SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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TERESA CASTELLANO, as Adminstratrix for the estate of DONALD SNOOK, and TERESA CASTELLANO, individually,

Plaintiffs,

- v -

ANN/NASSAU REALTY LLC, BRF CONSTRUCTION CORP., GATEWAY DEMOLITION CORP., and PARK EAST CONSTRUCTION CORP.,

Defendants.

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INDEX NO. 160655/2014

MOTION DATE 11/31/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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ANN/NASSAU REALTY LLC and BRF CONSTRUCTION CORP.,

Plaintiffs,

-against-

PARK EAST CONSTRUCTION CORP.,

Defendant.

Third-Party
Index No. 595498/2015

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ANN/NASSAU REALTY LLC and BRF CONSTRUCTION CORP.,

Plaintiffs,

-against-

FELDMAN LUMBER US LBM, LCC,

Defendant.

Second Third-Party
Index No. 595786/2015

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 154, 155, 157, 158, 163, 190 were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action seeking damages arising from personal injuries sustained by the decedent, Donald Snook (Snook), while working at a construction site in Manhattan, the defendant Park East Construction Corp. (PEC) moved for summary judgment pursuant to CPLR 3212 dismissing the amended complaint and all cross claims/ third party claims against it (MOT SEQ 006). The plaintiffs opposed the motion. The defendants Ann/Nassau Realty, LLC (ANR) and BRF Construction Corp. (BRF) partially opposed the motion. On March 6, 2019, the court denied the motion because PEC failed to appear for oral argument.PEC subsequently moved, in effect, pursuant to CPLR 5015 to vacate its default (SEQ 007). On June 1, 2020, the court denied the motion. By an order dated November 23, 2021, the Appellate Division, First Department, reversed, granted the motion to vacate, and remanded the matter for a determination of PEC's summary judgment motion (SEQ 006) on the merits. Castellano v Ann/Nassau Realty, LLC, 199 AD3d 558 (1st Dept. 2021). Upon remand, the motion is granted in part.

II. BACKGROUND

The following facts are derived from the admissible evidence submitted in connection with the instant motion.

On March 13, 2013, Snook, now deceased, suffered personal injuries at a construction project site at 113 Nassau Street in Manhattan (the project) while working as a truck driver for second third-party defendant Feldman Lumber (Feldman). Snook was delivering sheetrock to the project site. According to Feldman's accident report and statements in Snook's medical

records,[1] Snook was standing on a loading dock when the wheel of a hand-propelled, A-frame dolly upon which several sheets of sheetrock had been placed snapped, causing the sheetrock to fall onto another dolly and then onto Snook. The sheetrock, which weighed approximately 1,700 pounds, crushed Snook's right side, and pinned him against a makeshift railing, injuring his right wrist, right shoulder, and left leg.

ANR was the owner of the property where the project was located. BRF was the general contractor for the project. PEC was hired by BRF as the carpentry drywall contractor for the project. PEC purchased sheetrock for the project from nonparty Janus Industries (Janus). PEC had no written contract with Janus. Rather, PEC would call in material orders to Janus and Janus would coordinate supply and delivery through Feldman. Feldman employees would deliver sheets of drywall via truck to the project site and unload them at a designated dock, placing them on A-frame dollies with four wheels. Feldman employees would then transport the sheetrock to an area within the project site specified by PEC, either through its onsite foreman at the time of delivery or by prior notice to Janus, and leave it there, taking the dollies back with them. The dollies were owned and supplied by Feldman. Feldman periodically inspected the dollies and would take a dolly out of service if, for example, a defect such as a damaged wheel were discovered.

No eyewitnesses to the March 13, 2013, accident were identified or deposed. In connection with the sheetrock delivery itself on the date of the accident, however, PEC received an invoice from Janus with a corresponding invoice from Feldman attached. The invoice from Feldman indicated the items in the invoice were "sold to" or "ship[ped] to" "Janus

[1] As previously determined in the court's decision and order dated May 7, 2020, disposing of ANR and BRF's motion for summary judgment (SEQ 005), such evidence of the manner of Snook's injury is properly admissible. See People v Ortega, 15 NY3d 610 (2010); Petrocelli v Tishman Contr. Corp., 19 AD3d 145 (1st Dept. 2005).

Industries/Park East Cnstrctn" and "Park East Construction Attn: Jeff." The invoice from Feldman provided for the supply of 312 sheets of drywall and for "load and distribution." This included Feldman's provision of four sheetrock dollies to unload the drywall, to be returned to Feldman thereafter. The invoice further provided, "Customer is responsible to provide detailed distribution list, loading instructions and for supervision thereof." Feldman's invoice indicated delivery took place at 10:00 a.m. on March 13, 2013, and is signed and dated by an unidentified individual.

Snook did not return to work after the accident. He underwent a right shoulder arthroscopy in September 2013. Snook told his wife, Castellano, that the injuries caused him severe pain. Snook took pain medication daily and required Castellano's assistance to get dressed, cut his food, adjust the recliner, and go down the stairs, among other things. At the end of 2013, Snook was hospitalized with jaundice and liver failure induced by alcohol consumption. Snook had previously obtained a liver transplant in 2003. On January 26, 2014, Snook died from end stage liver disease.

Castellano, on behalf of Snook's estate, commenced this action as against ANR, BRF, and Gateway Demolition Corp. on October 28, 2014. ANR and BRF commenced a third-party action against PEC seeking, *inter alia*, common law and contractual indemnification on July 28, 2015. On August 4, 2015, Castellano filed an amended complaint adding claims against PEC and an individual claim sounding in loss of consortium (sixth cause of action). The claims asserted on behalf of Snook's estate sounded in general negligence (first cause of action), wrongful death (second cause of action), and violations of New York Labor Law (Labor Law) §§ 200 (third cause of action), 240(1) (fourth cause of action), and 241(6) (fifth cause of action).

On August 26, 2015, the action and all cross claims were dismissed as against Gateway Demolition Corp. Discovery ensued and the Note of Issue was filed on September 12, 2018.

ANR and BRF moved for summary judgment pursuant to CPLR 3212 dismissing the amended complaint and all cross claims asserted against them and granting judgment on their third-party claim for contractual indemnification against PEC (SEQ 005). Castellano opposed the motion and cross-moved pursuant to CPLR 3212 for summary judgment on the complaint. By decision and order dated May 7, 2020, the court granted ANR and BRF's motion to the extent of dismissing the fifth cause of action as against them and granting them a conditional order of contractual indemnification against PEC. The court denied Castellano's cross motion.

By its order dated November 23, 2021, the Appellate Division, First Department modified to grant ANR and BRF's motion as to Castellano's negligence and Labor Law § 200 claims and otherwise affirmed. Castellano v Ann/Nassau Realty, LLC, supra. The First Department noted that the negligence and Labor Law § 200 claims failed because ANR and BRF established, prima facie, that BRF did no more than general safety supervision at the project site and lacked supervisory control over the injury-producing work. The First Department sustained Castellano's wrongful death claim, holding, "Dismissal of the wrongful death claim is denied as against ANF and BRF as the argument was raised for the first time on reply." Id. at 559.

III. LEGAL STANDARD

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish his or her prima facie entitlement to judgment as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If

the movant fails to meet this burden and establish his or her claim or defense sufficiently to warrant a court's directing judgment in the movant's favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., supra; O'Halloran v City of New York, supra. Should the movant meet his or her burden, it then becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra.

IV. DISCUSSION

In support of its motion, PEC submits, *inter alia*, the pleadings; the verified Bills of Particulars; the deposition transcript of Castellano; the deposition transcript of Walter Bartels (Bartels), BRF's superintendent; the deposition transcript of James Wojcik (Wojcik), PEC's president; the deposition transcript of Philip Corso (Corso), Feldman's director of safety and fleet; the deposition transcript of Joseph Pecoraro (Pecoraro), Feldman's inventory control manager and safety coordinator; Feldman's incident report, prepared by Pecoraro and signed by Snook; delivery invoices from Janus and Feldman attributable to the sheetrock delivered on the date of the accident; and the plaintiff's death certificate. PEC contends that its submissions demonstrate, prima facie, that it did not control or create the dangerous condition that led to Snook's injuries, and thus cannot be held liable for any of the plaintiffs' Labor Law or general negligence claims. PEC also states that the plaintiffs' wrongful death claim must be dismissed because there is no evidence that Snook's injuries at the project site caused him to suffer liver failure and die. Finally, PEC contends that because Snook's injuries were not caused by the

negligence of PEC or its vendors, it is entitled to dismissal of ANR and BRF's cross claims/ third party claims sounding in common law indemnification and contribution and contractual indemnification.

