SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 155495/2019

DAVID PEREIRA,
Plaintiff,

MOTION SEQ. NO. 002; 003

- v -

KSK CONSTRUCTION GROUP, AGIME GROUP LLC, d/b/a 570 BROOME STREET-AGIME GROUP, and SOHO BROOME CONDOS, LLC.,
Defendants.

DECISION + ORDER ON MOTION

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KSK CONSTRUCTION GROUP,
Third-Party Plaintiff,

Third-Party
Index No. 595783/2019

-against-

COPPER SERVICES LLC and UNITED CRANE AND RIGGING SERVICES, INC.,
Third-Party Defendants.

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SOHO BROOME CONDOS, LLC.,
Second Third-Party Plaintiff,

Second Third-Party
Index No. 595273/2021

-against-

COPPER SERVICES LLC and UNITED CRANE AND RIGGING SERVICES, INC.,
Second Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 68, 81, 83, 84, 85, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125, 126, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for **SUMMARY JUDGMENT**.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 130, 133, 135, 136, 137, 138, 139, 152, 153, 154, 155, 156, 157, 158, 159, 161, 162, 163, 164, 165, 166, 167, 168, 169, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223

were read on this motion to/for **SUMMARY JUDGMENT**.

In this labor law action, plaintiff David Pereira sues for injuries he sustained at a worksite on April 13, 2019, when a counterweight being hoisted by a crane fell towards him, crushing his co-worker to death and forcing him to jump in order to avoid being crushed as well.

Plaintiff now moves for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants KSK Construction Group ("KSK Construction") and Soho Broome Condos LLC ("Soho Broome"). KSK Construction cross-moves for summary judgment dismissing plaintiff's claim under Labor Law § 200 (Mot. Seq. 002).

KSK Construction moves for summary judgment on its contractual indemnity claim against third-party defendant United Crane and Rigging Services Inc. ("United Crane"). Soho Broome also cross-moves for summary judgment on its claims for full contractual indemnity and additional insured coverage against United Crane (Mot. Seq. 003).

Motion Sequence Nos. 002 and 003 are consolidated for disposition.

For the reasons set forth below, plaintiff's motion for partial summary judgment is granted; KSK Construction's cross-motion for summary judgment on the Labor Law § 200 claim is denied; and the cross-motions for summary judgment on the contractual indemnification claims are granted.

Plaintiff was employed as a crane rigger for non-party Cranes Express, Inc. ("Cranes Express") beginning in August 2017 (NYSCEF Doc. No. 61 at 19, *Pereira dep*). On April 13, 2019, Cranes Express was erecting a crane to assist in the HVAC (heating, ventilation and air conditioning) installation at 570 Broome Street, a condominium being erected by defendant building owner Agime Group LLC, and Soho Broome ("Soho Broome") in New York, New York.

KSK Construction was the general contractor for this project (NYSCEF Doc. No. 9 ¶ 8, *amended complaint*). Third-party defendant Copper Services, LLC ("Copper Services") was hired by KSK Construction to perform certain HVAC work at the project. The HVAC work that Copper Services was hired to do required the use of a crawler crane to lift certain of the HVAC equipment onto the roof of the subject premises. Copper Services hired United Crane to provide the crawler crane to lift its HVAC equipment. United Crane, in turn, hired Cranes Express (plaintiff's employer) to erect and operate the crane that was involved in the accident on April 13, 2019 [*id.*, ¶¶ 9-10].

On April 13, 2019, plaintiff was working on the assembly of the crane, a Liebherr LTM 1500. The process of building the crane involved several Cranes Express employees. There was a crane operator, Michael Chichester, who was seated in the cab of the crane and operated the crane. Then there were two riggers stationed on the body of the crane whose job it was to make sure that the counterweights were situated properly. These two riggers were plaintiff and his co-worker Gregory Echevarria (Pereira dep at 74, 90). Plaintiff's responsibility during the assembly stage of the crane operation consisted of helping guide the counterweights, which are stored on a flatbed truck, onto their correct positions on the crane, so that the crane could have sufficient counterweight to begin hoisting the HVAC equipment to the building (Pereira dep at 74).

The last set of counterweights, those known as "cheeks", were in the process of being put in place when the accident happened. According to Mr. Chichester, Mr. Pereira and Mr.

