At an IAS Term, Part 83 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 28th day of April, 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JIAN PING KE,

Plaintiff,

-against-

Index No.: 509250/19
Motion Seq. 03 and
Motion Seq. 05

21ST DEVELOPMENT GROUP, LLC, STERLING TOWN EQUITIES, LLC[1] and J&G GENERAL CONTRACTING, INC.,

Defendants.

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21ST DEVELOPMENT GROUP, LLC,

Third-Party Plaintiff

-against-

PRO-H DEVELOPMENT, INC.,

Third-Party Defendant

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PRO-H DEVELOPMENT INC.,

Second Third-Party Plaintiff

-against-

JISHUN CONSTRUCTION, INC.,

Second Third-Party Defendant

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The following e-filed papers read herein: NYSCEF No.:

[1] Pursuant to a stipulation, dated February 17, 2021, and signed by all of the parties, plaintiff's claims and any and all cross claims asserted against Sterling Town Equities, LLC, were discontinued with prejudice.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	87-94, 112-124
Opposing Affidavits (Affirmations)	100, 130, 131-132
Affidavits/ Affirmations in Reply	132-136, 137, 138-139
Other Papers:	

Upon the foregoing papers, plaintiff Jian Ping Ke ("plaintiff") moves (Motion Seq. 3), for an order, pursuant to CPLR 3212, granting summary judgment as to liability on his claims arising under Labor Law §§ 240 (1) and 241 (6) as asserted against defendant/third-party plaintiff 21st Development Group, LLC ("21st Development").

21st Development moves (Motion Seq. 5) for an order, pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, and, as against third-party defendant/second third-party plaintiff Pro-H Development, Inc., ("Pro-H"), summary judgment on its claims for contractual and common law indemnification.

21st Development, the owner of premises located at 194 and 186 21st Street, Brooklyn, New York, retained Pro-H to serve as the general contractor for a gut renovation and construction project at the building (the project). Pro-H entered into a subcontract with second third-party defendant Jishun Construction, Inc., ("Jishun") to perform work on the project. Plaintiff, who was employed as a construction worker[2] at the project, testified that

[2] Plaintiff testified that he did not know the name of the company he worked for, only that his supervisor was Mr. Zhao. Pro-H contends, in its Second Third Party Complaint, that plaintiff was employed by Jishun. Jishun failed to appear in this action, and this court, in an order dated May 17, 2021, granted Pro-

on March 21, 2019, he was directed by his supervisor, Mr. Zhao, to install sheetrock to complete the basic structure of the ceiling of a room located on the first floor of the building. Plaintiff testified that the ceiling was approximately 6-8 feet high and that each piece of sheetrock weighed approximately 20 pounds. He further testified that he was performing this work with two other workers, one of whom shared the same last name as plaintiff, and the other's name he did not know. Plaintiff testified that they were provided with two A-frame ladders, one measuring 6-8 feet in height and the other 4-5 feet high. Plaintiff stated that one of his co-workers was using the 6-8-foot ladder which forced him to use the shorter 4-5-foot A-frame ladder. He testified that these were the only ladders available for use and that Mr. Zhao instructed them to use these ladders to complete their work. He further testified that he checked the ladder prior to using it and did not observe any problems or defects. The work they were performing entailed installing a full piece of sheetrock to the ceiling joists. Plaintiff, while standing on the third rung of the 4-5 foot ladder, was holding one end of the sheetrock, while one of his co-workers stood on the 6-8-foot A-frame ladder and held the other end of the sheetrock. The third worker was standing between the two ladders and pressing the middle of the sheetrock to the ceiling joists with a long pole. Plaintiff testified that he held the sheetrock against the ceiling with his left hand and had a battery-powered drill in his right hand. Plaintiff stated that as he was working on the ladder with both of his arms fully extended above him, the ladder

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H's motion for a default judgment as against Jishun. However, the court notes that while a Workers' Compensation Board decision, dated February 14, 2020, lists Pro-H as plaintiff's employer, Judge Dugan states in the body of that decision that he found that the plaintiff was injured in the course of his employment with Jishun.

suddenly moved, shook, and collapsed, causing plaintiff to fall off the ladder and onto the concrete floor. Plaintiff further testified that when he was on the ground, after falling off the ladder, he observed that one of the support brackets on the legs opposite the rungs had broken. Plaintiff alleges that he sustained multiple injuries as a result of the accident.

Plaintiff seeks partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against 21st Development, as the owner of the premises. In support of the motion, plaintiff asserts that he was engaged in an enumerated activity protected under Labor Law § 240 (1). In this regard, plaintiff notes that he was performing construction work at the site when he was forced to use the unsecured, improper, and defective A-frame ladder. Plaintiff argues that 21st Development violated its nondelegable duties under Labor Law § 240 (1) by failing to secure, stabilize or anchor the ladder; and failing to provide him with additional safety devices to prevent the ladder from shifting, or to prevent him from falling. Plaintiff maintains that the 4-5 foot ladder was not an adequate safety device for the work he was required to perform. In addition, plaintiff argues that there has been absolutely no evidence, through photographs or documentary proof, that there were any other elevation devices provided for his use on the day of the accident. He notes that his supervisor, Mr. Zhao, provided the ladders and directed plaintiff and his co-workers to use them to perform this work. Plaintiff further notes that there is no incident or accident report that suggests there were other elevation devices that he could use. Thus, he asserts that 21st Development cannot argue that his actions were the sole proximate cause of his accident.

In opposition, 21st Development argues that plaintiff's motion should be denied as both procedurally defective and premature. In this regard, 21st Development asserts that the motion is procedurally defective as plaintiff's counsel has failed to annex a Statement of Material Facts, pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, § 202.8-g, and plaintiff's unsigned deposition transcript submitted in support of the motion is inadmissible as a matter of law. Additionally, 21st Development asserts that the motion should be denied as premature since discovery is incomplete. Specifically, they note that none of the defendants' depositions have been held, and, although 21st Development's deposition was scheduled to be held on June 28, 2021, it was adjourned at the request of plaintiff's counsel. Moreover, 21st Development contends that plaintiff identified two non-party eyewitnesses during his deposition, who have not been deposed. Additionally, 21st Development asserts that third-party defendant, Pro-H, provided the subject ladder and thus, may be able to provide information as to the condition of the ladder prior to the accident. Further, 21st Development contends that plaintiff testified that he used a different ladder at the site prior to the date of the accident and also, that he had been directed by Mr. Zhao to use a platform when he performed work in a different area of the project. Thus, 21st Development argues that plaintiff may have chosen to use the 4-5 foot ladder when there were other more appropriate devices available, thereby making his actions the sole proximate cause of the accident.

Pro-H joins in 21st Development's arguments in opposition. Pro-H contends that plaintiff's motion should be denied as premature and for failing to include a statement of facts. Specifically, Pro-H asserts that:

> [c]ritical questions of fact, which were not within the Plaintiff's knowledge, including, but not limited to who owned the ladder, which entity controlled the means and methods of Plaintiff's work at the time of the incident, which entity directed Plaintiff to use the subject ladder, what safety devices were available, what other ladders were available, what duties each party contracted for and/or undertook with respect to the project, and the scope of the parties safety responsibilities, remain outstanding. Party and non-party depositions, including that of the witness co-worker identified by Plaintiff, have not been conducted and material questions of fact remain as to the happening of Plaintiff's accident and the roles of the parties, if any, involved in the injury producing work" (NYSCEF Doc No. 130 at ¶ 28).

In reply, plaintiff contends that the arguments raised by 21st Development and Pro-H lack merit. Plaintiff points out that an unsigned deposition transcript may be submitted by the party deponent himself and therefore adopted as accurate. Next, plaintiff notes that he has now submitted a statement of facts which mirrors the information contained in his attorney's affirmation in support of his summary judgment motion. Finally, plaintiff argues that neither 21st Development nor Pro-H submit any admissible evidence, either by way of incident reports, written statements, or sworn affidavits, refuting plaintiff's testimony. Further, plaintiff argues that there is no merit to 21st Development and Pro-H's assertion that additional discovery from his co-workers may shed some light on the condition of the ladder. He further contends there is no merit to the assertion that there were other ladders available for plaintiff's use. Plaintiff contends that this is directly refuted by his undisputed testimony that he was instructed by Mr. Zhao to use the ladder that collapsed. Thus, plaintiff argues that 21st Development, as the owner of the site, cannot avoid absolute liability under Labor Law § 240 (1) where, as here, he was provided with an unsafe, defective ladder that collapsed, causing him to sustain injuries.

Pursuant to 22 NYCRR 202.8-g, every motion for summary judgment in this state, except in lieu of a complaint pursuant to CPLR 3213, must annex a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR 202.8-g [a]). Such numbered paragraphs must specifically cite to evidence separately submitted in support of the motion (*id.* at [d]).

In this case, plaintiff provided a "Preliminary Statement" section within his attorney's affirmation, rather than a "Statement of Material Facts," pursuant to 22 NYCRR 202.8-g. However, under CPLR § 2001, a court may excuse defects where, as here, "a substantial right of a party is not prejudiced." Furthermore, the court finds that plaintiff's failure to provide statements of material facts is not fatal (*see Disarli v TEFAF N.Y., LLC*, 2022 NY Slip Op 30029(U), 5 [Sup Ct, Kings County 2022]; *Priority 1 Security v Childrens Community Servs. Inc.*, 2021 WL 4523600, [U] [Sup Ct, New York County 2021] *see generally Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1338 [4th Dept 2015] *but see De Leon v Kagansky*, 2021 WL 4537869, [U] [Sup Ct, Kings County 2021]; *Jimenez-Couret v Linzo*, 2021 WL 5044291, [U] [Sup Ct, Bronx County 2021]). Plaintiff, in moving, provided a clear, numbered factual statement in his original attorney's affirmation, and, in any event, has provided a statement of material facts with his reply papers (*see Disarli*, 2022 NY Slip Op 30029 [U],5; *Cushman & Wakefield, Inc. v Kadmaon Corp., LLC*, 175 AD3d 1141, 1142 [1st Dept 2019]). For this reason, the court finds that 21st Development has not been prejudiced by plaintiff's inclusion of a "Preliminary Statement," rather than a "Statement of Material Facts."

Additionally, the court finds no merit to 21st Development's argument that plaintiff's unsigned deposition transcript is inadmissible. The transcript is admissible under CPLR 3116 (a) as it was submitted by the deponent himself, and thus adopted as accurate (*see Pavane v Marte*, 109 AD3d 970, 970 [2d Dept 2013]; *Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 986 [2d Dept 2012]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]; *Ashif v Won Ok Lee*, 57 AD3d 700, 700 [2d Dept 2008]). Further, the court notes that 21st Development also relies on plaintiff's unsigned deposition transcript in support of its own motion.

It is further noted that "[a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Devoy v City of New York*, 192 AD3d 665, 668-669 [2d Dept 2021]; *Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017], *quoting MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041 [2d Dept 2015]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013] [internal quotation marks omitted]). Contrary to the assertions of 21st Development and Pro-H, plaintiff's motion for summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims is not premature. The court finds that they have failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the plaintiff's knowledge and control (*see* CPLR § 3212 [f]; *Yiming Zhou v 828 Hamilton, Inc.*,

173 AD3d 943, 944 [2d Dept 2019]; *Robinson v Bond St. Levy, LLC*, 115 AD3d 928, 929 [2d Dept 2014]; *Cajas-Romero*, 106 AD3d at 852; *Gillani v 66th St. Woodside Prop., LLC*, 63 AD3d 678, 679 [2d Dept 2009]). During his deposition, plaintiff testified that he was performing his work with two other co-workers. It is undisputed that neither of these workers are under plaintiff's direction and control. Moreover, 21st Development and Pro-H failed to produce witnesses for a deposition despite being directed to do so by this court in several prior discovery orders. Finally, 21st Development and Pro-H have failed to demonstrate that the facts essential to oppose this motion are exclusively within plaintiff's control. In fact, Pro-H admits that the issue of who owned the ladder and who controlled plaintiff's work are issues that are not within plaintiff's knowledge. Accordingly, the court finds that plaintiff's motion is not premature.

The court now turns to the merits of plaintiff's motion. Labor Law § 240 (1), states, in relevant 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, 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 purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78

NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], *quoting Ross*, 81 NY2d at 501).

The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High` Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). "To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (*id.*). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, "where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the

worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). "In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, 'the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], *quoting Runner,* 13 NY3d at 603; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Plaintiff's testimony reveals that his Labor Law § 240 (1) claim arises out of his fall from an unsecured A-frame ladder that he was directed to use to install sheetrock on the ceiling. Specifically, plaintiff testified that Mr. Zhao had directed him and his co-workers to use the two ladders that had already been placed in the room in which he was instructed to work (NYSCEF Doc No. 92, plaintiff tr at 179, lines 23-25). Moreover, plaintiff testified as follows:

> Q. Sir, what was it that caused you to fall that day from the ladder?
> A. When I was installing the sheetrock, about five to six minutes after that, I start to feel the ladder was shaking and moving. And myself and the ladder collapsed to the right and then I fell.
> Q. Sir, do you have any idea what it was that was causing the ladder to shake or move right before you fell?
> A. After I fell I saw the ladder, the rear leg of the ladder, one of the bar, was broken.
> Q. Do you know if it was broken at all before you fell?
> A. No.
> Q. To your knowledge, sir, did that part of the leg of the ladder break as a result of your fall?
> A. I think so. Because the leg of the ladder was broken, and it cause the ladder to shake and move, which caused my fall.
> Q. When you say the leg of the ladder, sir, was that one of the legs that would have come into contact with the ground on the ladder that you were standing on?

A. So when the ladder was opened up, so it was two legs on each side and the bar in the middle broke.
Q. Okay. The bar in the middle that connects the two legs of the ladder, sir; is that correct?
A. Yes.
Q. Was that toward the bottom of the ladder?
A. Yes, at the bottom.
Q. Would that have been on the opposite side of the ladder from the steps that you would have been standing on?
A. It was the back, the back leg, the rear leg of the ladder.
(NYSCEF Doc No.92, plaintiff tr at 187, lines,4-25; 188, lines 2-23).

"'Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials'" (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], *quoting Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]). Specifically, "with regard to accidents involving ladders, 'liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiffs injuries'" (*id., quoting Caws v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012]; *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 996-997 [2d Dept 2017]). Moreover, "[t]o establish a violation under Labor Law § 240 (1), '[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiffs injuries'" (*Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020], *quoting Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]). "Where, for instance, the plaintiff falls from a ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability

pursuant to Labor Law § 240 (1) does not attach" (*id.*). However, "where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation" (*id., citing Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *see also Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Ricciardi v Bernard Janowitz Constr. Corp.*, 49 AD3d 624, 625 [2d Dept 2008]; *Vicuna v Vista Woods, LLC*, 168 AD3d 1124. 1125 [2d Dept 2019]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]).

Here, plaintiff testified that while working on the ladder, it began shaking and moving and collapsed causing plaintiff and the ladder to fall to the ground. He further testified that after his fall, while he was on the ground, he observed that one of the support brackets on the legs opposite the rungs had broken. The court finds that plaintiff's testimony demonstrates that he was not provided with a proper and adequate safety device to perform his work at an elevated height, and that such failure to provide proper safety equipment was a proximate cause of the accident (*see Poalacin v Mall Props., Inc.*, 155 AD3d 900, 906 [2d Dept 2017]; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 689 [2d Dept 2017] [finding that plaintiff established his prima facie entitlement to judgment as a matter of law through his deposition testimony, which indicated that he was working on an unsecured ladder that moved while he was standing on it]; *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930 [2d Dept 2016] [plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim by submitting evidence that the unsecured ladder that he was standing on shifted, causing

him to fall]; *Casasola v State of New York*, 129 AD3d 758, 759 [2015]; *Diaz v 5-01-5-17 48th Ave., LLC*, 111 AD3d 661, 662 [2013]; *Kaminski v 22-61 42nd St., LLC*, 91 AD3d 606, 606 [2012]; *Melchor v Singh*, 90 AD3d 866, 868 [2011]; *Gonzalez v AMCC Corp.*, 88 AD3d 945, 946 [2d Dept 2011] [court imposed Labor Law § 240 (1) liability where plaintiff fell from an unsecured A-frame ladder and no other safety devices were provided noting that it was immaterial that the ladder had a brace in the middle to keep it open as it was" not secured to something stable" or "chocked or wedged in place"]; *Kozlowski v Ripin*, 60 AD3d 638,639 [2d Dept 2009]). Based upon the foregoing, the court finds that plaintiff has demonstrated his prima facie entitlement to partial summary judgment on the issue of liability for his Labor Law § 240 (1) claim.

In opposition, 21st Development fails to raise a triable issue of fact as to whether plaintiff's actions were the sole proximate cause of the accident (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Everhome Mtge. Co. v Aber*, 195 AD3d 682, 688 [2d Dept 2021]; *Yiming Zhou*, 173 AD3d at 944; *Robinson*, 115 AD3d at 929; *Cajas-Romero*, 106 AD3d at 852). Accordingly, that branch of plaintiff's motion seeking summary judgment on the issue of liability with regard to his Labor Law § 240 (1) claim as asserted against 21st Development is granted.

Plaintiff also argues that he is entitled to summary judgment as to liability on his Labor Law § 241 (6) claim, which provides, in pertinent part, that:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC,* 96 AD3d 727, 728 [2d Dept 2012]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]). In support of his motion, plaintiff alleges that his Labor Law § 241 (6) claim is predicated upon 21st Development's violation of Industrial Code §§ 23-1.21 (b) (1), 23-1.21 (b) (3) (i) (ii) and (iv). Plaintiff maintains that these provisions are specific, applicable and were violated.

Industrial Code § 23-1.21 (b) (1), which refers to "Ladders and Ladderways," states, as follows:

> (b) General requirements for ladders. (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon.

Plaintiff argues that 21st Development failed to provide a ladder that was capable of sustaining his weight and a 20-pound panel of sheetrock without breakage, which was less than four times the maximum load intended for such a device. Thus, he maintains that

there was a violation of Industrial Code § 23-1.21 (b) (1). In support, plaintiff refers to his deposition testimony that after he fell from the ladder he observed that one of the support brackets on the legs opposite the rungs had broken.

Initially, the court notes that § 23-1.21 (b) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]), and that it is applicable to the facts herein. The court finds that plaintiff has demonstrated his prima facie entitlement to judgment as a matter of law on the issue of 21st Development's liability under Labor Law § 241(6), as predicated upon a violation of Industrial Code § 23-1.21 (b) (1) and that such violation was a proximate cause of his injuries (*see Ortega v Roman Catholic Diocese of Brooklyn*, N.Y., 178 AD3d 940, 941-942 [2d Dept 2019]; *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 742 [2d Dept 2015]; *Grant v City of New York*, 109 AD3d 961, 963 [2d Dept 2013]). The court notes that 21st Development fails to raise any opposition to this branch of plaintiff's motion.

Additionally, plaintiff contends that Industrial Code § 23-1.21 (b) (3) was violated as the ladder he was provided was old, defective, and not properly maintained. Industrial Code 12 NYCRR 23-1.21 (b) (3) states in pertinent part:

> 3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (i) If it has a broken member or part.(ii) If it has any insecure joints between members or parts. . . (iv) if it has any flaw or defect of material that may cause ladder failure.

Section 23-1.21 (b) (3) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654 [2d Dept 2014]). Moreover, §§ 23-1.21 (b) (3) (i) and (iv), which require that ladders be maintained in good

condition and forbid the use of any ladder that has a broken member or part or a flaw or defect that could cause the ladder to fail, apply to the facts of this case. As discussed previously, plaintiff testified that he was caused to fall when the unsecured ladder began to shake and move and that he observed a broken support bracket after he fell off the ladder and onto the ground. Accordingly, the court finds that plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code §§ 23-1.21 (b) (3) (i) and (iv). Again, 21st Development offers no opposition to this branch of plaintiff's motion. Based upon the foregoing, that branch of plaintiff's motion seeking summary judgment in his favor on his Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code §§23-1.21 (b) (1), (b) (3) (i) and (iv) is granted.

The court will now address 21st Development's motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims. Additionally, 21st Development seeks summary judgment in its favor on its claims for contractual and common law indemnification as against Pro-H.

Section 200 of the Labor Law statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which

the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010], *quoting Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). General supervisory authority to oversee the progress of the work is insufficient to impose liability (*see LaRosa v Internap Network Servs. Corp.,* 83 AD3d 905, 909 [2d Dept 2011]; *see also Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d at 505). "'A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed'" (*Sullivan v New York Athletic Club*, 162 AD3d 955, 958 [2d Dept 2018] *quoting Erickson v Cross Ready Mix, Inc.,* 75 AD3d 519, 522 [2d Dept 2010]; *see Roblero v Bais Ruchel High Sch., Inc.,* 175 AD3d 1446, 1448 [2d Dept 2019]; *Cambizaca v New York City Tr. Auth.,* 57 AD3d 701, 702 [2d Dept 2008]; *Ortega v Puccia,* 57 AD3d 54, 62 [2d Dept 2008]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common-law (*see LaRosa v Internap Network Servs. Corp.,* 83 AD3d at 909; *see also Ross v Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d at 505).

Moreover, "'the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law

negligence'" (*Marquez v L & M Dev. Partners, Inc*, 141 AD3d 694, 698 [2d Dept 2016], quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], affd on other grounds 15 NY3d 869 [2010]; *see Torre v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]).

Here, plaintiff's accident arose out of the manner in which the work was performed, rather than a dangerous condition on the premises. Thus, liability can only be imposed on 21st Development if it had the authority to exercise supervision and control over the work (*see Teodoro v C.W. Brown, Inc.*, 200 AD3d 999, 1002 [2d Dept 2021]; *Rojas v Schwartz*, 74 AD3d, 1046, 1046 [2d Dept 2010]).

21st Development argues that liability for plaintiff's Labor Law § 200 and common law negligence claims cannot be imposed upon it as it did not control the means and methods of plaintiff's work. In this regard, 21st Development points to plaintiff's deposition testimony that while working at the subject jobsite he only received instructions from his supervisor, Mr. Zhao (NYSCEF Doc No. 122, plaintiff tr at 75, lines 3-6; 82, lines, 20-25; 83, lines 2-3). Further, 21st Development points to plaintiff's testimony that Mr. Zhao provided him with all the tools and equipment he needed including a brush, a broom, and a ladder (*id.* at 73, lines 11-19; 84, lines 11-14), and instructed him where to perform his work on the date of the accident (*id.* at 101, lines 14-18; 103, lines 5-18).

In addition, 21st Development submits an affidavit from its employee, John Contino ("Mr. Contino"), who served as the Project Manager for this project. Mr. Contino affirms that 21st Development owned the premises at the time of the accident and had contracted with Pro-H to serve as the general contractor for this project. Mr. Contino states that all of

the work was performed by either Pro-H or its subcontractors. He further affirms that 21st Development did not provide any equipment, supplies or safety materials for this project and did not direct or supervise the means, manner and methods of the work being performed by the workers at the jobsite. Mr. Contino further affirms that he was "onsite on a daily basis during the construction, never received any complaints regarding the worksite and was unaware of the accident until the filling of the Summons and Complaint" (NYSCEF Doc No. 123 at ¶¶ 5 and 9). The court credits Mr. Contino's testimony and finds that 21st Development has established, prima facie, that it lacked the authority to supervise or control the means and methods of the plaintiff's work (*see Chowdhury v Rodriguez*, 57 AD3d 121, 132 [2008]). Plaintiff submitted no opposition to 21st Development's motion. Accordingly, that branch of 21st Development's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is granted.

Regarding indemnification, 21st Development argues that Pro-H is obligated to defend and indemnify it for any liability imposed upon 21st Development related to plaintiff's claims. In this regard, 21st Development points to Article 3.18 of the contract entered into between these entities which provides as follows:

> To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent

> caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in party by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in Section 3.18.

21st Development reasons that plaintiff's accident resulted from Pro-H's negligence, since plaintiff fell from a ladder that was supplied to him by Pro-H. 21st Development further reasons that it is entitled to contractual indemnification from Pro-H to the extent that any liability attaches to 21st Development due to New York's statutory scheme. 21st Development points out that Colony Insurance Company, the commercial general liability carrier for Pro-H, has already agreed to provide defense and indemnity to 21st Development pursuant to the terms of the above referenced contract.

In opposition, Pro-H argues that 21st Development's assertion that Pro-H was the entity that supplied the ladder to plaintiff is a material misrepresentation. In this regard, Pro-H points to plaintiff's testimony that the subject ladder was provided by his supervisor, Mr. Zhao. Pro-H maintains that Mr. Zhao was not employed by Pro-H and submits an affidavit from Enning Xu, Pro-H's office manager, who affirms that plaintiff was not employed by Pro-H. Accordingly, Pro-H argues that questions of fact exist regarding what entity Mr. Zhao was employed by, and thus, 21st Development has failed to establish its entitlement to summary judgment on its contractual indemnification claim as against Pro-H.

In reply, 21st Development contends that at the time of the accident, the plaintiff (and therefore, his supervisor, Mr. Zhao), were employed by Pro-H's subcontractor, Jishun,

and points to the February 11, 2020, Notice of Decision of the Workers Compensation Board which states that: the plaintiff "was injured in the course of his employment with Jishun Construction..." (NYSCEF Doc No. 135). Thus, 21st Development argues that whether the ladder was provided by Pro-H, or its subcontractor Jishun, it is clear that the accident arose out of either Pro-H, or its subcontractor's negligence, both of which are covered under the indemnity clause at issue. 21st Development notes that it is undisputed that Pro-H had subcontracted with Jishun and submits a copy of the subcontract. Moreover, 21st Development points to Pro-H's second third-party complaint against Jishun, in which Pro-H alleges that plaintiff "was performing work at the subject premises on March 21, 2019, in the course of his employment with JISHUN" (NYSCEF Doc No. at ¶10).

Under applicable law, "the right to contractual indemnification depends upon the specific language of the contract" (*Pena v 104 N. 6th St. Realty Corp.*, 157 AD3d 709, 710-711 [2d Dept 2018]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). "The intent to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*Pena*, 157 AD3d at 710-711; *De Souza*, 155 AD3d at 606). Moreover, "[a] 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" (*Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716 [2d Dept 2020]).

Here, 21st Development has established that it was free from negligence, its liability is solely statutory, and that it is a party entitled to indemnification under the indemnification provision of its contract with Pro-H. Therefore, it is entitled to conditional

summary judgment on its claim for contractual indemnification from Pro-H, pending a determination of Pro-H's negligence, or the negligence of one of its subcontractors or employees thereof (*see Buffardi v BJ's Wholesale Club, Inc.*, 191 AD3d 833, 834 [2d Dept 2021]; *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]).

To establish a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). Moreover, "[l]iability for indemnification may only be imposed against those parties (*i.e.*, indemnitors) who exercise actual supervision over the work" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]).

Here, the court finds that factual issues with respect to Pro-H's negligence and whether it actually supervised plaintiff's work, preclude summary judgment on 21st Development's common law indemnification claim as asserted against Pro-H (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]; *Aponte v Airport Indus. Park, LLC*, 202 AD3d 895, 897 [2d Dept 2022]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097-1098 [2d Dept 2018]; *Perri*, 14 AD3d at 684-685). Accordingly, that branch of 21st Development's motion seeking summary judgment on its common law indemnification claim as asserted against Pro-H is denied.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is

ORDERED that branch of plaintiff's motion (Motion Seq. 3) for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted, as is that branch of his motion for summary judgment on his Labor Law § 241 (6) claim but only to the extent it is predicated upon a violation of Industrial Code §§ 23-1.21 (b) (1), (b) (3) (i) and (iv); that branch of the motion seeking summary judgment on his Labor Law 241 (6) claim based upon a violation of Industrial Code § 23-1.21 (b) (ii) is denied; and it is further

ORDERED that branch of 21st Development's motion (Motion Seq. 5) seeking summary dismissal of plaintiff's common-law negligence and Labor Law § 200 claims is granted and said claims are dismissed as against 21st Development; that branch of 21st Development's motion seeking summary judgment on its claim for common law indemnification as against Pro-H is denied; and 21st Development is granted conditional summary judgment on its contractual indemnification claim from Pro-H; and it is further

ORDERED that to reflect the discontinuance of this action as against Sterling Town Equities, LLC, the caption of this action is amended to read in its entirety, as follows:

----------X
JIAN PING KE,

Plaintiff,

-against- Index No.: 509250/19

21ST DEVELOPMENT GROUP, LLC
and J&G GENERAL CONTRACTING, INC.,
Defendants.

----------X
21ST DEVELOPMENT GROUP, LLC,

Third-Party Plaintiff

-against-

PRO-H DEVELOPMENT, INC.

Third-Party Defendant

----------X
PRO-H DEVELOPMENT, INC.,

Second Third-Party Plaintiff

-against-

JISHUN CONSTRUCTION, INC.,

Second Third-Party Defendant
----------X

This constitutes the decision, order, and judgment of the court.

E N T E R,

HON. INGRID JOSEPH, J. S. C.

Hon. Ingrid Joseph
Supreme Court Justice