solal do not have a relationship and he had never heard of Maccarone Plumbing or the plaintiff named herein.

Deposition testimony of Joseph Scala (Federal Realty Investment Trust)

Scala testified that he works for Federal Realty Investment Trust as the property manager since 2016. He stated that the function and role of a property manager within Federal's system includes maintaining the shopping centers to the standards of Federal Realty by hiring and doing the contracts for landscapers, snow removal, routine inspections of the property and surrounding areas. He acknowledged that Solal Realty LTD is the lease or land holder of the Melville Mall and that there is an Uncle Giuseppe's located at that mall. In short, Federal is the tenant of Solal for this particular location and Uncle Giuseppe's is the subtenant. It is Scala's understanding that the agreement between Solal and Federal provides for Federal to have complete control of the property. He further confirmed that Federal was acting on behalf of the owner Solal.

Scala testified that he was made aware that someone had fallen off a ladder and went to the hospital, however, he did not personally do any investigation as to the incident. Additionally, he averred that in this particular case, the tenant signed the lease, and it was their responsibility to build out their store and it was just our responsibility to approve the plan. Essentially, he testified, that it was the tenant's responsibility, Uncle Giuseppe's, to do the construction. It was his understanding that Uncle Giuseppe's would be responsible in some way for the safety of the construction workers.

He stated that, as to his custom and practice as property manager in 2017, he did not have a responsibility to go to the location daily. He acknowledged that as property manager, Federal did not have an office location at each of their properties, but he would make some trips to the Mall because there was a construction build-out going on and wanted to make sure the property appearance was up to Federal Realty standards. Scala testified that when the construction was going on at Uncle Giuseppe's, he was there once a month for their construction meeting and there were other times where he made sure that work was being performed in accordance with the lease. He further stated that at these construction meetings all the trades, subcontractors and Uncle Giuseppe's employees would be in attendance. The general contractor and Uncle Giuseppe's construction manager would lead the meetings. Scala testified that Uncle Giuseppe's took an active role in the construction process. Scala acknowledged that he had the ability to tell someone from Uncle Giuseppe's if work was being performed in an unsafe manner. Scala mentioned that if he noticed something that needed relay at the site, he would report it to someone at Federal.

Scala testified that federal did not provide any materials, tools or equipment to the project site. He stated that the only responsibility he recalled for Federal in terms of the new lease was a new roof. Additionally, he stated that he did not supervise the work that was being performed by the workers during the build-out.

Deposition testimony of Adam Giovia (Uncle Giuseppe's Melville, Inc.)

Giovia testified that he is currently the vice president of Uncle Giuseppe's and has held this title for approximately four years. He testified that his job duties include overseeing all the operations in the company, including store operations, marketing and accounting. Giovia averred that he did not have any role in securing the property that was built out for Uncle Giuseppe's nor did he have a role in regard to the construction of that property. He further testified that Uncle Giuseppe's hired a facilities manager to oversee the new store construction, his name was Zachary Williamson. Giovia stated that Williamson had the authority on behalf of Uncle Giuseppe's to hire subcontractors to perform the work and it would be authorized by him. In essence, he averred, Williamson was completely in charge of the construction at the Melville location. Giovia testified that Williamson would involve subcontractors in the bidding process and make recommendations, moreover, he had the authority to make simple decisions, but if it were a major renovation change, he did not have authority. Additionally, he stated that Williamson would be on the job site daily and if he saw something he believed was dangerous, he had the ability to stop the work and he acted as the project manager. Once the project concluded, Williamson was no longer an employee.

Giovia was unaware of the Federal Realty Investment Trust and Solal Realty LTD Partnership. As to the accident, he testified that no one from Uncle Giuseppe's ever investigated the particulars of the incident. He was advised by Williamson "that somebody was working on a sprinkler head and fell off a ladder and hit something on their way down." Giovia did not have any knowledge regarding the ladder. He also stated that Williamson was not required to give a written statement about the incident. Giovia testified that if Williamson saw the individual on the ladder and believed that something he was doing was dangerous, he could stop them from doing the work. He stated that Williamson would not supervise the work that was being performed by different trades and how to perform the work. He did not know who owned the ladder in question and recalls seeing multiple ladders at the job site.

Deposition testimony of Dawn Marie Acquafredda (Maccarone Plumbing, Inc.)

Acquafreeda testified that she is the bookkeeper and a member of human resources for Maccarone Plumbing. She testified that she worked for the company since 2017. She averred that her duties include payroll, accounts payable, insurances and union reporting. She further stated that the workers in the field are generally members of a particular union, and Maccarone also has employees that are permanent members or employees. She acknowledged that Maccarone submitted a proposal for the work at the site and were responsible to do all the plumbing and all the fire sprinklers. She did not have any knowledge as to the general contractor for the job, but she did recall giving insurance to Federal Realty for this project. She testified that the plaintiff was a W-2 employee and received benefits through his Local Union 638, with Workers' Compensation provided by Maccarone.

She acknowledged that Thomas Smith is a plumber foreman for Maccarone Plumbing. Acquafreeda testified that Smith would have been at the site on a daily basis during the time that Maccarone was doing work, however, he did not witness the accident. She further stated that Smith prepared the accident report, and she contacted the plaintiff for a statement. Acquafreeda stated that she did not recall anything specific as to what caused the plaintiff to fall from the ladder. She acknowledged that Maccarone created its own site safety plan for each project and was unaware as to whether Maccarone provided the tools of the trade to its workers at a particular site. She was unaware if anyone from Federal Realty or Uncle Giuseppe's was on site on a regular basis.

Deposition testimony of Thomas Smith (Maccarone Plumbing, Inc.)

Smith was a foreman for Maccarone Plumbing and retired from this position in September of 2020 after working for them for five years. He testified that as foreman for Maccarone his duties included having talks every morning and payroll. Smith averred that he was aware of plaintiff's accident. He further stated that he did not work with the plaintiff and was not in charge of fitters, he was executively the plumbing foreman. Smith averred that he first became aware of plaintiff's accident when he heard a commotion. He acknowledged that at this job, Maccarone had its own ladders, but they were not A-frame ladders.

As to the date of the accident, the first thing he observed when he arrived at the site was an older gentleman on the ground and knew he was one of the Maccarone fitters. He could not recall the position of the ladder or the type of ladder that was present at the site. He testified that it was policy to being ladders back to the gang box and lock them up so that no-one else takes them or uses them during off hours. He acknowledged that they do not inspect the ladders each day and had no recollection of there being any issue with the stability or the rubber feet or locking mechanism of any of the ladders. Moreover, he stated that he had no knowledge as to what may have caused the accident or what the injured worker claims caused the accident. Smith averred that they do not use a harness or lanyard when using an A-frame ladder.

Affidavit of Paul Rivera (Maccarone Plumbing, Inc.)

Rivera stated that in October of 2017 he was employed by Maccarone Plumbing as the steamfitter foreman in charge of the fire sprinklers for the Uncle Giuseppe's project. He verified that the plaintiff was one of the steamfitters working on that job and was aware of his accident. He further stated that he was not an eyewitness to the accident but heard it happen and was called to the area where it occurred. Rivera explained that he saw the plaintiff standing on an A-frame ladder drilling through a wall to the outside where his partner was working just prior to the accident. He confirmed that the plaintiff was wearing his hard hat just prior to the accident. He stated that after the accident he found him lying on the floor in a dazed and nearly unconscious condition. Rivera averred that the ladder he had been standing on had fallen over and was across from where he had been working. He witnessed blood on the plaintiff's hard hat and the cloth cap that he was wearing. Rivera instructed some of the workers in the area to grab some tarps to put on the plaintiff to keep him warm as he was concerned he would go into shock. He further stated that he stayed with the

plaintiff until the EMS team came and took him out by ambulance. Lastly, he explained that prior to the accident, the plaintiff was an able and capable worker and did not complain to him of any pains or problems which were preventing him from doing any of the work he was required to do on his job.

Affidavit of Daniel T. Swanson (Maccarone Plumbing, Inc.)

Swanson stated in his affidavit that on the date of plaintiff's accident he was working as a steamfitter at the construction site helping to build out a future Uncle Giuseppe's supermarket. At the time he was employed by Maccarone, but is no longer their employee and currently works for North Shore Sprinkler Company. He acknowledged that the plaintiff was his work partner at the Uncle Giuseppe's jobsite, and they worked together for approximately one week prior to the accident. He stated that they were responsible for installing a fire sprinkler system in the kitchen area of the future store. At the time of the plaintiff's accident, Swanson stated that it was their intention to drill through an exterior wall from both sides to meet in the middle in order to install sprinkler piping. He recalled seeing an eight-foot A-frame fiberglass ladder in the open position in the bakery which he knew would have to be used by the plaintiff to reach the proper height on the interior side of the building. He also stated that we were never told by our employers to bring any ladders to the job site, therefore in the rare occasion we needed one we would borrow one from the other tradesman on the site.

Swanson averred that at the time of plaintiff's accident, they began drilling holes through their respective sides of the wall and the process of drilling took approximately a half hour. After he removed his drill, Swanson stated that he looked though the hole, saw the plaintiff, and then immediately thereafter saw him disappear and heard the crash of the ladder. He further stated that it took him about a half of a minute to approach the plaintiff, he saw the ladder fell to the left where the plaintiff was working, it was leaning over some bakery equipment. He acknowledged that the ladder was previously set so the plaintiff could work. As he approached, he saw the plaintiff was on the ground and he was horrified to see him bleeding in the back of his scalp and noticed that he had hit his head on the nearby stove as he fell. He stated that while the plaintiff was conscious, he tried to get himself up and appeared to be in shock and not fully coherent. Swanson tried to stop the bleeding and waited with the plaintiff until EMS arrived. Swanson explained that the investigator on behalf of the defendant's insurance company never asked him specific questions as to how the ladder had fallen or the position of it as I saw it both before and after the accident.

Affidavit of Bernard Lorenz, P.E. (Federal and Uncle Giuseppe's engineer)

Lorenz stated that he is a professional engineer and has more than thirty-one years of experience. In his professional opinion and based on his review of documents related to this matter, he opined that there was no violation of Labor Law 200 as the area where plaintiff's accident occurred was in a condition that provided reasonable and adequate protection to his safety. Additionally, he stated that there was no violation of Labor Law 240 as the stepladder being used by the plaintiff at the time of the accident was in good condition, properly placed, and the appropriate safety device for the work the plaintiff was performing at that time. Additionally, Lorenz averred that in order to support a claim under Labor Law 241(6), there needs to be a violation of Rule 23 of the Industrial Code of the State of New York, and there is no such claim

made here. He further stated that the evidence reviewed reveals that the ladder being used by the plaintiff was sufficient strength in accordance with Section 1.21(b)(1); was properly maintained in accordance with Section 1.21(b)(3); contained the proper bracing in accordance with Section 1.21e (2) and had proper footing in accordance with Section 1.21e(3). He concluded his affidavit stating that within a reasonable degree of engineering and construction safety certainty, that defendants did not violate Labor Law Sections 200, 240 or 241(6).

Affidavit of Mark A. Sandberg, Ph.D. (Plaintiff's psychologist)

Sandberg stated that he is a licensed psychologist and is board certified in rehabilitation psychology and neuropsychology. He further averred that he is the treating psychologist for the plaintiff, for head injuries he sustained as a result of the October 2017 accident. He stated that the defendants in this matter are utilizing statements written by him as well as his subsequent report to indicate that the plaintiff had no memory of the fall other than for grabbing for something. He further averred that had the defendants contacted him or subpoenaed him to testify, he would advise that at no point in time did he ever specifically question the plaintiff in regarding to what the mechanics leading to his fall were, including whether the ladder upon which he was working was caused to move, slip or fall over resulting in his fall from it. Sandberg further explained that he had no interest in what the cause was or what were the mechanics of why he fell from the ladder, he was only concerned with the details of what the actual resulting fall entailed. He would only ask questions as to whether he had a memory of the fall itself and whether his head or body struck any obstructions on the way down. He stated, "In fact, as a treating psychologist such as plaintiff's. any questions as to what may have happened before he fell are in no way germane to my diagnosis and treatment of a head injury such as Mr. San Inocencio's of any of my patient for that matter, in that only the length of the fall, its speed/force and whether there was a striking of any objects on the way down is of relevance to me."

Master Lease Agreement between Solal Realty Limited Partnership and Federal Realty Investment Trust

The lease agreement designates Solal as the landlord and Federal as the tenant for the lease which commenced on October 16, 2006. The agreement states in pertinent parts:

> 8. Alterations
>
> Without notice to Landlord, without obtaining Landlord's consent therefor Tenant may from time to time perform such alterations, installations, additions, improvements, removals and/or demolitions in and to the premises as tenant, in its sole and absolute discretion, deems advisable provided that tenant complies with requirements, if any, regarding alterations in the existing mortgages. All Alterations made by Tenant in or to the Premises shall be made (i) at tenant's sole expense, (ii)

> in a good and workmanlike manner and (iii) in accordance with all applicable legal requirements.
>
> 18. Liability for Damage to Personal Property and Person
>
> 18.2 Landlord shall not be liable for any personal injury to tenant, tenant's employees, agents, business invitees, licensees, customers, clients, family members, guests or trespassers arising from the use, occupancy and condition of the premises or the improvements, unless such party establishes that there has been negligence or a willful act or failure to act on the part of the landlord, its agents, representatives or employees.

Lease Agreement between Federal Realty Investment Trust and Uncle Giuseppe's Melville, Inc.

The lease agreement designates Federal as the landlord and Uncle Giuseppe's as the tenant for the lease which commenced on July 5, 2016. The agreement states in pertinent parts:

> Section 8.01 Indemnity- A. Tenant shall indemnify, defend and hold Landlord, its lessors, partners and members, and their respective shareholders, partners, members, trustees, agents, representatives, directors, officers, employees and mortgagees (collectively "Landlord Indemnitees") harmless from and against all liabilities, obligations, damages, judgments, penalties, claims, costs, charges and expense, including reasonable architect's and attorney's fees, which may be imposed upon, incurred by or asserted against any of Landlord's Indemnitees by a third-party and arising, directly or indirectly, out of or in connection with…(ii) the acts or negligence of tenant or any person claiming by, through or under tenant, or the agents, contractors, employees, servants and licensees of any such person in on or about the leased premises, or (iii) the use or occupancy of the leased premises.

Arken Inc. proposal to Uncle Giuseppe's for Build-Out

> The proposal provides in part that Arken would perform the following work for Uncle Giuseppe's: general conditions, concrete interior, masonry/carpentry/drywall/ceilings, interior doors/traffic doors, aluminum & glass interior, EIFS interior, ceramic tiles for depts/baths, bathroom fixtures/partitions, floor fixtures (A-101), install decoration by Lind, FRP kitchens/preps, install shelving/pathracks,

corrugate and pits for Refrige, OH&P, floor preparation, floor finish tile/epoxy/seal, roof preparations/steel dunnage, metal stairs and railings, install coolers/cases/checkouts, install millwork/equipment. Price Includes management and superintendent. Price includes all necessary lifts, scaffolding, and fences.

DISCUSSION

Plaintiff now seeks an order pursuant to CPLR 3212 granting summary judgment as to Federal, Solal and Uncle Giuseppe's under Labor Law §240(1), third-party defendant Maccarone Plumbing, Inc. also made a motion pursuant to CPLR 3212 for an order dismissing the third-party action against them on the grounds that the third-party claims are barred by the Workers' Compensation Law, defendant Solal also moved pursuant to CPLR 3212 for summary judgment and dismissing plaintiff's negligence and Labor Law §200, §240(1) and 241(6) claims and all cross claims in their entirety and granting Solal summary judgment on its contractual and insurance cross claims against defendant Uncle Giuseppe's, and defendants Federal Realty Investment Trust and Uncle Giuseppe's Melville, Inc. also moved for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's complaint and all cross-claims against them.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

Plaintiff's Labor Law §200 Claim

With respect to plaintiff's Labor Law § 200 and common law negligence claims, defendants Solal, Federal and Uncle Giuseppe's argue that these claims should be dismissed as these entities did not exercise any direction, supervision, or control over the means and methods of the contracted work and did not create or have notice of the alleged dangerous condition.

Section § 200 of the Labor Law is not a strict liability statute but a "negligence statute" codifying the owner's or general contractor's common law duty to maintain a safe workplace (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common law negligence when the injury complained of falls into one of two categories; 1) those involving the manner in which the work was performed, or 2) those where workers are injured as a result of a dangerous condition at the work site (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Unlike §§ 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under § 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition *(see Rizzuto v L.A. Wenger Constr. Co., Inc.,* 91 NY2d 343, 352 [1998]).

Hence, a party's duty under § 200 is contingent upon contractual or other actual authority to control the activity bringing about the injury *(see Nowak v Smith & Mahoney, P.C.,* 110 AD2d 288, 289 [3d Dept 1985]) as well as proof that the defendant had actual or constructive notice of the alleged unsafe condition or location (*see Canning v Barney's New York,* 289 AD2d 32 [1st Dept 2001]). It is well settled that evidence of general supervisory control, presence at the worksite or authority to enforce general safety standards is insufficient to establish the necessary control over the work activity that caused the injury (*see Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.,* 104 AD3d 446 (1st Dept 2013]). That a general contractor has an on-site safety manager with responsibility for the safety of the work done by subcontractor, or for holding safety meetings, does not provide "any basis for imposing liability on the general contractor based on an injury allegedly caused by a subcontractor's work" (*see O'Sullivan v IDI Constr. Co.,* 28 AD3d 225 [1st Dept 2006]).

Rather, "[a]bsent any evidence that [the owner or general contractor] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, these entities cannot be held liable under Labor Law § 200 or for common-law negligence" (*id*.). An owner or general contractor thus will not be liable under § 200 where the evidence demonstrates that plaintiff's employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff's work was performed (*id*.). In contrast, where the general contractor has or exercises the authority to control the methods by which plaintiff's work is performed, liability may be established (*see Rizzuto,* 91 NY2d 343).

Where, however, the injury arises out of a "dangerous condition on the site," rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury producing work," only that it "had notice of the condition" (*see Minorczyk v Dormitory Auth. of State of New York,* 74 AD3d 672 [1st Dept 2010]; *Seda v Epstein,* 72 AD3d 455 [1st Dept 2010]; *Murphy v Columbia Univ.,* 4 AD3d 200 [1st Dept 2004]). "General awareness" that a dangerous condition may be present is insufficient (*see Gordon v American Museum of Natural History,* 67 NY2d 836, 838 [1986]). "The notice must call attention to the specific defect or hazardous condition and its specific location" (*see Mitchell v New York Univ.,* 12 AD3d 200, 201 [1st Dept 2004]). Furthermore, constructive notice of a defect requires that the "defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id*.).

Applying these principles to the instant case, the court finds that defendants Solal, Federal and Uncle Giuseppe's make a prima facie showing that they did not supervise or control plaintiff's work. The court holds that plaintiff's injury arose of out the means and methods of Maccarone's work, as it is undisputed that he was injured while working on a ladder while performing work for

Maccarone. The issue is therefore whether defendants Solal, Federal and Uncle Giuseppe's exercised supervisory control over the work.

According to Adam Giovia, the vice president of Uncle Giuseppe's, Williamson would involve subcontractors in the bidding process and make recommendations, moreover, he had the authority to make simple decisions, but if it were a major renovation change, he did not have authority. Additionally, he stated that Williamson would be on the job site daily and if he saw something he believed was dangerous, he had the ability to stop the work and acted as the project manager. Joseph Scala, Federal's property manager, stated that he had the ability to tell someone from Uncle Giuseppe's if work was being performed in an unsafe manner. Scala mentioned that if he noticed something that needed relay at the site, he would report it to someone at Federal. Scala further testified that Federal did not provide any materials, tools or equipment to the project site. Additionally, he stated that he did not supervise the work that was being performed by the workers during the build-out. Gansberg of Solal acknowledged that the lease between Solal and Federal has a provision that if the tenant is going to do any work, it is to be done in accordance with all applicable legal requirements and in a workman like manner. He further acknowledged that AVR and Solal do not have a relationship and he had never heard of Maccarone Plumbing or the plaintiff named herein.

A general level of supervision is not enough to warrant holding defendants Solal, Federal and Uncle Giuseppe's liable for plaintiff's injuries (*see Burkoski v Structure Tone, Inc.,* 40 AD3d 378, 381[1st Dept 2007]). There is no evidence in the record that these entities instructed plaintiff as to the means by which plaintiff's work should be performed, did not supervise plaintiff's work, and did not have notice of a dangerous condition at the site.

Further, plaintiff testified that no one other than Paul Rivera, the steamfitter foreman for Maccarone would instruct him as to his work duties. Such testimony has repeatedly been held to satisfy a defendants' burden of showing that it did not supervise or control the activity that gave rise to the injury, and to shift the burden to the plaintiff to raise a triable issue of fact (*see Reilly v Newireen Assoc.,* 303 AD2d at 220 [1st Dept 2003]; *Hughes v Tishman Constr. Corp.,* 40 AD3d at 307-308 [1st Dept 2007]). Plaintiff fails to meet his burden.

Defendants' motions to dismiss plaintiff's claims under Labor Law §200 is granted and that claim is hereby dismissed as to them.

Plaintiff's Labor Law §240 (1) Claim

Plaintiff asserts in his motion for partial summary judgment on the issue of liability that the accident was caused by the defendants' Federal, Solal, Uncle Guiseppe's and Arken, Inc.'s failure to provide an adequate protective device in violation of Labor Law § 240(1).

To the contrary, defendants in opposition and in support of Solal, Federal and Uncle Giuseppe's motions to dismiss plaintiff's 240(1) claims and cross claims, take the position that issues of fact exist as to whether a violation of the New York State Labor Law caused the plaintiff's accident, whether plaintiff was the sole proximate cause of his own accident, and whether the

safety devices supplied was adequate, warranting the denial of plaintiff's motion for summary judgment.

Labor Law section 240(1), commonly referred to as the "scaffold law," provides, in relevant part:

> All contractors and owners and their agents, except owners of two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing 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.

The court referenced the requirements of Labor Law section 240(1) in *Vasquez v Cohen Brothers Realty Corp.*, 105 AD3d 595 [1st Dept 2013]). The court stated:

> "An owner or its agent is liable under Labor Law Section 240(1) if the plaintiff was injured while engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. The statute requires "owners and their agents" to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building. The purpose of the statute is to protect workers by placing the ultimate responsibility for worksite safety on the owner, and Labor Law Section 240(1) imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury" (*Vasquez*, 105 AD3d at 597).

The purpose of Labor Law Section 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear the responsibility, instead of on the workers, who are not in a position to protect themselves (*see John v Baharestani*, 281 AD2d 114, 117 [1st Dept 2001]).

"In evaluating a claim under Labor Law Section 240(1), the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a physically significant elevation differential" (*see Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013]). The statute must be construed as liberally as may be for the accomplishment of the purpose of protecting workers who are exposed to gravity related risks (*see Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.,* 118 AD3d 524, 526 [1st Dept 2014]). The question as to whether the statute applies to a particular accident is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011]).

A worker injured by a fall from an elevated worksite must generally prove that the absence of or defect in a safety device was the proximate cause of his injuries (*see Felker v Corning, Inc.*, 90 NY2d 219, 244 [1st Dept 2001]). A defendant is not liable under Labor Law 240(1) when a plaintiff's own negligence was the sole proximate cause of the accident (*see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

There are two main defenses to a Labor Law § 240 claim: (1) the recalcitrant worker defense; and (2) the sole proximate cause defense (*see Torres v 1148 Bryant Ave., Inc.*, 81 AD3d 467 [1st Dept 2011]; *Cordeiro v Shalco Investments*, 297 AD2d 486, 488 [1st Dept 2002]). A defendant wishing to invoke the recalcitrant worker defense must show that the injured worker refused to use the safety devices that were provided by the owner or employer (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). As to whether plaintiff was the sole proximate cause of his injury, to raise such an issue of fact in a § 240(1) claim, defendants must present evidence that "adequate safety devices [were] available; that [plaintiff] knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 5 [1st Dept 2011]). In other words, under this defense, a "defendant can avoid liability under the statute if it can demonstrate that it did not violate the labor law, and that the proximate cause of the plaintiff's accident was plaintiff's own negligence" (*see Blake*, 1 NY3d 280).

Here, plaintiff asserts that Labor Law § 240(1) applies because, while he was on the ladder, the ladder shifted or slid, causing him to fall off the ladder. Importantly, "'where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [plaintiff injured because of unsteady ladder only needed to show that adequate safety devices to prevent the ladder from slipping or to protect him from falling were absent and not that the ladder was defective]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]).

Significantly, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason' [citation omitted]" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240(1)]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005]).

Plaintiff has shown through his own testimony that, while plaintiff performed his assigned work, the ladder on which he was working shifted or slid, causing him to fall to the ground and

become injured (*see Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]). His co-worker Swanson corroborated the fact that plaintiff was standing on the ladder when it fell. Further, it is unrefuted that no safety devices were provided to secure the ladder or protect plaintiff from the fall.

Additionally, the defendants have not shown, as a matter of law, that the plaintiff is a recalcitrant worker, and the present record contains no evidence that the plaintiff ignored safety instructions or refused to use any supplied equipment. The record contains no testimony which indisputably proves that the plaintiff's actions were the sole proximate cause of the accident (*see Blake*, 1 NY3d 280).

Nevertheless, the defendants argue that they were not the general contractor on plaintiff's work so as to be deemed liable under Labor Law §§ 240(1) and 241(6), which renders owners and "general contractors" absolutely liable for statutory violations. An entity is a "contractor" within the meaning of the Labor Law only if it had the power to enforce safety standards and choose responsible contractors. Only direct or prime contractors are considered "general contractors" for purposes of Labor Law §§ 240(1) and 241(6). Thus, the mere status or designation of a party as a "general contractor" does not establish liability. Further, if liability is to be premised on supervisory control, it must be control over the work in which plaintiff was engaged at the time of his injury. Whether a party may be deemed a "general contractor" or agent of an owner under the Labor Law is based on the "nature of the work in which plaintiff was engaged at the time of the injury" and who retained such employer.

Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to Labor Law §§ 240(1) and 241(6), it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if its functions as an agent of the owner of the premises (*see generally Walls v Turner Constr. Co.*, 4 NY3d 861 (2005). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*see Linkowski v City of New York*, 33 AD3d 971 (2006). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*id.*). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally Aranda v Park E. Constr.*, 4 AD3d 315 [2d Dept 2004]).

"[A] general construction manager charged with the duty of coordinating 'all aspects' of a construction project is a 'contractor' with nondelegable duties under Sections 240 and 241 of the Labor Law" (*see Kenny v George A. Fuller Co.*, 87 AD2d 183, 190 [2d Dept 1982]). On the appellate level, construction managers have been held liable under the statute when they were "responsible 'for coordinating and supervising the…project and [were] invested with a concomitant power to enforce safety standards and to hire responsible contractors'" (*see Ewing v ADF Construction Corp.*, 16 AD3d 1085 [4th Dept 2005]); when they "had the responsibility to coordinate and the authority to supervise all aspects of the renovation project" (*see Maniscalco v Liro Engineering Construction Management, P.C.*, 305 AD2d 378, 380 [2d Dept 2003]); when their construction management agreement "unambiguously authorized [them] to select the various

contractors and to supervise and control their work" (*see Griffin v MWF Development Corp.*, 273 AD2d 907, 908 [4th Dept 2000]).

However, appellate courts have also found that a construction manager had no status as a general contractor or agent when the "role was only one of general supervision, which is insufficient to impose liability under Labor Law 240(1) and 241(6)" (*see Linkowski c City of New York*, 33 AD3d 971, 975 [2d Dept 2006]), and when they "only coordinated the different subcontractors, created work schedules, and prepared progress reports for the instant construction project" (*see Armentano v Broadway Mall Properties*, 30 AD3d 450, 451 [2d Dept 2006]). Appellate courts have also found questions of fact when "[t]he agreement [between the construction manager and owner] gave the construction manager many of the powers of a general contractor" (*see Nienajadlo v Infomart New York, LLC*, 19 AD3d 384, 385 [2d Dept 2005]), and when the construction manager "was on the job full time to supervise and manage the subtrades" (*see Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]).

Here, the plaintiff has adduced sufficient evidence to show he fell from an unsecured ladder which slid, and thus made a prima facie showing of liability under Labor Law 240(1). Even if the plaintiff was negligent in setting up the ladder, his actions would, at most, constitute comparative negligence, which is not a defense to liability under Labor Law 240(1) (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d at 403; *see also, Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 474 [1st Dept 20070["It does not avail defendants to argue that the manner in which plaintiff set up and stood on the ladder was the sole cause of the accident, where there is no dispute that the ladder was unsecured and no other safety devices were provided"]).

Accordingly, plaintiff is entitled to summary judgment as to liability on his Labor Law 240(1) claim against defendants Federal, Solal, Uncle Giuseppe and Arken. Defendants' motions dismissing plaintiff's 240(1) claim is denied.

Plaintiff's 241(6) Claim

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents…when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped …as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*see,* 91 NY2d at 348; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]). As the duty to comply with the regulation is non-delegable, it is not

necessary for the plaintiff to show that a defendant exercised supervision or control over the work site in order to establish a Labor Law § 241(6) claim. (*see Rizzuto v L.A. Wenger Contracting Co., Inc.,* 91 NY2d 343,693 NE2d 1068,670 NYS2d 816; *Ross v Curtis-Palmer Hydro-Electric Co.*, supra, 81 NY2d 494, 502 ["to the extent that plaintiff has asserted a viable claim under Labor Law § 241(6), she need not show that defendants exercised supervision or control over his work site in order to establish his right of recovery"]).

To sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*see Annicaro v Corporate Suites, Inc.,* 98 AD3d 542, 544 [2d Dept 2012]). Moreover, plaintiff's "comparative fault, if any, would not absolve a defendant of liability pursuant to Labor Law § 241(6)" (*see Owen v Schulmann Const. Corp.,* 26 AD3d 362, 363 [2d Dept 2006]).

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240(1) and 241(6) has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*see Russin v Louis N. Picciano & Son,* 54 NY2d 311, 318 [1981]).

Plaintiff asserted an alleged Industrial Code violation in his bill of particulars of 12 NYCRR 23-1.21.

12 NYCRR 23-1.21. Ladders and ladderways

(b) General Requirements for Ladders

(4) Installation and Use

(ii) All ladder foots shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Here, defendants have not shown that the ladder complied with Section 23-1.2(b)(4)(ii). Based on plaintiff's testimony that no one was holding the ladder in place at the time of his fall, Paul Rivera's testimony and defendants' expert engineer report, there are issues of fact as to whether the violation of this section was the proximate cause of his accident and whether plaintiff was comparatively negligent in using the ladder (*see Once v Service Ctr. of N.Y.*, 96 ad3D 483, 483 [1ST Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

Accordingly, defendants' motions to dismiss plaintiff's Labor Law §241(6) claim under Industrial Code 12 NYCRR 23-1.21(b)(4)(ii) is denied.

Maccarone Plumbing motion dismissing third-party action

It has been established that Solal is the lease and landowner of the Melville Mall, Solal leased the property to Federal and Uncle Giuseppe's is a sub-tenant. Uncle Giuseppe's retained Maccarone to perform certain fire sprinkler work in connection with the build out of the Uncle Giuseppe's store at the Melville Mall. The plaintiff worked for Maccarone and was provided with workers compensation benefits.

Procedurally, on or about February 26, 2019, Solal filed a third-party compliant against Maccarone asserting causes of action for contractual indemnification, common law indemnification and contribution on the grounds that plaintiff may have sustained a grave injury and, as such, the claims are not barred by the workers compensation law; and for failure to procure insurance naming Solal as an additional insured. On or about June 2019, Maccarone filed an answer to the third-party complaint denying all allegations.

Third-party defendant Maccarone Plumbing, Inc. makes a motion to dismiss the third-party action against them on the grounds that the third-party claims are barred by Workers' Compensation Law. In particular, Maccarone asserts that there exists no contract between Maccarone and Solal wherein Maccarone was required to provide Solal contractual indemnification. Moreover, plaintiff's alleged traumatic brain injury is not a "grave injury" as defined by Section II of the Workers Compensation Law and as such Solal cannot maintain its third-party action against it.

It is well settled that "[a]n employer's liability for an employee's on the job injury is ordinarily limited to workers' compensation benefits…However, when an employee sustains a grave injury, as enumerated in Workers' Compensation Law §11, a primary defendant may commence a third-party action against the injured plaintiff's employer for common law indemnification and/or contribution" (*see Maxwell v Rockland County Community Coll.,* 78 AD3d 793, 794, 911 NYS2d 130, 132 [2d Dept 2010] [internal citations and quotation marks omitted]). A grave injury is defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability (Workers' Compensation Law §11).

If a plaintiff has "some use," "minimal use," or a "substantial loss of use," these limitations are insufficient to qualify for a "grave injury" under the category of "permanent and total loss of use…of an arm, leg, hand or foot" (*see Kraker v Consol. Edison Co., Inc.,* 23 AD3D 531, 532, 533 [2d Dept 2005]). "Words in a statute are to be given their plain meaning without resort to forced or unnatural interpretations" (*Castro v United Container Mach. Group, Inc.,* 96 NY2d 398,401 [2001], citing McKinney's Cons. Laws of NY, Book 1, Statutes § 232; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577, 583 [1998]). "Given the plain meaning of the words used in Workers' Compensation Law § 11, ... some, albeit minimal, use of [an arm, leg, hand, or foot] is [not] sufficiently equivalent to a total loss of use to qualify as a grave injury" (*Trimble v Hawker Dayton Corp.,* 307 AD2d at 453). The "proponent of a motion for summary judgment seeking to

dismiss a third-party action for want of a grave injury is ... obligated to prove, prima facie that the plaintiff did not sustain a grave injury" (*Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487, 488 [2d Dept 2001] ["[A] proponent of a motion for summary judgment dismissing a third-party complaint because the plaintiff did not sustain a grave injury, is required to make a prima facie showing of entitlement to judgment as a matter of law, much the same as a defendant seeking summary judgment dismissing a claim for non-economic damages for lack of serious injury under the No-Fault Insurance Law"]).

In support of the motion, third-party defendant Maccarone submits, inter alia, medical records of Dr. Mark Sandberg and Thomas E. Myers, Ph.D., ABPP-CN.

Dr. Sandberg, a licensed psychologist, stated in his records that plaintiff was an alert and oriented man, and determined the following: as to his intellectual functioning, he has an IQ of 86, which is designated as low average and a verbal comprehension index of 85 and a perceptual reasoning composite score of 91. Dr. Sandberg noted that these scores reflect a pattern of intellectual functions as measured by a psychometric test of this nature and there is no reason to suspect a diminished level of cognitive ability. He also noted that plaintiff's speech was clear, his ability to recall a complex figure from his memory fell below average after a short delay and significantly below average after a longer delay, his rate of learning was below average, his fine motor dexterity fell in the superior range when using his dominant right hand to place pegs into a foam board and markedly above average when his left hand was used. He opined that plaintiff meets the criteria for a post-concussion disorder and an adjustment disorder with depressive features. He opined that the combined influences of these conditions undermine his usual state of equanimity and creates a moderately severe disabling condition when considering the impact of neuropsychological findings on his present occupational capacity. On November 7, 2018, Dr. Sandberg notes that plaintiff continues to struggle with various aspects of his disability, including persistent pain, a routine that is markedly diminished from how he participated prior to injury. It was further noted that as of October 23, 2019, plaintiff continues to present with mild neurocognitive disorder and major depressive disorder symptoms. Both conditions are causally related to the October 26, 2017 work injury.

Dr. Myers, a board-certified clinical neuropsychologist, conducted an independent neuropsychological evaluation on October 19, 2019. He stated that they know from the vast scientific research literature on the natural history of concussion/TBI that the vast majority of individuals experience a complete recovery within a few days to weeks, or in some cases a few months following concussion. Based upon his examination of the plaintiff, he concluded that there is no work-related disability. From a neuropsychological perspective, the plaintiff is able to perform his usual daily activities and he can return to work without restrictions.

In opposition, Solal submits, inter alia, the supplemental bill of particulars, and asserts that since the motions were first submitted, plaintiff has undergone additional surgery, specifically a multi-level fusion. It argues that although surgery itself would generally not qualify as a "grave injury", that surgery demonstrates that the plaintiff is continuing with major care and treatment that could impart on other injuries and as such the motion is premature. As defendant Solal does not oppose the portion of the motion which seeks to dismiss the claim for contractual indemnification and there is no writing to establish that there was an agreement between

Maccarone and Solal, as such, it is this court's position that the claims for contractual indemnification are dismissed.

Here, by submitting competent medical evidence, along with plaintiff's bill of particulars and deposition transcripts showing that plaintiff has a moderately severe disabling condition and presents with a mild neurocognitive disorder and major depressive disorder and there is no record submitted indicating that the alleged TBI is total or permanent in nature, the third-party defendant met its burden of proving that plaintiff's injuries do not rise to the level of "grave." The opposition and partial opposition submitted are insufficient to raise a triable issue of fact as to the existence of a qualifying grave injury under Workers Compensation Law §11, the third-party defendants' motion for summary judgment is granted.

Solal summary judgment on contractual indemnification and insurance cross claims against Uncle Giuseppe's

Defendant Solal additionally moves for an order granting summary judgment on its contractual and insurance cross claims against Uncle Giuseppe's on the grounds that Solal leased the entirety of the premises to co-defendant Federal. It is asserted that the indemnity provision of the lease between Federal and Uncle Giuseppe's requires Uncle Giuseppe's to defend and indemnify the landlord Federal and its lessor, Solal harmless for claims such as this one.

Federal and Uncle Giuseppe's partially oppose the motion and take the position that plaintiff's accident was not caused by the negligence of Uncle Giuseppe's and thus Solal is not entitled to contractual indemnification. Additionally, Federal and Uncle Giuseppe's claim that at the very least there are questions of fact as to whose negligence caused plaintiff's accident which requires the denial of Solal's motion.

The lease agreement designates Federal as the landlord and Uncle Giuseppe's as the tenant for the lease which commenced on July 5, 2016. The agreement states in pertinent parts:

> Section 8.01 Indemnity- A. Tenant shall indemnify, defend and hold Landlord, its lessors, partners and members, and their respective shareholders, partners, members, trustees, agents, representatives, directors, officers, employees and mortgagees (collectively "Landlord Indemnitees") harmless from and against all liabilities, obligations, damages, judgments, penalties, claims, costs, charges and expense, including reasonable architect's and attorney's fees, which may be imposed upon, incurred by or asserted against any of Landlord's Indemnitees by a third-party and arising, directly or indirectly, out of or in connection with…(ii) the acts or negligence of tenant or any person claiming by, through or under tenant, or the agents, contractors, employees, servants and licensees of any such person in on or about the leased premises, or (iii) the use or occupancy of the leased premises.

"The right to contractual indemnification depends upon the specific language of the contract. In the absence of a legal duty to indemnify, a contractual indemnification provision must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (*see Alfaro v 65 West 13th Acquisition, LLC*, 74 ad3D 1255, 1255-1256 [2d Dept 2010]). "Moreover, it is axiomatic that party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." (*see Bleich v Metropolitan Management, LLC,* 132 AD3d 933 [2d Dept 2015]).

A nonparty to a contract may sue for breach of the contract only if it is an intended, and not a mere incidental beneficiary *(East Coast Athletic Club, Inc. v Chicago Tit. Ins. Co.,* 39 AD3d 461, 463 [2007]). A party asserting the rights as a third-party beneficiary must establish 1) the existence of a valid and binding contract between other parties, 2) that the contract was intended for [its] benefit and 3) that the benefit to [it] is sufficiency immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] for the benefit is lost." (*Nanomedicon, LLC v Research Found. of State Univ. of N.Y.,* 112 AD3d 594, 596 [2013]).

Here, Solal has not met its prima facie burden in that it has not established that it is free from negligence. The court finds that summary judgment is premature as it cannot be said at this stage that the accident was caused by acts or omissions of Solal. There remain questions of fact as to the manner in which the accident occurred, whether plaintiff was the sole proximate cause of his accident, and whether the safety device supplied was adequate. Moreover, the Second Department held that where "there are triable issues of fact as to whose negligence, if anyone's cause the plaintiff's accident…it is premature to reach the issue of contractual indemnification." (*see Fritz v Sports Authority,* 91 AD3d 712 [2d Dept 2012]).

Thus, Solal's motion for summary judgment on its contractual indemnification claim and cross claims against Uncle Giuseppe's is denied.

Request to change venue to Suffolk County

Defendants Federal, Uncle Giuseppe's and Solal request to change venue based upon the fact that the defaulting defendant is the only party that maintained its principal place of business in Queens County. It is their position that since a default judgment was granted as to defendant Arken, Inc., the matter no longer has any nexus with Queens County and Arken, Inc. is no longer a party to the action. Defendants correctly assert that "a motion to change venue may be made any time before trial" *Gangi v Daimler Chrysler Corp.,* 14 AD3d 483 [2d Dept 2005]). Here, plaintiff's residence is in Suffolk County and the accident occurred in Suffolk County. Defendants' principal places of business are in Nassau County, Westchester County, and the State of Maryland.

Plaintiff in opposition argues that even though plaintiff has a default judgment against Arken, Inc., they remain a party to the action and has the right to defend the issue of damages at trial.

In the case of *Rawlings v Gillert,* 104 AD3d 929, 962 NYS 2d 325 [2d Dept 2013], the court states in pertinent part that, "…where an entry of default judgment against a defendant is made after an application to the court, the defendant is entitled to a " 'full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages' " (*Napolitano v Branks,* 128 AD2d at 687, quoting *Reynolds Sec. v Underwriters Bank & Trust Co.,* 44 NY2d 568, 572, 378 NE2d 106, 406 NYS2d 743 [1978]; *see Godwins v Coggins,* 280 AD2d 582, 582, 720 NYS2d 809 [2001]). As Arken, Inc. remains a party to the action, this portion of defendants motions must be denied.

Conclusion and Order

For the foregoing reasons, it is hereby

ORDERED that defendants motion to dismiss plaintiff's claim under Labor Law §200 is granted and that claim is hereby dismissed as to them; and it is further

ORDERED that plaintiff is entitled to summary judgment as to liability on his Labor Law 240(1) claim against defendants Federal, Solal, Uncle Giuseppe and Arken. Defendants' motions dismissing plaintiff's 240(1) claim is denied.

ORDERED that defendants' motions to dismiss plaintiff's Labor Law §241(6) claim is denied; and it is further

ORDERED that third-party defendants' motion for summary judgment is granted; and is further

ORDERED that Solal's motion for summary judgment on its contractual indemnification claim and cross claims against Uncle Giuseppe's is denied; and it is further

ORDERED that defendants' motion to change venue to Suffolk county is denied.

Plaintiff is directed to serve a copy of this order, with notice of entry, on defendants within 30 days of its upload onto NYSCEF.

Any requested relied not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: August 26, 2022

FILED
9/13/2022
COUNTY CLERK
QUEENS COUNTY

HON. KARINA E. ALOMAR, J.S.C.