Echevarria helped to load the counterweights — there were seven "slab counterweights" in total — off the truck (NYSCEF Doc. No. 62, at 48, *Chichester dep*). Thereafter, Mr. Pereira and Mr. Echevarria climbed to the top of the counterweights to assist with the installation of "cheek" counterweights, two of which go on each side (*id.* at 55). When the two men were standing on top of the slab counterweights, there were no safety harnesses for the crane riggers to wear, and no scaffolding for them to stand upon (*id.* at 185).

Mr. Pereira and Mr. Echevarria stood on top of the seventh counterweight as Mr. Chichester retrieved the cheek counterweights from the flatbed truck and placed them onto the top counterweight. Plaintiff assisted Mr. Chichester by guiding the cheek counterweights to their correct location (*id.* at 108). When the first set of cheek counterweights was landed and secured, Mr. Pereira and Mr. Echevarria removed the cable links from the check counterweight, and then signaled Mr. Chichester to "cable up," meaning that he would retract the crane cable several feet above the counterweights (Pereira dep at 276-277).

However, the crane operator started to move the crane prior to the cables being retracted, causing the cables to get caught in the top cheek counterweight, which in turn caused the counterweight to fall towards plaintiff and Mr. Echevarria (*id.* at 277 ["What I do remember is the crane starting to swing towards us before the cables were raised. Hence, that's why the cables got caught up into the top cheek, and it sent the counterweight flying towards us"]). The cable links caught the cheek counterweights as the crane moved, causing the top cheek counterweight — which weighed 5 tons, or 10,000 pounds — to move from its secured location. Mr. Pereira jumped off the crane and out of the way to avoid being crushed to death by the falling cheek counterweight (*id.* at 241 ["I had to jump off a crane, because if not, the counterweight would have struck me, and I landed on my back and on my head"]; *see also* Pereira Workmen's Compensation C-2 Form (NYSCEF Doc. No. 63 ["Employee was standing on counterweight unhooking it from the crane rigging equipment. Crane Operator cabled up and a cable hooked onto and lifted counterweight, causing employee to fall onto ground"]; photos of crane accident [NYSCEF Doc. No. 64]). Mr. Pereira landed on his head and back, and sustained serious physical injuries, including, *inter alia*, a fractured skull, and multiple neck and back injuries. Mr. Pereira has not returned to work since the date of the accident. While Mr. Pereira survived the crane accident, Mr. Echevarria was crushed to death by the falling cheek counterweight.

Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide or erect ladders, scaffolds and other safety devices in order to protect workers engaged in tasks associated with elevation-related risks. (see *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512 [1991]; *Jamil v Concourse Enters.*, 293 AD2d 271, 272 [1st Dept 2002].) The failure to provide a safety device is a *per se* violation of the statute, for which an owner/contractor is strictly liable. (see *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 519 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009].) Since the duty imposed by Labor Law § 240(1) is nondelegable, a contractor or owner who breaches that duty is liable regardless of whether it actually exercised supervision or control over the work. (see *Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d at 512), and

regardless of whether plaintiff's negligence contributed to the accident. (see *Bland v Manocherian*, 66 NY2d 452, 460 [1985].)

"The burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices falls upon the plaintiff" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). To prevail on a motion for partial summary judgment on his cause of action under Labor Law § 240(1), plaintiff must show both that the statute was violated, i.e., that an enumerated device was required and not provided, and that the violation was a proximate cause of his injuries. (see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003].) A breach of the statute that proximately causes injuries mandates liability. (see *Bland v Manocherian*, 66 NY2d at 460.)

A statutory violation is present where an owner or general contractor fails to provide a worker engaged in Section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009].) Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment". (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

The collapse of a crane constitutes a *prima facie* violation of Labor Law § 240(1) (see *id.* at 427; *Cosban v New York City Tr. Auth.*, 227 AD2d 160, 161 [1st Dept 1996]). Although the crane at issue here did not collapse, nevertheless, "[a] plaintiff need not be directly injured by a portion of the crane for the Labor Law to apply – injuries that occur while trying to avoid being struck during a hoisting may qualify" (*Degidio v City of New York*, 176 AD3d 452, 453 [1st Dept 2019]). Accordingly, New York courts have repeatedly held that where an object falls from a crane or similar hoisting apparatus because it was being hoisted improperly, Labor Law § 240(1) has been violated. In fact, the First Department has specifically held that "[w]hen a crane is being used to move a large, heavy or unwieldy item from one spot to another," the term "hoisting" should be interpreted broadly, and includes the vertical, as well as the horizontal portions of the operation. (*McCoy v Metropolitan Transp. Auth.*, 38 AD3d 308, 309 [1st Dept 2007].) As set forth more fully below, since it is undisputed that a cheek counterweight fell while being hoisted, defendants are liable as a matter of law under Labor Law § 240(1).

For the absolute liability provisions of Labor Law § 240(1) to apply, a plaintiff must be involved in one of the following enumerated construction activities listed below to recover for a "gravity related" accident:

> "All contractors and owners and their agents ... 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"

Mr. Pereira was employed by Cranes Express as a Crane Rigger (Pereira dep at 19). As such, he was exposed to the special hazards presented by gravity-related risks. It is uncontroverted that Mr. Pereira was injured after a cheek counterweight came loose and fell off of a crane — the very type of elevation-related hazard that Labor Law § 240(1) protects. (see *Flores v Metropolitan Transp. Auth.*, 164 AD3d 418 [1st Dept 2018]; *Engelbert v Flushing Commons Prop. Owner, LLC*, 2019 NY Slip Op 30633[U] [Sup Ct, NY County 2019].) New York courts have consistently held that Labor Law § 240(1) liability will be imposed, as a matter of law, where an improperly hoisted object falls and causes injury to the plaintiff, regardless of whether the accident occurs while the load is being raised or lowered. (see *Harris v City of New York,* 83 AD3d 104, 109 [1st Dept 2011]; *Ray v City of New York* [62 AD3d 591, 591 [1st Dept 2009]; *see also Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007]; *Cammon v City of New York*, 21 AD3d 196, 200-201 [1st Dept 2005].)

Here, plaintiff has demonstrated his *prima facie* entitlement to summary judgment as a matter of law on this Labor Law § 240(1) claim by demonstrating that his injuries were the proximate cause of a falling object that was improperly hoisted or inadequately secured. Plaintiff submits deposition testimony that he was injured because the cheek counterweight was improperly hoisted when the crane operator accidently hooked onto and lifted it, causing it to fall from the crane, and then causing him to jump out of the way to avoid being struck. Indeed, Cranes Express, plaintiff's employer, specifically confirms this testimony, stating that, as the crane operator "cabled up and a cable hooked onto and lifted counterweight", plaintiff was "caus[ed] … to fall onto ground" (*see* Pereira Workmen's Compensation C-2 Form; *see also* Chichester Workmen's Compensation C-2 Form [NYSCEF Doc. No. 65] ["Employee was standing on counterweight unhooking it from the crane rigging equipment. Crane operator cabled up and a cable hooked onto and lifted counterweight causing employees to fall off onto ground"].)

The falling counterweight was, without doubt, an "elevation related" hazard, that was not properly secured while being hoisted. Had the cheek counterweight not slid off the crane deck and crashed into the ground, plaintiff would not have had to jump out of the way to save his own life. As such, the falling ten-thousand-pound cheek counterweight's "unchecked, or insufficiently checked, descent" was clearly the proximate cause of plaintiff's injuries. (see *Harris*, 83 AD3d at 110 ["the injury suffered by the plaintiff was every bit as direct a consequence of the descent of the slab as would have been an injury to a worker positioned in the descending slab's path"] [citation and quotation marks omitted]; *Runner*, 13 NY3d at 603 ["The harm to plaintiff was the direct consequence of the application of the force of gravity to the reel]"). Accordingly, plaintiff has demonstrated his *prima facie* entitlement to summary judgment as a matter of law on his Labor Law § 240(1) claim by demonstrating that defendants' failure to provide an adequate safety device enumerated in Labor Law § 240(1) proximately caused him to fall off the scaffold.

Owners and contractors are strictly liable under Labor Law § 240, even if they do not control or supervise the work performed. (*see Campanella v St. Luke's Hospital*, 247 AD2d 294, 296 [1st Dept 1998]). Here, KSK Construction was the general contractor, and Soho Broome was the owner of the subject property. As the owner of the property, Soho Broome is absolutely liable under Labor Law § 240(1). (see *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339

[2008]; *Coleman v City of New York*, 91 NY2d 821, 822-823 [1997]; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007]; *Spagnuolo v Port Auth. of N.Y. & N.J.*, 8 AD3d 64, 64 [1st Dept 2004]). As the general contractor in charge of the renovation project, KSK Construction is also absolutely liable under the statute (*see id.*).

The burden shifts to defendants to submit evidence sufficient to raise a triable issue of fact (see *Klein v City of New York*, 222 AD2d 351, 351 [1st Dept 1995], *affd* 89 NY2d 833 [1996]; *Desouter v HRH Const. Corp.*, 216 AD2d 249 250 [1st Dept 1995]), but defendants fail to meet this burden.

In opposition to the motion, defendants first argue that plaintiff is the sole proximate cause of the accident. In making this argument, defendants point to Mr. Chichester's testimony that, they contend, contradicts plaintiff's testimony that Mr. Chichester rotated the boom of the crane before the sling cleared the cheek, causing the sling to catch and dislodge it. In his testimony, Mr. Chichester denies rotating the boom. According to him, the sling caught the outside of the cheek as it was being raised vertically, and he blames plaintiff for not clearing the sling from the cheek before giving him the signal to cable up. Thus, defendants argue, the sole proximate cause of plaintiff's injuries was his failure to ensure that the sling was clear of the cheek before giving Mr. Chichester the signal to boom up.

Contrary to defendants' argument, the conflicting testimony of Mr. Pereira and Mr. Chichester as to why the counterweight fell from the crane does not preclude summary judgment in plaintiff's favor, as the statute was violated under either version of the accident, by defendants' failure to properly secure the counterweight. (see *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010].) Accordingly, such testimony is irrelevant "to the dispositive issue of whether defendants provided plaintiff with proper protection under the statute" (*Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015].) Indeed, once plaintiff has shown that defendants have violated Labor Law § 240(1), no actions by plaintiff can be the sole proximate cause, and absolute liability must be imposed for plaintiff: "Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290). Moreover, any alleged contributory or comparative negligence on plaintiff's part is irrelevant. (see *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [1st Dept 2007]; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003].)

In addition, for the sole proximate cause defense to apply, the accident must have been caused "exclusively" by plaintiff's own acts. (*Kyle v City of New York*, 268 AD2d 192, 196 [1st Dept 2000].) Here, defendants have failed to proffer any competent evidence that establishes that the accident was caused exclusively by plaintiff's conduct. Indeed, plaintiff testified that *both* he and Mr. Echevarria were setting up the counterweights. As such, it is axiomatic that plaintiff cannot be the "sole" proximate cause of the accident.

Next, defendants argue that "gravity played no role in plaintiff being injured" because "Mr. Pereira's injuries resulted from him trying to avoid the cheek that was sliding sideways rather than from the cheek falling from the base of the crane to the ground" (KSK Construction memorandum of law [NYSCEF Doc. No. 116, at 5]. This argument is without merit. In essence, defendants argue that because the counterweight did not directly fall on plaintiff, there can be no liability. However, courts have repeatedly rejected this same argument. (see *Osowski v Amec Constr. Mgt., Inc.*, 2008 NY Slip Op 30043[U] [Sup Ct, NY County 2008]; *Engelbert*, 2019 NY Slip Op 30633[U] at ** 7.) Accordingly, defendants' claim that "gravity played no role" in the accident is baseless and must be rejected.

Defendants next argue that "plaintiff was standing on the same level as the cheek," and that "his injuries [were not] the result of a significant elevation differential between him and the cheek. (KSK Construction memorandum of law at 13, 14). However, "[w]here an accident is clearly gravity-related, a violation of Labor Law § 240(1) may be implicated even where the 'worker sustains an injury caused by a falling object whose base stands at the same level as the worker'" (*Valle v Port Auth. of NY & N.J.*, 189 AD3d 594, 598 [1st Dept 2020], quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011].) Thus, defendants' claim that there was not a "significant elevation differential" between plaintiff and the cheek must likewise be rejected.

Finally, defendants argue that "summary Judgment must be denied because the plaintiff failed to satisfy his burden of establishing that the cheek required securing" (KSK Construction memorandum of law at 12). However, "case law supports the notion that a falling object need not be in the process of being hoisted or secured in order for the accident to be covered under Labor Law § 240(1). It is enough that said object simply needed securing 'for the purposes of the undertaking'" (*Coyne v Consolidated Edison Co. of N.Y., Inc.*, 44 Misc 3 1221[A], 2014 NY Slip Op 51220[U], * 6 [Sup Ct, NY County 2014] [citation omitted].) "An object needs to be secured if the nature of the work performed at the time of the accident posed a significant risk that the object would fall" (*McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1095 [2d Dept 2012].) "What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 269 [1st Dept 2007]; *see also Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 731 [2d Dept 2011]; *Ortlieb v Town of Malone*, 307 AD2d 679, 680 [3d Dept 2003].)

Likewise here, the type of work being performed – moving several ton counterweights with a crane requiring two crane riggers to secure and guide the load – posed a significant risk that the counterweight would fall. As such, plaintiff has satisfied his burden of establishing that the cheek required securing. (see *Franco v 1221 Ave. Holdings, LLC*, 189 AD3d 615, 615 [1st Dept 2020]; *O'Keefe v Tishman Westside Constr. of NY*, 2007 NY Slip Op 34436[U], * 3 [Sup Ct, NY County 2007].) Accordingly, defendants fail to raise any triable issue of fact as to whether plaintiff has established a prima facie violation of Labor Law § 240(1), and plaintiff's motion for summary judgment is, thus, granted.

Turning next to KSK Construction's cross-motion for summary judgment dismissing plaintiff's Labor Law § 200 claim, Labor Law § 200 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 *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 977 [1993]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577 [1990].) An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; see also *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Comes*, 82 NY2d at 877.) Thus, absent actual or constructive notice of an unsafe condition, an owner or contractor who exercises no control over the work being performed is not responsible for an accident, and no liability attaches under either the common law or Labor Law § 200. (see *Comes*, 82 NY2d at 877; *Lombardi v Stout*, 80 NY2d 290, 295 [1992].) Accordingly, where a plaintiff's claim arises out of the "means and methods of the work, including the equipment used," owners and contractors cannot be liable under Labor Law § 200 if they did not actually supervise or control the activity that gave rise to the accident. (see *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]; *see e.g. Sovulj v Procida Realty & Constr. Corp. of N.Y.*, 129 AD3d 414, 415 [1st Dept 2015]; *Estrella v GIT Indus., Inc.*, 105 AD3d 555, 556 [1st Dept 2013]; *Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011].)

KSK Construction contends that plaintiff's Labor Law § 200 claim should be dismissed because the accident arose out of the means, methods and materials of his work, i.e., the erection of the crane; that Cranes Express, plaintiff's employer, exercised exclusive control over his work at the time of the accident; and that KSK Construction did not exercise any supervisory control over plaintiff's activities at the time of the alleged accident.

However, in opposition to the motion, plaintiff raises issues of fact as to the extent of KSK Construction's control over the erection of the crane. Plaintiff submits evidence that Elias Karis, an agent of KSK Construction who was brought in to handle the role of site safety supervisor, may have been the person directly in charge of the assembly of the crane on April 13, 2019. Ali Cuhruk, the project manager at KSK Construction for the construction project at issue in this case, specifically testified as follows:

> Q: So, Mr. Karis, was he the site safety manager, from the day you started at the project up until the date of this incident?
>
> A: Correct.
>
> Q: Did he hold regular safety meetings?
>
> A: Yes, he kept all — maintained all his logs that were — yes.
>
> Q: Was he there the evening of this crane assembly?
>
> A. He was there, yes.

(Cuhruk dep [NYSCEF Doc. No. 151], at 185-186]; *see also id.* at 189 ["Q: The site safety manager, who is he employed by? A: He had his own company. He was a consultant to KSK I think for the 570 Broome Street project. The company name is Sirrk Construction"]).

Since Mr. Karis was brought in specifically by KSK Construction to monitor site safety and, was present and supervising the job site at the time of the accident, the scope of supervisory control that he exhibited over the assembly of the crane is an issue of fact for the jury. (see *Ramirez v A.W. & S. Constr. Co.*, 178 AD3d 555, 556 [1st Dept 2019]; *Gallagher v Levien & Co.*, 72 AD3d 407, 409 1st Dept 2010].) As such, KSK Construction's motion for judgment on plaintiff's Labor Law § 200 claim is denied.

KSK Construction moves for contractual indemnification against United Crane, and Soho Broome cross-moves for contractual indemnification against United Crane.

On April 11, 2019, two days before the accident, United Crane executed an insurance and indemnification rider in favor of KSK Construction (NYSCEF Doc. No. 99). This rider provided for complete or, if appropriate, partial indemnification, for any loss arising out of the operation that United Crane was about to undertake at the site. Kim Smith, United Crane's president, signed this agreement on, April 11, 2019, and emailed a pdf to KSK Construction that same day.

In addition, United Crane, which was a subcontractor to Copper Services, entered into a master subcontract agreement with Copper Services, effective October 29, 2015, that was applicable to any job that United Crane performed for Copper Services. (NYSCEF Doc. No. 101). In that agreement, United Crane agreed to indemnify Copper Services, as well as the general contractor on any project for which Copper Services retained United Crane as a subcontractor.

"'[T]he right to contractual indemnification depends upon the specific language of the contract'" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017] [citation omitted]; *see also Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2d Dept 2005]). "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [citation omitted]; *see e.g. De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606-07 [2d Dept 2017].)

With respect to KSK Construction, both the KSK Construction rider and the master subcontract agreement all contain broad indemnity provisions which provide, to the maximum extent permitted by law, that United Crane would indemnify and hold KSK Construction harmless for claims or damages arising out of, or in any way connected with, the subcontractor's work. Accordingly, KSK Construction is entitled to contractual indemnification from United Crane as a matter of law.

The indemnity provision in the Indemnification and Insurance Rider applies to all claims "directly or indirectly arising out of any work of Indemnitor or of any of its sub-contractors, or any of Indemnitor's or such sub-contractor's respective agents, servants or employees." That

plaintiff's accident occurred as an incident of plaintiff's presence at the project is sufficient to trigger the "arising out of" indemnity obligation. (see *O'Connor v Serge El. Co.*, 58 NY2d 655, 657-58 [1982].) It is uncontroverted that the accident occurred on the project while plaintiff was performing work at the express direction of his employer, Cranes Express, a subcontractor to United Crane. It is also uncontroverted that the work that Cranes Express was performing fell within the scope of work that United Crane agreed to perform in its subcontract with Copper Services — the only reason plaintiff was at the project site was because he was acting in the course of his employment as a rigger for United Crane's subcontractor. Thus, United Crane's indemnity obligations are triggered, and KSK Construction is entitled to contractual indemnification from United Crane for plaintiff's claim, including reimbursement for all expenses, including but not limited to attorney's fees, costs and disbursements.

In addition, "(a) finding on the issue of causation . . . is not necessary to trigger the subject indemnification clause." (*Barnes v New York City Hous. Auth.*, 43 AD3d 842, 845 [2d Dept 2007].) Instead, United Crane's contractual obligations to indemnify KSK Construction are triggered by plaintiff's commencement of this action, asserting causes of action against KSK Construction for Labor Law §§ 240(1), 241(6), and 200/common-law negligence. Moreover, the fact that United Crane claims that it was not negligent does not preclude indemnification. It is well settled that similar provisions conditioning indemnity upon claims "arising out of" or otherwise connected with the performance of the contracted work do not require proof of the indemnitor's negligence or fault. (*see e.g. Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 178 [1990]; *Vev v Port Auth. of N.Y. & N.J.*, 54 NY2d 221, 226 [1981]; *Beharovic v 18 E. 41st Street Partners, Inc.*, 123 AD3d 953, 956 [2d Dept 2014].)

Based on the plain and clear language of the contracts quoted above, which contains an "arising out of" (as opposed to a negligence) indemnity trigger, United Crane's indemnity obligation to KSK Construction has been triggered by the plaintiff's accident. (see *Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 471 [1st Dept 2022].)

Likewise, Soho Broome is entitled to summary judgment on the issue of contractual indemnity against United Crane as a matter of law. The language of the indemnity provision in the indemnification and insurance rider clearly provides that United Crane shall defend and indemnify all relevant parties from and against all claims directly or indirectly arising out of any work of the "Indemnitor" or of any of its sub-contractors. This provision specifically provides that this indemnity will apply to any owner of the property, i.e., Soho Broome. As previously discussed, plaintiff's claim unquestionably arises out of United Crane's performance of its work under the subcontractor agreement, as his employer was engaged by United Crane to perform part of the work that United Crane was hired by Copper Services to do. Plaintiff was acting in the course of his employment as a rigger for Cranes Express, who was United Crane's subcontractor. As such, United Crane's contractual obligations to indemnify Soho Broome were triggered.

United Crane makes several arguments in opposition to the motion and cross-motion, none of which are sufficient to raise a triable issue of fact. First, United Crane argues that the insurance and indemnification rider was of limited enforceability because it was applicable only to claims in which the Port Authority was a named defendant and does not refer to any contract

that was already in existence and that, on its own, it does not have the legal requirements of a contract. In support of this argument, United Crane seeks to offer parol evidence in the form of an affidavit from Ms. Smith, United Crane's president. The court rejects this argument.

Under New York law, unambiguous contractual language is given its plain meaning. (see *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002].) Whether contractual language is ambiguous is a question of law for the court to decide. (see *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990].) Evidence outside the four corners of the document as to what was really intended, but unstated or misstated, is generally inadmissible to add to or vary the terms of an unambiguous contract. (see *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 267 [1990].) Moreover, contractual indemnification clauses must be "construed to achieve the apparent purpose of the parties" (*Hooper Associates, Ltd. v AGS Computers Inc.*, 74 NY2d 487, 491 [1989]; *Arrendal v Trizechahn Corp.*, 98 AD3d 701, 703 [2d Dept 2010]), and must be enforced where "'the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances'" (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014] [citation omitted]; *see e.g. Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973].)

Here, the terms of the Insurance and Indemnification Rider are clear, unequivocal and unambiguous, and contain no reference to United Crane's assertion with respect to the Port Authority. Accordingly, United Crane's attempt to use parol evidence to vary the terms of the Insurance and Indemnification Rider is unavailing. (see *Matter of Wells Fargo Bank*, 198 AD3d 156, 163 [1st Dept 2021].)

United Crane next argues that the October 29, 2015 master subcontract agreement does not afford indemnity to KSK as a 3rd party beneficiary. This argument fails, however, because the plain wording of the indemnity provisions manifests the intention of the parties to benefit upstream contractors, such as KSK Construction. The term "the G.C." appears immediately before Copper Services in the indemnification provision. Obviously not knowing which projects would be subject to the agreement, the parties used the generic term "the G.C." to reflect that any general contractor that hired Copper Services would also be entitled to indemnification.

Finally, United Crane argues that the indemnity provision is void because it violates General Obligations Law § 5-322.1. This argument is unpersuasive. "The indemnity provision does not run afoul of General Obligations Law § 5-322.1 because it contemplates indemnification 'to the fullest extent of the law,' which means that [KSK and Soho Broome] are not seeking indemnification for [their] own negligence" (*Winkler*, 206 AD3d at 461, citing *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; see also *Frank v 1100 Ave. of Ams. Assocs.*, 159 AD3d 537, 537 [1st Dept 2018]). Thus, the motion and cross-motion for contractual indemnification are granted. The court has considered the remaining arguments and finds them to be without merit. Thus, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants KSK Construction Group and Soho Broome Condos LLC (Mot. Seq. 002) is granted; and it is further

ORDERED that the cross-motion of defendant KSK Construction Group for summary judgment on plaintiff's Labor Law § 200 claim (Mot. Seq. 002) is denied; and it is further

ORDERED that the motion of defendant/third-party plaintiff KSK Construction Group for contractual indemnification against third-party defendant United Crane and Rigging Services Inc. (Mot. Seq. 003) is granted; and it is further

ORDERED that the cross-motion of defendant/second third-party plaintiff Soho Broome Condos LLC for contractual indemnification against third-party defendant United Crane and Rigging Services Inc. (Mot. Seq. 003) is granted; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

January 4, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:							
		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER