

Kruk v Jamaica Ave. Owner, LLC
2022 NY Slip Op 35067(U)
September 14, 2022
Supreme Court, Queens County
Docket Number: Index No. 703568/19
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

ANDRZEJ KRUK,

Index No. 703568/19

Plaintiff,

Motion

- against -

Date March 22, 2022

JAMAICA AVENUE OWNER, LLC,

Motion
Cal. No.

Defendant.

Motion
Seq. No. 3 & 4

JAMAICA AVENUE OWNER, LLC,

Third-Party Plaintiff,

- against -

TRIBUTE RESTORATION INC.,

Third-Party Defendant,

TRIBUTE RESTORATION INC.,

Second Third-Party Plaintiff,

- against -

SPRING SCAFFOLDING LLC,

Second Third-Party Plaintiff,

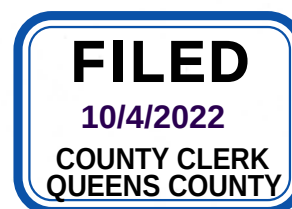
JAMAICA AVENUE OWNER, LLC,

Third Third-Party Plaintiff,

- against -

SPRING SCAFFOLDING LLC,

Third Third-Party Defendant.



The following e-filed papers read on the motion by defendant, Jamaica Avenue Owner LLC (Jamaica) (Seq. No. 3) for (1) summary judgment on its claims for contractual indemnification and breach of contract, for failure to procure insurance against third-party defendant, Tribute Restoration Inc. (Tribute), and attorney's fees, costs, and expenses, (2) a hearing on reasonable attorney's fees, (3) a conditional order of common-law indemnification and contribution against second third-party defendant, Spring Scaffolding, LLC (Spring), and (4) summary judgment dismissing the plaintiff's common-law negligence and Labor Law § 200 causes of action against it; separate motion by the plaintiff (Seq. No. 4) for (1) summary judgment on its Labor Law §§ 240(1) and 241(6) claims against Jamaica and (2) summary judgment on its Labor Law § 200 and common-law negligence claims against Spring; and cross motion by Spring for (1) denial of that branch of Jamaica's motion seeking a conditional order of common-law indemnification and contribution against it, (2) denial of that branch of the plaintiff's motion seeking summary judgment on its Labor Law § 200 and common-law negligence claims against it, and (3) dismissal of the claims and cross claims against it.

	<u>Papers Numbered</u>
Notice of Motion (Seq. No. 3) - Affirmation - Exhibits.....	EF 82-97
Affirmation in Opposition - Exhibits (Plaintiff).....	EF 120-122
Affirmation in Opposition - Exhibits (Tribute).....	EF 137-151
Reply Affirmation.....	EF 166, EF 167
Notice of Motion (Seq. No. 4) - Affirmation - Exhibits.....	EF 98-116
Affirmation in Opposition - Exhibits (Jamaica).....	EF 152-155
Affirmation in Opposition - Exhibits (Tribute).....	EF 123-136
Reply Affirmation	EF 162-163, EF 164-165
Notice of Cross Motion - Affirmation - Exhibits.....	EF 156-158
Affirmation in Opposition - Exhibits (Tribute).....	EF 160
Affirmation in Opposition - Exhibits (Plaintiff).....	EF 161
Affirmation in Opposition - Exhibits (Jamaica).....	EF 167

Upon the foregoing papers, it is ordered that the motions and cross motion are consolidated and are determined as follows:

On February 15, 2019, the plaintiff was allegedly injured while performing work at a construction site located at 184-10/184-60 Jamaica Avenue, Queens, New York (the premises). The plaintiff was employed by Tribute, a company hired by the owner of the premises, Jamaica, to perform façade work. Spring was retained to install scaffolding at the premises. The plaintiff contends that on the date and time of the accident, he was removing planks with a coworker from the first level of scaffolding located above a sidewalk bridge at the premises. The planks being removed were from additional scaffolds ("bicycle scaffolds") installed by Tribute. The sidewalk bridge the plaintiff stood on was previously erected by Spring. The sidewalk bridge was one level above ground level and the plaintiff was being passed planks by hand from his coworker on the level of scaffolding above him. The plaintiff alleges that a plank slipped from his coworker's hands, the plaintiff tried to catch the plank, and it hit him in his

chest. The plaintiff contends that, due to the height the plank was being passed from, the weight of the plank, and the surface of the ground being wet and slippery due to rain, he fell backwards. As he fell backwards, he tripped over a raised plank on the surface of the sidewalk bridge and fell to the ground of the sidewalk bridge.

Thereafter, the plaintiff commenced the instant action against Jamaica alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Jamaica commenced a third-party action against Tribute as third-party defendant alleging causes of action for, among other things, contractual indemnification and breach of contract for failure to procure insurance. Tribute commenced a second third-party action against Spring as second third-party defendant alleging common-law indemnification and contribution. Jamaica commenced a third third-party action against Spring as third third-party defendant also alleging common-law indemnification and contribution. The plaintiff subsequently amended his complaint to add Spring as a defendant alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6) against it.

Motion Seq. No. 3

Jamaica now moves for (1) summary judgment on its third-party claims for contractual indemnification and breach of contract for failure to procure insurance against Tribute, and attorney's fees, costs, and expenses, (2) a hearing on reasonable attorney's fees, (3) a conditional order of common-law indemnification and contribution against Spring, and (4) summary judgment dismissing the plaintiff's common-law negligence and Labor Law § 200 causes of action against it.

With respect to Jamaica's request for partial summary judgment on its contractual indemnification claim against Tribute, "[t]he right to contractual indemnification depends upon the specific language of the contract, and 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" (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096 [2d Dept 2018]). In addition, "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" (*Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657 [2d Dept 2012], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, the trade contract between Jamaica and Tribute required Tribute, "[t]o the fullest extent permitted by law," to indemnify Jamaica and indemnitees "from and against any and all liability, damages, demands, lawsuits, claims, loss, interest, judgment, liens and actions of any nature whatsoever...which arise or are alleged to arise out of or are connected with the performance of any Work under this Agreement by Trade Contractor...but only to the extent caused by the acts or omissions of Trade Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense, is caused in part by an Indemnitee thereunder." Thus, contrary to Jamaica's contention in its moving papers, based on the language of the contract, Jamaica is required to establish that Tribute was negligent as a matter of law in order to demonstrate its entitlement to summary judgment, and not only that the accident arose out

of Tribute's work (*see Hirsch v Blake Housing, LLC*, 65 AD3d 570 [2d Dept 2009]). Jamaica's moving papers raise issues of fact as to whether the plaintiff's accident was "caused by the acts or omissions of" a Tribute employee and, as such, whether the accident triggered the applicability of the indemnification clause in the trade contract (*see McNamara v Gusmar Enters., LLC*, 204 AD3d 779 [2d Dept 2022]). Therefore, that branch of Jamaica's motion for summary judgment on its contractual indemnification claim against Tribute is denied (*id.*).

Turning to Jamaica's breach of contract claim against Tribute, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014], citing *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738 [2d Dept 2003]). The relevant portion of the trade contract between Jamaica and Tribute states:

"Prior to commencement of any Work under this Agreement, Trade contractor shall, at its own expense, procure and maintain the insurance specified in Exhibit C, until completion of the Work and final payment to Trade Contract on its own behalf and for the protection of Owner and all other Indemnitees named in this Agreement (collectively 'Additional Insureds')."

Jamaica argues that Tribute did not procure insurance in conformance with the terms of the trade contract insofar as Jamaica "tendered the defense and indemnification to TRIBUTE and TRIBUTE'S insurance carrier which in turn refused JAMAICA'S tender." However, Jamaica fails to submit any evidence of how Tribute's insurance carrier's refusal of Jamaica's tender of the defense and indemnification indicates a failure to comply with any provisions of the trade contract and/or Exhibit C governing the procurement of insurance (*see Ginter v Flushing Terrace, LLC*, 121 AD3d at 844; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552 [2d Dept 2014]). Moreover, "[a]n agreement to procure insurance is not an agreement to indemnify and hold harmless, and the distinction between the two is well recognized" (*Kwang Ho Kim v D&W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]). As such, this branch of Jamaica's motion is also denied.

With respect to that branch of Jamaica's motion for an order of conditional common-law indemnification and contribution against Spring, "[s]ummary judgment on a claim for common-law indemnification 'is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved'" (*Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 489 [2d Dept 2006], quoting *La Lima v Epstein*, 143 AD2d 886, 888 [2d Dept 1988]). Jamaica asserts in its moving papers that Tribute's negligence included that it supervised the means and methods of the work, supervised the plaintiff, provided the plaintiff with equipment, and was responsible for and inspected the worksite each day. Jamaica further contends that Spring's negligence included that it created, inspected, and approved the alleged defective condition of the raised plank that the plaintiff tripped on. Here, even if Jamaica is not negligent, issues of fact remain with respect to "the precise degree of fault attributable," if any,

to Tribute and Spring, respectively (*see Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027 [2d Dept 2009]). As such, the branch of Jamaica's motion for conditional summary judgment on its claim for common-law indemnification and contribution against Spring is denied as a determination of this claim would be premature at this time (*see Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160 [2d Dept 2020]; *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734 [2d Dept 2008]).

Finally, those branches of Jamaica's motion seeking dismissal of the plaintiff's common-law negligence and Labor Law § 200 claims against it are granted as unopposed by the plaintiff.

Motion Seq. No. 4

The plaintiff now moves for (1) summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims against Jamaica and, (2) summary judgment on his on his common-law negligence and Labor Law § 200 claims against Spring.

Turning to that branch of the plaintiff's motion with respect to Jamaica, pursuant to Labor Law § 240(1), "[a]ll contractors and owners...shall furnish or erect, or cause to be furnished or erected...scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises]" (Labor Law § 240[1]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). The statute "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). In order to prevail on a claim under Labor Law § 240(1), a plaintiff must prove that the defendant violated the statute and that this violation was a proximate cause of his or her injuries (*see Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]). Notably, however, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501 [emphasis in original]). "Rather, the 'special hazards' referred to are limited to 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*, 81 NY2d at 501; *see DeHaen v Rockwood Sprinkler Co.*, 258 NY 350 [1932]).

The plaintiff contends that his accident fits under the "falling object" line of cases under Labor Law § 240(1). "To prevail on a motion for summary judgment in a section 240(1) 'falling object' case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" (*Pazmino v 41-50 78th St. Corp.*, 139 AD3d 1029, 1030 [2d Dept 2016], quoting *Fabrizi v 1095 Ave. of the Ams. L.L.C.*, 22 NY3d 658, 662-663 [2014]). For Labor Law § 240(1) to apply in this context, "[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset*

Bay Assoc., 96 NY2d 259, 268 [2001]; *see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d at 662; *Pazmino v 41-50 78th St. Corp.*, 139 AD3d at 1030).

Here, the plaintiff avers that he was engaged in an enumerated activity under the statute and that Jamaica's failure to provide him with "a safety device to lower the wet and slippery 10-foot long, 60-pound plank one level" was a proximate cause of his injuries. He also asserts that the height difference between the first level of scaffolding and the sidewalk bridge he was located on was six feet. The plaintiff established his *prima facie* entitlement to judgment as a matter of law on the issue of liability with respect to the Labor Law § 240(1) cause of action by showing that while he was working on the sidewalk bridge, a plank from an elevated level slipped out of his co-worker's hands and struck him (*see Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664 [2d Dept 2020]).

However, in opposition to the plaintiff's *prima facie* showing, Jamaica and Tribute raise material issues of fact including, but not limited to, whether the plaintiff was hit by a falling plank, and whether the accident occurred in the manner alleged by the plaintiff (*see Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043 [2d Dept 2012]). Roman Pilch (Pilch), Tribute's foreman, testified at his deposition that he was present at the premises at the time of the accident but did not observe it. Pilch further testified that, after the plaintiff's alleged fall, the plaintiff told Pilch that he tripped and fell. Pilch stated that the plaintiff did not tell him that the plank being handed to the plaintiff hit him in the chest causing him to fall. Further, in the plaintiff's C-3 Employee Claim form submitted to the Workers' Compensation Board dated February 21, 2019, the plaintiff reported in response to the question "How did the injury/illness happen?" that he "tripped and fell" and made no mention of a falling object.

Moreover, the plaintiff's medical records provide varying accounts of how the accident was caused. The plaintiff saw Dr. Jeffrey Kaplan, M.D., on February 21, 2019, for an orthopedic evaluation. The records from this evaluation indicate that the plaintiff sustained injuries "when a scaffold bridge fell." The plaintiff saw Dr. Paul Brisson, M.D., on March 4, 2019, for an initial consultation. The records from this consultation indicate that the plaintiff "has fallen backwards from scaffold." On July 25, 2019, the plaintiff saw Dr. Jozef Debeic, M.D., for an initial/surgical consultation. The records from this consultation indicate that the plaintiff's injuries occurred during a "slip and fall accident." In an independent medical examination report by Dr. Matthew Grimm, M.D., it is indicated that the plaintiff sustained injuries "during a scaffold bridge fall." The abovementioned records do not present any narrative in which the plaintiff reported he was hit by a falling plank. As such, material issues of fact exist, and the plaintiff is not entitled to summary judgment on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) against Jamaica.

The plaintiff further asserts that he is entitled to summary judgment as to liability against Jamaica on so much of his cause of action alleging a violation of Labor Law § 241(6) as is predicated on 12 NYCRR 23-1.7(d) and (e). Owners and contractors have a nondelegable duty to provide reasonable and adequate protection and safety to construction workers (*see Aragona v State of New York*, 147 AD3d 808 [2d Dept 2017]; *Hricus v Aurora Constr., Inc.*, 63 AD3d 1004 [2d Dept 2009]). "To prevail on a cause of action under Labor Law § 241(6), a plaintiff

must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor” (*Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1091 [2d Dept 2019]). Sections 23-1.7(d) and (e) of the Industrial Code provide:

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

With respect to section 23-1.7(d), material issues of fact exist as to whether the floor on which the plaintiff alleges he fell was in a slippery condition. The plaintiff testified that the sidewalk bridge upon which he was working was wet and slippery due to rain the night before the accident and the morning of the accident. However, this testimony is contradicted by Pilch’s affidavit dated January 17, 2022, submitted by Tribute in opposition to the plaintiff’s motion. He avers that, on the date of the accident, it was not raining or snowing and that the sidewalk bridge, scaffold, and scaffold planks involved in Tribute’s work were dry. Moreover, Tribute submitted weather reports from the National Centers for Environmental Information for LaGuardia Airport (LaGuardia) and JFK International Airport (JFK), both located in Queens, New York, for the month of February 2019. The LaGuardia report indicates there was no precipitation on either February 14, 2019 or February 15, 2019. The JFK report indicates there was no precipitation on February 14, 2019 and “trace” precipitation on February 15, 2019 at 8:00 a.m. and 9:00 a.m. As material issues of fact exist regarding whether the surface the plaintiff allegedly slipped on was wet, this branch of the plaintiff’s motion is denied.

With respect to section 23-1.7(e), the plaintiff asserts that the raised plank on the sidewalk bridge constituted a tripping hazard that was a proximate cause of his injuries. Jamaica, in opposition, argues that the area where the accident occurred was not a “passageway” pursuant to 23-1.7(e)(1). However, “[r]esponsibility under Labor Law § 241(6) ‘extends not only to the point where the...work was actually being conducted, but to the entire site, including passageways utilized in the provision of storage and tools, in order to insure the safety of laborers going to and from the points of actual work’” (*Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2006], quoting *Sergio v Benjolo N.V.*, 168 AD2d 235, 236 [1st Dept 1990]). As the plaintiff makes a prima facie showing that he tripped on a raised plank in the

sidewalk bridge where he was conducting the work of removing the planks, Jamaica's argument is unavailing. Therefore, the plaintiff is entitled to summary judgment on his Labor Law 241(6) claim predicated on section 23-1.7(e)(1) against Jamaica.

However, the plaintiff fails to demonstrate his entitlement to summary judgment on its Labor Law § 241(6) claim predicated on section 23-1.7(e)(2) insofar as there are no allegations that he tripped on any "accumulations of dirt and debris and from scattered tools and materials and from sharp projections." In fact, the plaintiff testified that, on the date of the accident, the sidewalk bridge was clean because the renovation at the premises was almost complete. As such, this branch of the plaintiff's motion is denied.

The court now turns to the plaintiff's request for summary judgment on its common-law negligence and Labor Law § 200 claims against Spring. Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*see Mondungo v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820 [2d Dept 2020]; *Moscatti v Consolidated Edison Co. Of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]). "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]). In its moving papers, the plaintiff contends that its claim against Spring arises out of an allegedly dangerous condition on the premises. "A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition only if it has control over the work site and either created the dangerous condition or had actual or constructive notice of it" (*Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019]).

The plaintiff asserts that, as the entity that installed the sidewalk bridge with the raised plank, Spring had control over the sidewalk bridge and created the dangerous tripping condition. However, with respect to "control over the work site," the plaintiff testified that he reported to Pilch, that Pilch told him where he would be working and what his job duties were each day, and that Pilch supervised his work. Further, Pilch testified that, as a foreman at Tribute, he was present each day that Tribute workers were at the premises, he went through a safety checklist each day that included inspection of the scaffolding, he supervised the plaintiff's work, and he directed the plaintiff to remove planks on the date of the accident. He also testified that the means and methods of the work were left up to Tribute to determine. Moreover, William Knight (Knight), Vice President at Spring, testified at his deposition that Spring was not responsible for daily inspections of the pipe scaffolding or the sidewalk bridge. He also testified that the contractor was responsible for daily inspections and that he does not know the name of the contractor for the work site at the premises. Therefore, issues of fact exist as to whether Spring had control over the work site and, as such, an award of summary judgment with respect to the causes of action alleging common-law negligence and a violation of Labor Law § 200 against Spring is not warranted (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012]).

Turning now to Spring's cross motion, it seeks an order (1) denying Jamaica's request for summary judgment on its common-law indemnification and contribution claims against it;

(2) denying the plaintiff's request for summary judgment with respect to liability on his common-law negligence and Labor Law § 200 claims against it; and (3) dismissing all claims and cross claims against it. With respect to that branch seeking dismissal of all claims and cross claims against it, Spring only substantively argues for the dismissal of the plaintiff's common-law negligence and Labor Law § 200 claims against it.

Tribute and Jamaica argue, as a preliminary matter, that Spring's cross motion is untimely because it was not made within 120 days after the Note of Issue of was entered. Indeed, pursuant to CPLR 3212(a), a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648, 651-652 [2004]). "Absent a 'satisfactory explanation for the untimeliness,' constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649 [2d Dept 2021], quoting *Brill v City of New York*, 2 NY3d at 652). "However, an untimely cross motion for summary judgment may nevertheless be considered by the court 'where a timely motion was made on nearly identical grounds' " (*Dojce v 1302 Realty Co., LLC*, 199 AD3d at 649-650, quoting *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]).

Here, in the court's foregoing discussion, it has already addressed two of the three branches of Spring's motion. First, that branch of Jamaica's motion seeking a conditional order of common-law indemnification and contribution against Spring is denied. Second, that branch of the plaintiff's motion seeking summary judgment on its common-law negligence and Labor Law § 200 claims against Spring is also denied. Thus, effectively, those branches of Spring's motion are granted. The remaining branch of Spring's motion, seeking dismissal of the plaintiff's common-law negligence and Labor Law § 200 claims against it, shall be considered on the merits as it is made on nearly identical grounds as the timely motion of Jamaica seeking to dismiss the plaintiff's common-law negligence and Labor Law § 200 claims against it (*id.*).

Tribute also argues that Spring's motion is procedurally defective insofar as its statement of material facts is not separate from its notice of motion as promulgated by 22 NYCRR 202.8-g and counsel fails to provide a word count certification page as promulgated by 22 NYCRR 202.8-b. However, CPLR 2001 and 22 NYCRR 202.1(b) give the court discretion to overlook procedural defects (*see Dowds v The City of New York*, 2021 NY Slip Op 32734[U] [Sup Ct, NY County 2021]). Further, 22 NYCRR 202.8-g(a) does not require that the motion be denied (*id.*). As such, the court will consider the merits of the remaining branch of Spring's motion seeking dismissal of the plaintiff's common-law negligence and Labor Law § 200 claims against it.

"Where a claim is based on an alleged dangerous condition on the premises, an owner or contractor is liable where it created the dangerous condition or had actual or constructive notice of its existence'" (*Gargan v Palatella Saros Bldrs. Group, Inc.*, 162 AD3d 988, 989 [2d Dept 2018], quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dept 2016]). Here, Spring argues, among other things, that it did not create a dangerous condition or have actual or constructive notice of an unsafe condition regarding the sidewalk shed. In support of its argument, Spring points to the plaintiff's testimony in which he states he traversed the

subject sidewalk bridge “150, 200” times prior to his accident without issue and that the sidewalk bridge was a level and flat surface. Spring also points to the testimony of Pilch that he conducted a daily inspection of the premises, including on the morning of the plaintiff’s accident, and found no issues of concern.

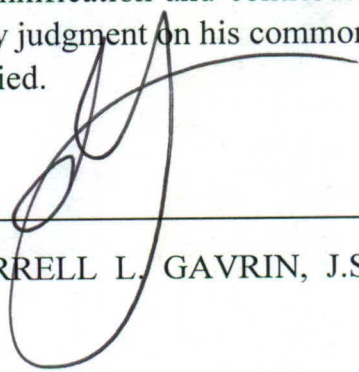
However, Knight testified that Spring built the scaffolding and the sidewalk bridge at the premises. He also testified that a foreman and supervisor from Spring inspected and “signed-off” on the scaffolding and sidewalk bridge after installation. At his deposition, Knight was shown a photograph of the sidewalk bridge depicting a raised plank. Knight testified that only Spring would have altered the scaffolding at the job site. As such, Spring fails to eliminate triable issues of fact including, but not limited to, whether it created or had actual or constructive notice of the alleged dangerous condition of the raised plank (*see Pacheco v Smith*, 128 AD3d 926 [2d Dept 2015]). Therefore, that branch of Spring’s motion seeking dismissal of the plaintiff’s common-law negligence and Labor Law § 200 claims against it must be denied.

Accordingly, Jamaica’s motion is granted only to the extent that the plaintiff’s causes of action for common-law negligence and Labor Law § 200 as and against Jamaica are dismissed.

The plaintiff’s motion is granted only to the extent that partial summary judgment is granted on its Labor Law § 241(6) claim as is predicated on section 23-1.7(e)(1) of the Industrial Code as and against Jamaica.

Spring’s motion is granted only to the extent that Jamaica’s request for summary judgment on its claim for common-law indemnification and contribution against Spring is denied, and the plaintiff’s request for summary judgment on his common-law negligence and Labor Law § 200 claims against Spring is denied.

Dated: September 14, 2022



DARRELL L. GAVRIN, J.S.C.