The court addresses each of PEC's arguments in turn.

A. First and Third Causes of Action

Labor Law § 200 is a codification of the common law duty imposed upon an owner and general contractor to provide workers with a safe place to work. See Ross v Curtis-Palmer Hydro Elec Co., 81 NY2d 494 (1993); Cackett v Gladden Props., LLC, 183 AD3d 419 (1st Dept. 2020). A subcontractor may also be held liable under the Labor Law as a statutory agent of the owner and general contractor when the provisions of the subcontract explicitly grant the subcontractor supervisory authority or the evidence demonstrates that the subcontractor actually exercised supervisory authority over the area of the workplace where injury occurs. Nascimento v Bridgehampton Const. Corp., 86 AD3d 189, 193 (1st Dept. 2011); see, e.g., Royland v McGovern & Company, LLC, 203 AD3d 677, 678 (1st Dept. 2022); Goya v Longwood Housing Development Fund Company, Inc., 192 AD3d 581, 583 (1st Dept. 2021). In such instances, the subcontractor "stands in the shoes of the owner and general contractor, and may be held liable if it 'actually created the dangerous condition [that caused the subject accident] or had actual or constructive notice of it.'" Cackett v Gladden Props., LLC, supra at 421 (quoting DeMaria v RBNB20 Owner, LLC, 129 AD3d 623, 625 [1st Dept. 2015]); see Sledge v S.M.S. Gen. Contrs., Inc., 151 AD3d 782, 783 (2nd Dept. 2017).

Where a construction accident arises out of the means and methods of the construction work, as opposed to a dangerous condition on the site, liability under Labor Law § 200 or for common-law negligence may be imposed where the defendant exercised control or supervision

over the performance of the work and had actual or constructive notice of the purportedly unsafe condition. See Burkoski v Structure Tone, Inc., 40 AD3d 378, 380-81 (1st Dept. 2007); Alonzo v Safe harbors of the Hudson Hous. Dev. Fund Co., Inc., 104 AD3d 446, 449 (1st Dept. 2013). Mere general supervisory authority and inspection of work product are insufficient to impose liability, however. See Maddox v Tishman Const. Corp., 138 AD3d 646, 646 (1st Dept. 2016); Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc., supra at 449; see also Poulin v Ultimate Homes, Inc., 166 AD3d 667, 670 (2nd Dept. 2018).

Contrary to its assertions, PEC is the statutory agent of ANR and BRF for purposes of Castellano's Labor Law claims. The subcontract between PEC and BRF, previously filed in connection with ANR and BRF's motion for summary judgment (SEQ 005) and incorporated by reference in ANR and BRF's partial opposition to the instant motion, provides, in relevant part, that PEC was responsible for furnishing "all supervision, labor, materials, plant, hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the demolition and the completion of the work." The "Work" is defined in a detailed addendum to the subcontract to include furnishing and installation of drywall at the project and the delivery of materials to the project site. PEC agreed that "the prevention of accidents to workers engaged in the Work is the responsibility of the Subcontractor" and, elsewhere, that "[t]he Subcontractor is solely responsible for the safety of its work and of all equipment and materials to be used therein until final completion and acceptance of the same." Thus, the subcontract granted PEC the exclusive ability to control the activity which brought about Snook's injury, i.e., the furnishing of drywall to the project site. See Royland v McGovern & Company, LLC, supra at 678; Lind v Tishman Construction Corp., 180 AD3d 505, 505 (1st Dept. 2020); Nascimento v Bridgehampton Const. Corp., supra at 192-93. PEC's purported delegation of its responsibilities to supervise and

control delivery of drywall to Janus further demonstrates that PEC actually possessed the requisite authority to be held liable as a statutory agent. See Nascimento v Bridgehampton Const. Corp., supra at 193; Weber v Baccarat, Inc., 70 AD3d 487, 488 (1st Dept. 2010).

Nonetheless, as a statutory agent, PEC stands in the shoes of the owner or contractor, neither of whom "may be held liable under common-law negligence or Labor Law § 200 … for injuries arising from a dangerous condition in the absence of evidence that such party actually created the dangerous condition or had actual or constructive notice of it." DeMaria v RBNB20 Owner, LLC, supra at 625 (citations omitted). Further, like an owner or contractor, a statutory agent may not be held liable for injury arising from the means and methods of construction work where it did not exercise control and supervision over the work. See Burkoski v Structure Tone, Inc., supra at 380-81; Alonzo v Safe harbors of the Hudson Hous. Dev. Fund Co., Inc., supra at 449. The uncontroverted testimony of PEC's president is that no PEC employee was involved in the delivery of sheetrock to the project site and that Feldman employees were exclusively tasked with unloading sheetrock onto the dollies that Feldman provided for such purpose. Thus, the injury-producing work was entirely delegated by PEC, via Janus, to Feldman. Since PEC did not provide or load the defective dolly, had no actual or constructive notice of any issue with the dolly, and did not supervise deliveries of sheetrock, it may not be held vicariously liable for the negligence of its downstream subcontractor. See DeMaria v RBNB20 Owner, LLC, supra at 625.

The first and third causes of action, which sound in common law negligence and violation of Labor Law § 200, are therefore dismissed.

B. Fourth Cause of Action

As opposed to Labor Law § 200 or common law negligence standards, "Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide proper protection" to workers subject to the risks inherent in elevated work sites. Headen v Progressive Painting Corp., 160 AD2d 319, 321 (1st Dept. 1990); see also Jock v Fien, 80 NY2d 965, 967 (1992); Rocovich v Consolidated Edison Co., 78 NY2d 509, 512 (1991); White v 31-01 Steinway, LLC, supra at 430. "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." Ross v Curtis Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993). "In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 662 (2014) (quoting Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]).

For the reasons discussed in the court's May 7, 2020, decision and order, the fact that the sheetrock on the dolly was at the same height level as Snook when it fell on him is not fatal to Snook's claim. Rather, there exists a triable issue of fact as to whether Snook's injury was caused by the defendants' failure to provide for adequate safety measures for the unloading of sheetrock given the weight of the sheetrock placed on the dolly and the danger that it could fall on and injure a worker. See Willinsky v 334 92nd Housing Dev/ Fund Corp., 18 NY3d 1 (2011); see also Kandatyan v 400 Fifth Realty, 155 AD3d 848 (2nd Dept. 2017). As the statutory agent

of the owner and contractor, PEC would be subject to liability under Labor Law § 240(1) if a finder of fact were to answer that question in the affirmative.

PEC's argument that it cannot be liable because it delegated procurement and delivery of sheetrock for the project to Janus, and did not directly contract with Feldman, is misplaced. "[O]nce a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity." Nascimento v Bridgehampton Const. Corp., supra at 195; see Badzio v East 68th Street Tenants Corp., 200 AD3d 591, 592 (1st Dept. 2021); White v 31-01 Steinway, LLC, 165 AD3d 449, 452 (1st Dept. 2018); DeMaria v RBNB20 Owner, LLC, supra at 625; Naughton v City of New York, 94 AD3d 1, 9-10 (1st Dept. 2012). This principle has been embraced even when a subcontractor's delegee further delegates work to another party. See, e.g., Badzio v East 68th Street Tenants Corp., supra at 592; Naughton v City of New York, supra at 9-10.

Accordingly, the fourth cause of action is sustained as against PEC.

C. Fifth Cause of Action

Labor Law § 241(6) requires owners, contractors, and their agents "'to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.'" St. Louis v Town of N. Elba, 16 NY3d 411, 413 (2011) (quoting Ross v Curtis Palmer Hydro Elec. Co., supra at 501-02). Unlike Labor Law § 240(1), Labor Law § 241(6) is not self-executing because it depends upon an outside source, namely, the Industrial Code. See Long v Forest-Fehlhaber, 55 NY2d 154, 160 (1982). To recover under Labor Law § 241(6), "the plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a specific and

applicable provision of the New York State Industrial Code." Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 488 (1st Dept. 2018).

The plaintiffs' Bill of Particulars alleges violation of 12 NYCRR § 23-1.28, which provides that "hand-propelled vehicles" must be "maintained in good repair" and that "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles." Feldman's incident report and Snook's medical records contain evidence that, according to Snook, the accident occurred because the dolly on which nearly a ton of sheetrock had been loaded collapsed due to a broken wheel. Thus, there is a triable issue as to whether Snook was injured because the defendants failed to maintain the dollies in good repair with "free-running" and "well secured" wheels. As under Labor Law § 240(1), PEC's delegation of its responsibilities as statutory agent is insufficient to escape liable for violations under Labor Law § 241(6). See Tuccillo v Bovis Lend Lease, Inc., 101 AD3d 625, 628 (1st Dept. 2012); Nascimento v Bridgehampton Constr. Corp., supra at 192-93.

Accordingly, the fifth cause of action is sustained as against PEC.

D. Second and Sixth Causes of Action

To recover upon a statutory cause of action for wrongful death pursuant to the New York Estates, Powers and Trusts Law (EPTL), a plaintiff must demonstrate (1) death, (2) caused by the wrongful conduct of a defendant, (3) giving rise to a cause of action which could have been maintained, at the moment of death, by the plaintiff's decedent if death had not ensued, (4) survival by distributees who have suffered pecuniary loss by reason of the death, and (5) appointment of a personal representative of the decedent. See EPTL 5-4.1 et seq. A plaintiff pleading wrongful death generally must show with reasonable certainty that the defendant's wrongful conduct proximately caused the decedent's death. See Acevedo v Audubon

Management, Inc., 280 AD2d 91, 96-97 (1st Dept. 2001); Estate of Crichlow v New York City Transit Authority, 184 AD2d 395, 395 (1st Dept. 1992); Estate of Morgana v Staten Island Hotel, 140 AD3d 1113, 1113-14 (2nd Dept. 2016). "Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of [death] but is not one of its causes." Estate of Morgana v Staten Island Hotel, supra at 1114; see Battochio v Paolino, 171 AD3d 429, 430 (1st Dept. 2019); Beloff v Gerges, 80 AD3d 460, 461 (1st Dept. 2011).

The uncontroverted evidence submitted by PEC, including Snook's death certificate and Castellano's testimony, establishes that Snook's death was caused by liver failure rather than by any injuries he sustained on March 13, 2013, ten months earlier. Thus, PEC establishes its prima facie entitlement to dismissal of the second cause of action.

In opposition, the plaintiffs speculate that Snook began drinking heavily enough to induce the failure of his transplanted liver within months because of the pain of the injuries to his shoulder and other body parts. However, mere speculation is not sufficient to defeat a motion for summary judgment. See, e.g., Issing v Madison Square Guarden Center, Inc., 116 AD3d 595, 595-96 (1st Dept. 2014); Montas v JJC Const. Corp., 92 AD3d 559, 559 (1st Dept. 2012); Harrington v City of New York, 79 AD3d 545, 546 (1st Dept. 2010); Lynn v Lynn, 216 AD2d 194, 196 (1st Dept. 1995). The record is devoid of any admissible evidence to support the plaintiffs' theory that Snook self-medicated with alcohol. To be sure, Castellano, who said she was assisting Snook with most daily life activities after the accident, testified that she did not know if or when Snook had resumed heavy drinking until he was hospitalized with end stage liver disease. Further, the plaintiffs have provided no expert testimony or other evidence that

would support a finding that a sudden relapse in alcohol consumption induced the failure of Snook's second liver and death within months, as opposed to years.

Contrary to the plaintiffs' arguments, they are not entitled to application of the relaxed standard of proof on causation set forth in Noseworthy v City of New York, 298 NY 76 (1948), because they do not demonstrate any causal relationship between the defendants' alleged fault and Snook's death. See Varona v Brooks Shopping Centers, LLC, 151 AD3d 459, 459 (1st Dept. 2017). Moreover, since there is no evidence that anyone other than Feldman employees was present during the accident, the defendants had no more knowledge of the events surrounding it than Snook did. See id.; Gayle v City of New York, 256 AD2d 541, 542 (2nd Dept. 1998).

In the absence of competent medical proof indicating a causal relationship between Snook's injury and his subsequent death, the conjecture of the adminstratrix of Snook's estate is insufficient to sustain a cause of action for wrongful death. See McGuire v Small, 129 AD2d 429, 429 (1st Dept. 1987); Goldfarb v 65 East 11th St. Corp., 40 AD2d 657, 657 (1st Dept. 1972); McCarthy v Downes, 17 AD2d 919, 919 (1st Dept. 1962); see also McGuire v Triborough Bridge and Tunnel Authority, 305 AD2d 322, 323 (1st Dept. 2003) (wrongful death claim must be dismissed where there "is not a scintilla of evidence in the record" to indicate defendant should have anticipated decedent's suicide would result from his actions). Accordingly, the plaintiffs' second cause of action must be dismissed as against PEC.

The sixth cause of action, asserted on behalf of Castellano in her individual capacity and stating a claim for loss of consortium, must also be dismissed to the extent it seeks to recover for the permanent loss of Snook's consortium due to death. Even if the court had sustained the plaintiffs' wrongful death claim, New York law does not recognize a distinct cause of action by a surviving spouse for loss of consortium due to death. See Liff v Schildkrout, 49 NY2d 622, 632-

33 (1980); Dawson v YMCA of Long Island, Inc., 120 AD3d 748, 749-50 (2nd Dept. 2014). The sixth cause of action may continue to the extent that it reflects Castellano's loss of her husband's consortium during the period of Snook's conscious pain and suffering from injuries attributable to the defendants' Labor Law violations prior to his death. See Ruiz v New York City Health and Hospitals Corp., 165 AD2d 75, 80 (1st Dept. 1991).

E. Cross Claims/ Third Party Claims against PEC

By its order dated May 7, 2020, the court conditionally granted ANR and BRF's cross claim/ third party claim sounding in contractual indemnification pursuant to the indemnification clause in PEC's subcontract. That clause provided that PEC would indemnify BRF for, *inter alia*, liability arising from the acts or omissions of its vendors. The Appellate Division, First Department, affirmed the court's holding in this regard, stating, "Given the dismissal of the negligence-based claims against ANR and BRF and PEC's contractual obligation to indemnify ANR and BRF for injuries arising from its work and arising from its acts or omissions or those of its direct and indirect employees, ANR and BRF are entitled to summary judgment on their claim for contractual indemnification conditioned on a finding of negligence against PEC or its direct or indirect employees (see Torres v Love Lane Mews, LLC, 156 AD3d 410 [1st Dept 2017])." Castellano v Ann/Nassau Realty, LLC, supra at 559.

While the record does not contain evidence that PEC was negligent, there is evidence that the accident was caused by the negligent acts or omissions of Feldman's employees in failing to ensure that the dollies used to unload drywall at the project site were safe and capable of bearing the loads placed upon them. Thus, PEC is not entitled to dismissal of the contractual indemnification claims against it. However, PEC correctly contends that ANR and BRF's

common law indemnification and contribution claims must be dismissed in the absence of evidence of PEC's own negligence. ANR and BRF do not present any argument to the contrary.

V. CONCLUSION

Accordingly, it is

ORDERED that the motion of Park East Construction Corp. for summary judgment pursuant to CPLR 3212 dismissing the amended complaint and all cross claims/ third party claims against it is granted to the extent that the first, second, and third causes of action are dismissed in their entirety as against Park East Construction Corp., the sixth cause of action is dismissed to the limited extent it arises from the plaintiffs' wrongful death claim as against Park East Construction Corp., and all third party claims/ cross claims against Park East Construction Corp. seeking common law indemnification or common law contribution are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

DATED: February 17, 2023

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON