

Neira-Bernal v City of New York

2023 NY Slip Op 30997(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 151092/2017

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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LUIS NEIRA-BERNAL,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, SKANSKA INC., SKANSKA USA CIVIL INC., SKANSKA USA CIVIL NORTHEAST INC., TREVCON CONSTRUCTION COMPANY, INC., SKANSKA INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE, SKANSKA USA CIVIL INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE, AND, SKANSKA USA CIVIL NORTHEAST INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE., URS - LIRO A JOINT VENTURE, URS CORPORATION, AECOM, AS SUCCESSOR IN INTEREST TO URS CORPORATION, AECOM TECHNOLOGY CORPORATION, AS SUCCESSOR IN INTERES TO URS CORPORATION, LIRO PROGRAM & CONSTRUCTION MANAGEMENT, P.C., LIRO PROGRAM AND CONSTRUCTION MANAGEMENT PE P.C., CERTIFIED SITE SAFETY OF NY, LLC,

Defendants.

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THE CITY OF NEW YORK,, THE NEW YORK CITY DEPARTMENT OF SANITATION,, SKANSKA INC.,, SKANSKA USA CIVIL INC.,, SKANSKA USA CIVIL NORTHEAST INC.,, TREVCON CONSTRUCTION COMPANY, INC.,, SKANSKA INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE,, SKANSKA USA CIVIL INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE, AND, SKANSKA USA CIVIL NORTHEAST INC. AND, TREVCON CONSTRUCTION COMPANY, INC., A JOINT VENTURE.

Plaintiffs,

-against-

SIG CONTRACTING CORP.

Defendant.

INDEX NO. 151092/2017

02/28/2022,
03/01/2022,
02/28/2022,
02/28/2022,
03/17/2022,

MOTION DATE 03/29/2022

MOTION SEQ. NO. 002 004 005
006 007 008

DECISION + ORDER ON MOTION

Third-Party
Index No. 595463/2017

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 247, 248, 255, 256, 262, 277, 278, 296, 301, 302, 303, 304, 305, 310

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 249, 257, 286, 287, 288, 289, 290, 297, 298, 299, 300, 312

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 250, 258, 291, 292, 293, 294, 295, 315, 316

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 251, 259, 268, 269, 270, 271, 272, 273, 274, 275, 276, 306, 307, 308, 313, 314

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 238, 239, 240, 241, 242, 243, 244, 245, 246, 252, 254, 260, 264, 265, 266, 267, 309

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 253, 261, 281, 282, 283, 284, 285, 311

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This is an action to recover damages for personal injuries allegedly sustained by a union mason's assistant on June 9, 2016, when, while working at a construction site located at York Avenue and 91st Street, New York, New York, known as the Marine East River Transfer Station (the Premises), he fell from a scaffold.

In motion sequence number 002, plaintiff moves, pursuant to CPLR § 3212, for summary judgment on his Labor Law § 240 (1) claim against all defendants.

In motion sequence number 004, defendants URS Corporation New York (and that part of URS Corporation that has an interest in URS-Liro, a Joint Venture [ULJV]), URS

Corporation, and AECOM (f/k/a AECOM Technology Corporation (collectively URS/AECOM) move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims as against them.

In motion sequence number 005, defendant Liro Program & Construction Management, PE P.C. (Liro) (and that part of Liro that has an interest in ULJV) moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims as against it.¹

In motion sequence number 006, defendants/third-party plaintiffs, The City of New York, The New York City Department of Sanitation (together, the City defendants), Skanska Inc., Skanska USA Civil Inc., Skanska USA Civil Northeast Inc. (together, the Skanska defendants), Trevcon Construction Company, Inc. (Trevcon), Skanska Inc. and Trevcon Construction company, Inc. a Joint Venture (STJV) move, (1) pursuant to CPLR § 3025 (b), for leave to amend the third-party complaint, (2) pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims as against them and (3) pursuant to CPLR § 3212, for summary judgment on their third-party claims against third-party defendant SIG Contracting Corp. (SIG).²

In motion sequence number 007, SIG moves, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint and all cross-claims as against it.

¹ For ease of reference, where they are aligned, URS/AECOM, Liro and ULJV will be referred to as the ULJV defendants.

² The City defendants, the Skanska defendants, Trevcon and STJV are all represented by the same counsel. Except for the City defendants, the motion papers generally do not differentiate or separately address any of these entities. For simplicity, the Skanska defendants, Trevcon, and the STJV are therefore collectively referred to as the “STJV defendants” and the City defendants and the STJV defendants, who jointly move together, are collectively deemed the “City Movants” in this decision.

In motion sequence number 008, defendant Certified Site Safety of NY, LLC. (Certified) moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims as against it.

The motions are consolidated for disposition.

BACKGROUND

On the day of the accident, the Premises was under construction for the benefit of the City defendants. The City defendants hired the STJV as the general contractor for a project at the Premises that entailed the demolition of an old municipal facility and the construction of a new municipal facility (the Project). The City defendants also hired ULJV as the construction manager/owner's representative for the Project. ULJV hired Certified as the safety inspector for the Project. The STJV defendants had their own safety personnel. They also hired SIG as the masonry contractor for the Project. Plaintiff was an employee of SIG.

Plaintiff's 50-H Testimony

Plaintiff testified that on the day of the accident, he was an assistant bricklayer employed by SIG on the Project (plaintiff's 50-h at 12). He was provided his personal protective devices and tools by SIG.

On the day of the accident, plaintiff was assigned to assist masons working on scaffolding above the ground floor of a new construction area. The scaffold had a metal frame and wooden plank flooring. He had traversed the scaffold without issue several times on the day before and the day of the accident.

Plaintiff testified that immediately before the accident, he was on the scaffold "approximately six feet" above the ground (*id.* at 27). Plaintiff also testified that he had a safety line, but no place to tie off (*id.* at 30). Specifically, plaintiff explained that there would typically

be places in the ceiling with hooks designed to tie off, but there were no such spaces or hooks in the area where he fell (*id.* at 33).

Plaintiff testified that his work entailed carrying bricks to a mason, who was building the wall adjacent to the scaffold. A portion of the scaffolding had a “bicycle” – a lower section of scaffolding adjacent to the full scaffold (*id.* at 50). Above that portion of the scaffolding, black pipes were situated at a height that caused plaintiff to have to bend over as he walked across the scaffolding (*id.* at 58-59).

While walking on the planks near the “bicycle,” plaintiff attempted to duck under the pipes. While bending down and moving under the pipe, plaintiff slipped and fell from the scaffolding and landed on the ground. Plaintiff explained that he fell “because there was no safety rail” (*id.* at 61).

Plaintiff's Deposition Testimony

Plaintiff's deposition testimony largely repeats his 50-h hearing testimony. He further explained that his job entailed carrying bricks to “put [them] at the reach of the mason” (plaintiff's tr at 20). To do so, he had to traverse the scaffold. He also testified that he “did not have any place to tie [his safety harness] to” while on the scaffold because there “was no place to hook the harness” (*id.* at 31 and 33).

He confirmed that at the time of the accident, he was working on the scaffold's platform (*id.* at 36). He was directed to work there by “Mario,” a SIG employee (*id.* at 89-90). Immediately before the accident, plaintiff was walking towards the mason he was assisting. He tried to pass under the black pipes that were above the scaffolding when he slipped and fell from the scaffold (*id.* at 38). He did not recall what he slipped on (*id.* at 52). At his second

deposition, plaintiff clarified that, to get past the black pipe, he “had to pass bending down” to reach the mason working on the other side (plaintiff’s second tr at 48).

Deposition Testimony of Juan Cuervo (City’s Deputy Program Director)

Juan Cuervo testified that on the day of the accident, he was employed by the City’s department of design and construction as the project manager for the Project (Cuervo tr at 13). His duties included overseeing the Project and other City project managers assigned to the Project. He also met regularly with the construction manager to discuss any issues that arose.

The Project entailed construction of a marine transfer station – a building that “receives the garbage trucks, processes the garbage, packages [it] in containers . . . and has the means to place those containers onto barges” (*id.* at 64).

Cuervo confirmed that STJV was the general contractor for the Project (*id.* at 21). The construction manager was ULJV (*id.* at 23). He explained that “the construction of the project [was] essentially run by [STJV]” (*id.* at 25). ULJV was responsible for “overseeing, on behalf of the City defendants, the quality of the building, the quality of the work that [was] being performed by the contractor” (*id.* at 26).

Cuervo testified that the City defendants did not direct or control any contractor’s work (*id.* at 45). It hired ULJV to generally oversee the project to “make sure that everything was getting done properly” (*id.* at 45). He further testified that the City defendants themselves did not assist in preparing any safety plans. That was STJV’s responsibility (*id.* at 38). STJV was also responsible for making sure that all workers had protective equipment (*id.* at 52). ULJV did not provide any equipment (*id.* at 74). When asked if ULJV operated, essentially, as the City defendants’ eyes and ears at the Project, Cuervo testified “yes, that was their role” (*id.* at 32).

Cuervo testified that ULJV hired Certified as a safety subcontractor, but he did not know the specifics of their subcontract, or what Certified's duties entailed (*id.* at 41). He was unaware of any subcontractors hired by STJV.

Cuervo was not present at the Premises on the day of the accident and did not know any specifics of plaintiff's accident.

Deposition Testimony of John Phillips (Skanska's Project Manager)

John Philipps testified that at the time of the accident, he was a project manager employed by Skanska, a heavy construction company. He was the project manager for the Project. His duties included, amongst other things, "oversight of the contract" and "subcontract administration" (Phillips tr at 10).

Skanska and Trevcon entered a joint venture agreement for the Project (the STJV Agreement) (*id.* at 14). Within that agreement, they divvied up their companies' responsibilities at the Project. Trevcon was "a marine contractor" and was responsible for that portion of the Project's construction work that was over the water itself (*id.* at 65-66). To the extent that there was any "work outside of [the STJV Agreement], Skanska would do that work" (*id.* at 17). Skanska and Trevcon both hired subcontractors for the Project, but those subcontractors were officially hired by the joint venture (*id.* at 69).

Phillips testified that ULJV was the "owner's representative" and "a construction manager overseeing the work being performed" on the Project (*id.* at 18). He further explained that they were "the eyes and ears of the owner out there every day" (*id.* at 25). Skanska would meet regularly with ULJV for status and update meetings. ULJV had five employees on the Project, most of whom were inspectors. The inspectors were responsible for reviewing the work for quality and accuracy in relation to the construction documents (*id.* at 22).

Skanska had safety personnel on site who were responsible for “walk[ing] the job each day” (*id.* at 38). If they saw an unsafe condition or unsafe practice, those Skanska employees could stop work.

STJV hired SIG to perform masonry work at the Project. STJV did not direct or control SIG’s work.

Phillips was shown a photograph of the accident location. He was unable to determine the height of the scaffold from the photograph. He testified that the black pipe above the scaffold was “mechanical pipe” and that it was not proper to “tie off” a safety line to such a pipe (*id.* at 90). He also confirmed that the area where plaintiff fell was the space where, once complete, there would be a doorway through the wall (i.e., an open space where no wall was constructed).

Phillips was present on the day of the accident, but he did not witness it. He learned of it shortly after it happened and went to the scene. Plaintiff had already been taken to the hospital. He learned that none of Skanska’s employees witnessed the accident (*id.* at 97). He directed his superintendent and safety person to conduct an inspection and “interview anyone who was there” (*id.* at 97). Phillips then reviewed Skanska’s incident report and signed off on it.

Deposition Testimony of Wayne Murry (Skanska’s Safety Manager)

Wayne Murry testified that on the day of the accident, he was one of Skanska’s safety managers at the Project (Murry tr at 18). He explained that Trevcon was responsible for installing “piles into the seabed so that the building could be built up” and installing concrete onto piers over the water (*id.* at 14). Skanska was responsible for building the structures on top of the piles and piers.

Murry's duties included walking the Project to make sure that proper safety precautions were being taken. If he learned of a safety issue, he would direct that it be corrected. He would prepare a daily report regarding any deficiencies he found.

Murry testified that a scaffold is typically built against a wall and, therefore, only one side would have a railing. Where the wall has a gap in it (such as where a doorway or accessway is left empty) there should be "a midrail, a top rail or personal fall protection" (*id.* at 45). If the open area had a "bicycle" – a device attached to the side of a scaffold that allows work at a slightly lowered level – then no railing would be necessary on the bicycle portion itself (*id.* at 53).

Murry was present on the day of the accident but did not witness it. He received a phone call about the accident, grabbed a first aid kit, and went over to the accident area (*id.* at 102). When he arrived, he saw plaintiff "lying on the floor with a significant head wound" (*id.* at 104). Murry then called 911 (*id.* at 114). Murry then prepared an accident report for Skanska (*id.* at 116). Murry spoke to "Raymond Wells" who "said that he had witnessed" the accident (*id.* at 119). He brought Wells into Skanska's trailer and typed up Wells' witness statement (*id.* at 124). He reviewed the statement with Wells, who then signed it. Murry then used Wells' statement to prepare Skanska's accident report.

The Skanska Incident Report

The Skanska incident report (the Report) was prepared on June 10, 2016, the day after the accident (plaintiff's notice of motion, exhibit 2; NYSCEF Doc. No.162). It was signed by Phillips on that date.

It states, in pertinent part:

“[Plaintiff] was standing on the outrigger support (AKA bike frame for bricklayer) of the scaffold (two planks wide) and was adjusting a plank above him. He stepped back and lost his balance

falling three feet to the plywood floor ramp. He hit a nearby metal shovel with his head causing a laceration to his head”

(*id.*).

The Report indicates that there was one witness, Raymond Wells. It also contains four photographs, one of the shovel that plaintiff hit, two of emergency personnel aiding plaintiff, and one denominated as a “reenactment photo.” The reenactment photograph depicts the subject scaffold, without any railings, adjacent to an empty space designated for a doorway (*id.*).

Witness Statement of Raymond Wells

The witness statement of Raymond Wells is dated June 9, 2016, the day of the accident.

It was taken by Wayne Murry. The statement relates, as relevant:

“I Wayne Murry am taking a statement from Ray Wells who witnesse[d] the incident.

“I Ray Wells saw [plaintiff] standing on two scaffold planks that were supported by the bike frames of the scaffold. [Plaintiff] was about 3 feet off the ground. [Plaintiff] was facing the scaffold trying to adjust a plank above his head when he lost his balance and fell to the ground. . . .

“I agree that Wayne Murry took this statement from me word for word. I agree with the statement”

(Skanska’s affirmation in opposition, exhibit C; NYSCEF Doc. No. 304).

Deposition Testimony of Salvatore Amabile (SIG’s Foreman)

Salvatore Amabile testified that on the day of the accident, he was SIG’s foreman at the Project. SIG performed masonry work on the Project. Amabile was “sort of the super[intendent]” at the Project (Amabile tr at 23). He was only present at the Premises three days a week. He was not at the Premises at the time of the accident.

To do its work, SIG would erect scaffolding of the kind used by plaintiff at the time of his accident. Plaintiff was a SIG employee. Plaintiff's work included assisting masons by gathering materials and tools for them (*id.* at 30).

Amabile had no personal knowledge of how the accident happened (*id.* at 90). He learned of it later in the day. By the time he arrived at the Premises, plaintiff was gone (*id.* at 41). He spoke with Wells, who was the mason that plaintiff assisted that day, and another SIG employee named "Mariusz" (*id.* at 47). Mariusz told Amabile that he did not witness the accident. Wells told Amabile that he did witness the accident. Wells and Mariusz told Amabile that plaintiff fell from the "bicycle" to the floor (*id.* at 49).

Amabile testified that prior to installing any scaffolding, Mariusz would use a scissor lift to install bolts in the ceiling that would allow people to utilize their safety harnesses to tie off while using the scaffold (*id.* at 83-84). Amabile was shown a photograph of the scaffold and identified two bolts and hanging tethers above it. He could not determine when the photograph was taken. Amabile further testified that the scaffolds were inspected daily by SIG.

Deposition Testimony of Charles Treubig (ULJV's Witness)

Charles Treubig testified that at the time of the accident, he was a resident engineer employed by Liro at the Project. As the resident engineer, Truebig was "the lead for Liro" at the Project (Treubig tr at 22). His duties included coordinating activities on site, scheduling inspections and dealing "with the contractors if there are issues in the field" and "to make sure everything is proceeding in a safe manner" (*id.* at 15).

He explained that URS (now AECOM) was responsible for "more of the management duties while Liro had the resident engineer task" (*id.* at 20). The resident engineer's task primarily involved inspections and assisting management by running progress meetings,

scheduling and coordinating with STJV. ULJV did not have any laborers or construction workers on site (*id.* at 33) and did not provide any equipment or materials at the Project (*id.* at 34). Liro's employees were responsible for walking the site, while URS employees were more office/paperwork focused. If, during a site walkthrough, a ULJV employee witnessed a dangerous condition, they had the authority to stop work (*id.* at 44).

ULJV hired Certified as the safety consultant for the Project. Certified personnel were on site daily and walked the Premises regularly. According to Treubig, Certified was "an independent safety company" that would "make sure that anything found would be reported" to the City (*id.* at 137). Certified was there "to see how things were and report on them" (*id.* at 137).

Treubig also testified that ULJV had a general safety plan that was not specific to any project. STJV prepared the site specific safety plan for the Project. STJV was also responsible for investigating accidents and preparing accident reports (*id.* at 69). ULJV and Certified did not investigate or prepare accident reports (*id.* at 95).

ULJV did not hire any trade subcontractors, nor were they involved in approving any subcontractors. STJV hired them and the approval process was run by a city program (*id.* at 64).

Treubig did not witness the accident. His knowledge of what happened came entirely from Skanska's accident report and discussions with people afterwards.

Deposition Testimony of Neil Rapawy (Certified's Vice President of Finance)

Neil Rapawy testified that on the day of the accident, he was Certified's vice president of finance. His duties included maintaining and managing financial records and invoices.

Rapawy's work did not include travel to, or any involvement with construction site work.

Certified is a safety consulting services company for construction projects. Certified's workers would "provide administrative or other technical support . . . but not related to field work" (Rapawy tr at 17). It provided safety inspection services at the Project. Specifically, Certified provided two safety inspectors for the Project.

Deposition Testimony of Joanne Matamoro (Certified's Site Safety Inspector)

Joanne Matamoro testified that on the day of the accident, she was employed by Certified as a site inspector at the Project (Matamoro tr at 21). Certified was hired by Liro to be "another pair of eyes[] on the project" for both Liro and the City (*id.* at 18). It "does not enforce any rules" at the Project (*id.* at 22).

According to Matamoro, Certified would inspect the Premises along with the City's inspectors and STJV's safety people. Certified would "copy" any of the City's findings, including any deviations or hazards. Matamoro testified that her duties were limited to taking notes during the walkthrough and preparing a report based off those notes (*id.* at 27). Skanska was responsible for fixing any safety deficiencies identified during the walkthrough (*id.* at 28).

If Matamoro witnessed an unsafe practice, she could stop work (*id.* at 36-37). She did not prepare accident reports or investigate worker accidents. Prior to the subject litigation, she was unaware of plaintiff's accident.

Matamoro also testified that regulations required that guardrails be put in place on any scaffold at a height of six feet or above (*id.* at 55).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060,

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

The City Defendants’ and the STJV Defendants’ Motion to Amend the Third-Party Complaint (motion sequence number 006)

The City Movants move, pursuant to CPLR § 3025 (b) to amend the third-party complaint, which identified the incorrect contract at issue between STJV and SIG. CPLR § 3025 (b) provides the following:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court Leave shall be freely given upon such terms as may be just Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

The City Movants argue that the newly identified contract contains nearly identical provisions and that SIG cannot be prejudiced by the inclusion of the proper contract at issue in this action. SIG does not oppose the proposed amendment or the movants' request for leave to amend.

Accordingly, leave to amend the complaint to include the correct contract will be granted.

The Labor Law § 240 (1) Claim (Motion Sequence Number 002, 004, 005, 006 and 008)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim. The ULJV defendants and Certified move for summary judgment dismissing the same claim as against them. While the City Movants move for summary judgment dismissing the complaint, they do not address the Labor Law § 240 (1) claim in their moving papers.

Accordingly, the City Movants are not entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

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.

Labor Law § 240 (1) “imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work” (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It “was designed to prevent those types of accidents in which the scaffold . . . 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” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 “is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*O'Brien v. Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) must be construed “liberally so as to accomplish its purpose of protecting workers” (*Greenfield v Macherich Queens Ltd. Partnership*, 3 AD3d 429, 430 (1st Dept 2004)).

But not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace” (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) “does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site”). Instead, liability “is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Initially, the City defendants acknowledge that they are the owners of the Premises and STJV acknowledges that it was the general contractor for the Project. Therefore, they may be liable for plaintiff’s injuries under Labor Law § 240 (1). Further, the remaining STJV

defendants do not contest that they are proper Labor Law defendants. URS/AECOM and Liro (each separately, and in their capacities as members of ULJV) argue that they, as the construction manager entities, are neither an owner, general contractor or an agent of either, such that they could be liable for plaintiff's injuries under the Labor Law. Certified also argues that, as a safety inspector, it is also an improper Labor Law defendant.

When the work giving rise to these [Labor Law] duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241.

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011] [an entity becomes a statutory agent under the Labor Law when it has been "delegated the supervision and control either over the specific work area involved or the work which [gave rise] to the injury"] [internal quotation marks and citation omitted]).

Certified

Certified argues that, as a site safety consultant, its duties were limited to walking the site, along with City inspectors and STJV inspectors, taking notes during those walkthroughs and preparing reports for the City defendants based on those notes (Matamoro tr. at 27). In addition, Matamoro testified that Skanska was responsible for remedying any safety deficiencies identified during the walkthrough (*id.* at 28).

Certified is correct that a safety consultant will not be considered to be an owner or general contractor's agent where its contract did not confer any authority to supervise or control any work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 148 [1st Dept 2012] citing

Smith v McClier Corp., 22 AD3d 369, 371 [1st Dept 2005] [“a general contractual obligation to ensure compliance with safety regulations . . . is insufficient to support imposition of liability on an agency theory, or pursuant to Labor Law § 200 and its common-law counterpart”]).

Notably, plaintiff does not oppose dismissal of his Labor Law § 240 (1) claim as against Certified.

A review of the record establishes that Certified’s duties were limited to inspections related to safety compliance. Therefore, Certified, as a site safety consultant, is not an agent of an owner or general contractor, and cannot be liable for plaintiff’s injuries under the Labor Law

Accordingly, Certified is entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against it.

The ULJV defendants

The ULJV defendants each argue that they are not proper Labor Law defendants because they are merely the construction manager for a project that has a defined general contractor. In addition, they argue that their duties were limited to paperwork, ministerial matters and general oversight to ensure that the Project was built in accordance with the Project’s construction documents (Cuervo tr at 45 [City hired ULJV to “make sure that everything was getting done properly”]; Phillips tr at 22 [ULJV’s inspectors were responsible for reviewing work for quality and accuracy with respect to the construction documents]; Treubig tr at 33 and 34 [noting that ULJV did not have any laborers or workers at the Project, did not hire any construction subcontractors, and did not provide any materials or equipment to any entity]). Further it is undisputed that ULJV did not direct or supervise any workers at the Project.

In opposition, the City defendants argue that ULJV was an agent because it had the contractual authority to review payment bonds, schedule meetings, establish communication

procedures and oversee the progress of the Project. Specifically, the City defendants argue that ULJV's contract with the City required ULJV to "bring any nonconformance or unsafe working conditions found to the Contractor's attention immediately for prompt corrective action" (City's affirmation in opposition, exhibit B; NYSCEF Doc. No. 293]).

A review of the contract reveals that none of the duties delegated to ULJV in the contract between the City and ULJV give rise to strict liability under the Labor Law (*see e.g. DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 481 [1st Dept 2015] [construction manager did not become a statutory agent under the Labor Law where the contract "did not confer upon the construction manager the right to exercise supervisory control over the individual contractors, nor were [the construction manager defendants] authorized to stop the work if their personnel observed an unsafe practice"]; *see also Borbeck v Hercules Constr. Corp.*, 48 AD3d 498, 498 [2d Dept 2008] [construction manager did not have authority to control and supervise, and did not become a statutory agent, where it did not have "the authority to enforce the provisions of the contracts entered into by the owner with the project's prime contractors"]]).

The duties highlighted by the City defendants are mainly ministerial in nature and do not give rise to an authority to supervise or control any work (*Russin*, 54 NY2d at 318). In addition, the duty to "bring any nonconformance or unsafe working conditions found to the Contractor's attention" does not implicate the authority to control or correct such issues. Further, testimony establishes that such a contractual duty to correct safety issues was delegated to STJV, the general contractor at the Project.

Therefore, given the general contractual terms that do not "delegate[] the supervision and control either over the specific work area involved or the work which [gave rise] to the injury"

(*Nascimento*, 86 AD3d at 193) and the existence of a separate general contractor who was granted such authority, the ULJV defendants were not agents for the purposes of the Labor Law (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [“[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law”]).

Accordingly, the ULJV defendants are entitled to summary judgment dismissing plaintiff’s Labor Law § 240 (1) claims as against them.

The City Movants

Turning now to the substance of the claim, plaintiff has established that, while working from the top of a scaffold that did not have a railing on one side, he lost his footing and fell from the scaffold while attempting to traverse beneath a pipe that crossed over the scaffold (plaintiff’s 50-h, at 58-61; plaintiff’s tr at 38, 48). Plaintiff also testified that, at the time of the accident, there was no place for him to tie off his safety line (plaintiff’s 50-h, at 30, 33; plaintiff’s tr at 31 and 33).

Since the scaffold did not have sufficient safety railings in place, the scaffold was inadequate to prevent plaintiff from falling (*Gomes v Pearson Capital Partners LLC*, 159 AD3d 480, 481 [1st Dept 2018] [holding that the plaintiff was entitled to summary judgment on his section 240 (1) claim where “the subject scaffold did not have railings . . . and there was no place for plaintiff to tie off his safety harness”] accord *Berisha v 209-219 Sullivan St. L.L.C.*, 156 AD3d 457, 458 [1st Dept 2017]; see also *Celaj v Cornell*, 144 AD3d 590, 590 [1st Dept 2016] [“Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240 (1) claim by presenting undisputed evidence that he ‘fell off a scaffold without

guardrails that would have prevented his fall”]). Therefore, plaintiff has established his prima facie entitlement to summary judgment with respect to his Labor Law § 240 (1) claim.

In opposition, the City Movants argue that there remains a question of fact about how the accident occurred. They rely upon Skanska’s accident report (which in turn, relies entirely upon Wells’ witness statement) for the proposition that plaintiff only fell three feet from the scaffolding, not six (Skanska’s affirmation in opposition, ¶¶ 18-20; NYSCEF Doc. No. 301), and that SIG’s contract, OSHA’s rules and the STJV’s health and safety plan only required fall protection at a height of six feet or more (*id.*).

Initially, plaintiff argues that Wells’ statement is inadmissible hearsay. The City Movants argue that the statement is properly before the court under the business records exception to the hearsay rule. But as discussed below, even assuming that Wells’ statement is properly admissible, the version of the accident set forth in it still gives rise to liability under Labor Law § 240 (1).

The City Movants make two principal arguments regarding why the alternate version of the accident does not fall within the scope of Labor Law § 240 (1). Both are unpersuasive.

First, the City Movants argue that a fall from three feet, as described in Wells’ statement, is insufficient, as a matter of law, to invoke the protections of Labor Law § 240 (1). This is incorrect. “There is no bright-line minimum height differential that determines whether an elevation hazard exists” (*Auriemma v Biltmore Theatre, LLC*, 82 Ad3d 1, 9 [1st Dept 2011]). Further, courts have previously found falls from scaffolds from a height of three feet or less are within the ambit of the Labor Law’s protections (*see, e.g. Casabianca v Port Auth. of N.Y. & N.J.*, 237 AD2d 112, 113 [1st Dept 1997] [a “rolling scaffold elevated two feet off the ground did not meet the core objective of preventing injury from an elevation related risk and therefore

the accident falls within the protection of [section 240 (1)] where plaintiff fell from the scaffold while installing ceiling tiles”]; *Gramigna v Morse Diesel, Inc.*, 210 AD2d 115, 116 [1st Dept 1994] [Where the plaintiff fell two feet from the top of a scaffold to the “bicycle” below, the court held that “[t]he two-foot height differential between the two levels of the scaffolding . . . entail[s] an elevation risk”]).

Second, the City Movants argue that they cannot be liable under section 240 (1) because SIG’s contract, OSHA’s rules and Skanska’s health and safety plan only required fall protection at six feet or above. Such documents and rules do not protect a defendant where, as here, it failed to provide a proper safety device in the first instance (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 523 [1985] [“where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage”]; *Celaj v Cornell*, 144 AD3d 590, 591 [1st Dept 2016] [“expert’s opinion that the lack of safety railings accorded with industry customs and regulations is irrelevant under Labor Law § 240 (1)”]; accord *Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746 [2d Dept 2014] [“the violation of [section 240 (1)] provides an independent legal basis for liability, regardless of whether there was compliance with federal regulations or general industry standards”]). Therefore, the City movants cannot rely on their own contracts and safety plans, or OSHA guidelines to overcome the statutory protections of Labor Law § 240 (1).

Thus, under either version of the accident – where plaintiff fell six feet (plaintiff’s version) or three feet (defendants’ version) – defendants failed to provide plaintiff with a sufficient safety device to prevent his fall (*Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010] [conflicting versions of an accident will not preclude summary

judgment “where, as here, the statute was violated under either version of the accident”]; *John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001] [awarding the plaintiff summary judgment on his section 240 (1) claim where “[u]nder either version [of the accident], defendants have failed to secure an area at a construction site from which a fall could occur, thereby exposing the injured worker to an elevation related risk]).

Since both versions of the accident establish the City Movants’ liability under Labor Law § 240 (1), the City Movants fail to raise a material question of fact that defeats plaintiff’s prima facie entitlement to summary judgment (*Romanczuk*, 72 AD3d at 592; *John*, 281 AD2d at 118).

Finally, to the extent that defendants argue that the section 240 (1) claims should be dismissed because plaintiff was entirely at fault for his accident due to his failure to request that he be provided with tie off points, such argument is unavailing (*Berisha v 209-219 Sullivan St. L.L.C.*, 156 AD3d 457, 458 [1st Dept 2017] [“The record establishes that the scaffold had no railings to prevent the fall, there is no evidence that defendants provided an adequate safety device that plaintiff refused to use, and Labor Law § 240 (1) imposes no obligation that he affirmatively request one”]).

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim as against the City Movants.

The Labor Law §241 (6) Claims (Motion Sequence Numbers 004, 005, 006 and 008)

The City Movants, the ULJV defendants and Certified each move for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim as against them.

As an initial matter, as discussed above, because the ULJV defendants and Certified are not statutory agents pursuant to the Labor Law, they are entitled to summary judgment

dismissing plaintiff's Labor Law § 241 (6) claim as against them as well (*Russin*, 54 NY2d at 318).

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

“All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241 [6] imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 [6] claim, “a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct” (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Here, plaintiff has alleged violations of approximately 11 Industrial Code sections, as well as several OSHA regulations. The City Movants address only Industrial Code sections 23-1.7, 1.8 and 2.1, and the OSHA regulations in their motion for summary judgment.

In opposition, plaintiff does not oppose the dismissal of Industrial Code sections 23-1.7, 1.8 or 2.1. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

Further, the City Movants are entitled to the dismissal of those Industrial Code provisions predicated on violations of OSHA regulations (*Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021] [“The claimed violations of OSHA and SSFI (Scaffolding, Shoring & Forming Institute, Inc.) standards . . . do not provide a basis for liability under Labor Law § 241(6)”]).

However, there remain several unaddressed Industrial Code provisions, therefore, the City Movants have failed to establish their prima facie entitlement to summary judgment dismissing the Labor Law § 241 (6) claims predicated on those remaining Industrial Code provisions.

Accordingly, the ULJV defendants and Certified are entitled to summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim as against them and the City Movants are entitled to summary judgment dismissing only that portion of plaintiff’s Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7, 1.8 and 2.1 and violations of OSHA’s regulations.

The Common Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 004, 005, 006 and 008)

The City Movants, the ULJV defendants and Certified move for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against them.

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” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept. 2012] [“Claims for personal injury under [section 200] and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed”]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless “it actually exercised supervisory control over the injury-producing work” *Jackson v Hunter Roberts Constr., LLC*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *see also*

Ruisech, 208 AD3d at 414). Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). “General supervisory authority is insufficient to constitute supervisory control” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

However, where “a plaintiff’s injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]). Notably, “[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, plaintiff’s accident occurred when he fell from an insufficiently secured scaffold, i.e. a scaffold that lacked a railing, therefore, his accident was caused by the means and methods of the work – specifically the construction and maintenance of the scaffold and plaintiff’s work from the scaffold itself (*see Guevara-Ayala v Trump Palace/Parc LLC*, 205 AD3d 450, 451 [1st Dept 2022] [worker’s fall from scaffold system “falls into the means and methods category of Labor Law § 200 cases”]; *Bautista v Archdiocese of N.Y.*, 164 AD3d 450, 452 [1st Dept 2018] [determining that “plaintiff’s fall from scaffolding involved the means and methods of his work, which were supervised and controlled solely by his employer”]).

The record establishes that SIG was responsible for installing and maintaining the scaffold. SIG was also responsible for directing and supervising plaintiff’s work on the scaffold.

The record also establishes that the ULJV defendants, the City defendants, the STJV defendants and Certified neither installed or maintained the scaffold or directed nor controlled plaintiff's work. Therefore, as they had no actual control over the injury producing work, the City Movants, the ULJV defendants and Certified cannot be liable for plaintiff's accident under the common law or Labor Law § 200 (*Naughton*, 94 AD3d at 11).

To the extent that plaintiff argues that these defendants had general supervisory control and the authority to stop work at the Project, such general supervisory control is insufficient to impute liability under section 200. Even where a defendant "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Hughes*, 40 AD3d at 306 ["That Tishman, Site Safety or both, may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Tishman exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence"]).

Accordingly, the City Movants, the ULJV defendants and Certified are entitled to summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims as against them.

The City Movants' Third-Party Contractual Indemnification Claims Against SIG (Motion Sequence Number 006 and 007)

The City Movants move for summary judgment on their third-party claim for contractual indemnification as against SIG. Notably, while SIG's notice of motion indicates that it seeks to dismiss the entirety of the third-party complaint as against it, it affirmatively states that it is not

moving for summary judgment dismissing the third-party contractual indemnification (NYSCEF Doc. No. 309; ¶ 3. Accordingly, SIG is not entitled to summary judgment dismissing this claim.

“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’” (*Karwowski v 1407 Bdwy. Real Estate, LLC*, 160 AD3d 82, 87 – 88 [1st Dept 2018]; quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

“In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also *Lexington Ins. Co. v Kiska Dev. Group LLC*, 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee “has not established that it was free from negligence”]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia*, 259 AD2d at 65).

Additional Facts Relevant to this Issue

Skanska and SIG entered into a construction agreement for the Project on February 21, 2013 (the Skanska/Sig Agreement) (City Movants’ notice of motion, exhibit C; NYSCEF Doc. No. 207). It contains an indemnification provision (the Skanska/SIG Indemnification Provision) (*id.*, Art. 8.A.1) that provides, as relevant, the following:

“To the fullest extent permitted by law, [SIG] will fully defend and indemnify [Skanska], Owner, any higher-tier contractor of [Skanska] and any party who [Skanska] is obligated to indemnify . . . except to the extent expressly prohibited by statute and

excluding indemnification for acts or omissions for which Indemnitees are legally prohibited from being indemnified under applicable law, from and against any and all claims . . . of any kind or nature whatsoever, arising out of, caused by, resulting from, or occurring in connection with the performance of the Subcontract, whether or not such claims are based on Indemnitee's negligence”

(*id.*).

Here, plaintiff, a SIG employee, was injured when he fell off the scaffold, which was provided and erected by SIG. Therefore, the accident arose from SIG's work at the Project and the SKANSKA/SIG Indemnification Provision is applicable to plaintiff's accident, obligating SIG to indemnify the City Movants. Further, as discussed above, the City Movants were not negligent with respect to plaintiff's accident. Therefore, the City Movants have established *prima facie* entitlement to summary judgment on this claim as against SIG.

In opposition SIG argues that the Skanska/SIG Indemnification Provision violates General Obligations Law (GOL) § 5-322.1, which voids an indemnification provision that seeks indemnification for the indemnitee's own negligence. This argument is unpersuasive (*see Frank v 1100 Ave. of Ams. Assoc.*, 159 AD3d 537, 537 [1st Dept 2018] [“The indemnity clause expressly limits its own scope [t]o the fullest extent permitted by law. Such qualifying language limit[s] [a party's] contractual indemnity obligation solely to [the party's] own negligence and redeems an otherwise facially violative indemnity provision”] [internal quotation marks and citations omitted]; *see also Brooks v Judlau Contr, Inc.*, 11 NY3d 204, 210 [2008]).

Here, the provision contains, not only the phrase “to the fullest extent of the law” but also explicitly “exclude[es] indemnification for acts or omissions for which Indemnitees are legally prohibited from being indemnified under applicable law” (City Movants' notice of motion, exhibit C; NYSCEF Doc. No. 207 [the Skanska/SIG Indemnification Provision]). Therefore, the subject indemnification provision does not run afoul of GOL § 5-322.1.

Accordingly, the City Movants are entitled to summary judgment in their favor on their contractual indemnification claim as against SIG and SIG is not entitled to summary judgment dismissing this claim.

The City Defendants' Contractual Indemnification Cross-Claim Against ULJV (Motion Sequence Numbers 004, 005 and 006)

The City defendants move for summary judgment against ULJV, URS/AECOM and LIRO on their cross-claims for contractual indemnification. URS/AECOM and Liro each move for summary judgment dismissing the same as against them and ULJV.

Additional facts relevant to this claim

The City and ULJV entered into a construction management services agreement for the Project on or about May 9, 2007 (the City/ULJV Agreement) (City Movants' notice of motion, exhibit AA; NYSCEF Doc. No. 231). It contains an indemnification provision (the City/ULJV Indemnification Agreement) (*id.*, Art. 12), that provides, in pertinent part, the following:

“To the fullest extent permitted by law, [ULJV] shall indemnify, defend and hold the City . . . harmless against any and all claims . . . allegedly arising out of or in any way related to the operations of [ULJV] and/or its Subcontractors in the performance of this Contract or from [ULJV] and/or its subcontractors' failure to comply with any of the provisions of this Contract or of the Law”

(*id.*, Art. 12).

In arguing that ULJV owes it indemnification, the City defendants cite two definitions in the contract, which provide:

“1.16 ‘Project’ shall mean providing all of the construction management and related services required to ensure all four (4) replacement MTSs are constructed in a timely manner, on budget, in full compliance with all applicable regulatory requirements and in full conformance with the plans and specifications that have been prepared for each.

“1.17 “Safety Standards” shall mean all laws, union rules and trade or industry custom or codes of any kind whatsoever, in effect from

the date of this Contract through Final Acceptance of the construction work, pertaining to worker safety and accident prevention applicable to the Project and/or the construction work”

(*id.*, Art 1).

As an initial matter, while URS/AECOM and Liro raise the dismissal of these contractual indemnification cross-claims in their notices of motion, they fail to raise any arguments why they are entitled to summary judgment dismissing this claim as against them. Accordingly, URS/AECOM and Liro have failed to establish prima facie entitlement to judgment as a matter of law sufficient to dismiss the City defendants’ contractual indemnification claims as against them.

As to the City defendants, they provide only a conclusory statement that ULJV violated its contractual duties and, therefore, the accident arose from its’ operations. The City defendants’ reference to clauses found in the “Definitions” article of the City/ULJV Agreement do not establish what ULJV’s actual scope of work or duties entailed. Therefore, it cannot be determined whether the accident, as a matter of law, arose from ULJV’s “operations,” as required by the City/ULJV Indemnification Provision (NYSCEF Doc. No. 231, Art. 12).

Accordingly, the City defendants are not entitled to summary judgment in their favor on their contractual indemnification cross-claim against ULJV and URS/AECOM and Liro are not entitled to summary judgment dismissing this claim.

URS/AECOM’s Contractual Indemnification Cross-Claim Against Certified (Motion Sequence Numbers 004 and 008)

URS/AECOM provides argument in support of dismissing Certified’s contractual indemnification cross-claim as against it. However, it does not raise this relief in its notice of motion. In addition, Certified did not oppose this motion. CPLR 2214 (a) requires that a movant identify the “relief demanded and the grounds therefore” in the notice of motion. Moreover, this

court's part rules explicitly indicate that "[if] there is a discrepancy between the relief sought in your notice of motion and the relief sought in your supporting papers, the notice of motion is controlling" (Part 47 Rules, section II.D). As the notice of motion fails to identify the subject relief, it is not properly before the court.

In a similar vein, Certified moves for dismissal of this cross-claim as against it, but fails to raise any argument in support of dismissal. Therefore, it has not established its prima facie entitlement to judgment.

Accordingly, URS/AECOM and Certified are not entitled to summary judgment on URS/AECOM's contractual indemnification cross-claim against Certified.

The City Defendants' Contractual Indemnification Cross-Claim Against Certified (Motion Sequence Numbers 006 and 008)

The City defendants move for summary judgment on their contractual indemnification cross-claim against Certified. While Certified moves for summary judgment dismissing this claim, they fail to address contractual indemnification in their motion. Accordingly, Certified has not established its prima facie entitlement to summary judgment on this claim.³

Additional facts relevant to this claim

Certified entered into a "master subcontract for services" agreement with ULJV dated July 8, 2014 (the City Movants' notice of motion, exhibit DD; NYSCEF Doc. No. 234) (the ULJV/Certified Agreement). The agreement fully incorporated ULJV's contract with the City

³ Certified raises an argument regarding dismissal of Liro's contractual indemnification claim in its reply papers (but does not address the City defendants' contractual indemnification claims). In any event, as this argument was raised for the first time in its reply brief, it is deemed waived and the court will not consider it (*see Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 209 [1st Dept 2020] [affirming denial of motion to dismiss because the moving defendant "waived" argument which was raised "for the first time in its reply brief below"]).

(*id.*, Art 2.1). It contains an indemnification provision (the ULJV/Certified Indemnification Provision), which provides the following:

“To the fullest extent permitted by law, [Certified] agrees to indemnify, defend, and hold harmless [ULJV and] Client . . . from and against any and all losses [or] claims . . . arising out of or alleged to arise out of [Certified’s] performance of the Work under this Subcontract . . .”

(*id.*, Art 10.1). The term “Client” is defined as the City (*id.*, Art 2.1).

Under the “Work Authorizations” issued pursuant to the ULJV/Certified Agreement, Certified’s scope of work included the following:

“[P]rovide a safety professional to perform safety compliance audits. During construction the safety professional shall monitor the contractor’s implementation of the plan. Bring any nonconformance or unsafe working conditions found to the Contractor’s attention immediately for prompt corrective action”

(*id.*, Work Authorization No 1 and 2).

The City defendants argue that the ULJV/Certified Indemnification Provision is triggered because Certified failed to observe the missing railing on the scaffold and bring it to Skanska’s attention and, therefore, the accident arose from Certified’s performance of its work under the contract. This argument sufficiently sets forth a *prima facie* claim for indemnification pursuant to the ULJV/Certified Agreement.

Certified did not submit papers in opposition to this motion. In addition, as noted above, its own motion for summary judgment does not address the contractual indemnification claims against it. In light of Certified’s failure to oppose or otherwise address the City defendants’ arguments, no questions of fact have been presented that would overcome the City defendants’ *prima facie* showing.

Accordingly, the City defendants are entitled to summary judgment in their favor on their contractual indemnification cross-claim as against Certified, and Certified is not entitled to summary judgment dismissing this claim.

The Contractual Indemnification Cross-claims Against The City Movants (Motion Sequence Number 006)

The City Movants move for summary judgment dismissing all contractual indemnification cross-claims asserted against them. They correctly assert that no indemnification provisions exist requiring them to indemnify URS/AECOM, Liro or ULJV.

Accordingly, the City Movants are entitled to summary judgment dismissing all contractual indemnification cross-claims as against them.

The Common Law Indemnification Cross-Claims (Motion Sequence Numbers 004, 005, 006, and 007)

The City Movants move for summary judgment on their common-law indemnification and contribution cross-claims against ULJV and their third-party claims for the same against Certified. They also move for summary judgment dismissing these cross-claims as asserted against them and for summary judgment dismissing SIG's third-party cross-claims for the same. URS/AECOM, Liro and Certified move for summary judgment dismissing all common-law indemnification and contribution claims against them.

“To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; see also *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377–378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]).

Similarly, “[c]ontribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). “The ‘critical requirement’ for apportionment by contribution under CPLR article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought’” (*Raquet v Braun*, 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

Here, URS/AECOM, Liro, ULJV and Certified were not negligent with respect to plaintiff’s accident and the common-law negligence and Labor Law § 200 claims against them will be dismissed. Therefore, because they were not negligent, as a matter of law, no claims for common-law negligence or contribution can lie against them.

Accordingly, the City Movants are not entitled to summary judgment on their common-law indemnification and contribution claims against URS/AECOM, Liro, ULJV and Certified and URS/AECOM, Liro (and ULJV) and Certified are entitled to summary judgment dismissing all common-law indemnification and contribution cross-claims and counterclaims as against them.

The City Movant’s Third-Party Claims For Common-Law Indemnification and Contribution against SIG (Motion Sequence Numbers 006 and 007)

The City Movants move for summary judgment on their common-law indemnification and contribution claims against SIG and SIG moves for summary judgment dismissing this claim.

SIG is plaintiff’s employer, and it is undisputed that plaintiff received workers’ compensation as a result of the accident. Under Workers’ Compensation Law § 11, “[a]n

employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, [except] when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, plaintiff does not contest that he did not allege a grave injury as defined by the Workers Compensation Law.⁴ Therefore, no common-law indemnification or contribution claim may be sustained against SIG in this action.

Accordingly, the City Movants are not entitled to summary judgment on their common-law indemnification and contribution claims as against SIG and SIG is entitled to summary judgment dismissing these claims.

The Breach of Contract for the Failure to Procure Insurance Claims (Motion Sequence Numbers 004, 005, 006, and 008)

The City Movants move for summary judgment dismissing all breach of contract for the failure to procure insurance claims alleged against them. As these defendants have no contracts requiring them to procure insurance covering any other co-defendant or SIG, they are entitled to summary judgment dismissing these claims.

The City Movants also move for summary judgment in their favor on these claims as against ULJV and Certified. However, they fail to raise any argument in support of their claims.

⁴ A grave injury is defined in Worker's Compensation Law § 11 as:

“[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability”

Accordingly, that portion of the City Movants' motion for summary judgment in their favor on their breach of contract for the failure to procure insurance claims against ULJV and Certified is denied.

Similarly, while URS/AECOM, Liro and Certified each seek dismissal of all breach of contract claims asserted against them, they do not raise any arguments in support.

Accordingly, URS/AECOM, Liro and Certified are not entitled to summary judgment dismissing the breach of contract claims asserted against them.

The City Movants' Third-Party Breach of Contract for the Failure to Procure Insurance Claim Against SIG (Motion Sequence Numbers 006 and 007)

The City Movants move for summary judgment in their favor on their breach of contract for the failure to procure insurance claim against SIG and Sig moves for summary judgment dismissing this claim.

The Skanska/SIG Agreement contains an insurance procurement provision (City Movants' notice of motion, exhibit C, appendix C; NYSCEF Doc. No. 207). This provision requires SIG to obtain commercial general liability in the amount of "\$5,000,000 – each occurrence for Bodily Injury and Property Damage" with an aggregate limit of \$5 million.

SIG acknowledges that it only procured \$1 million in insurance, in violation of insurance procurement provision. Therefore, the City Movants have established that SIG breached its contractual obligation to procure \$5 million in commercial general liability insurance. However, any relief related to this breach of contract is limited only to those damages fixed at trial in excess of the \$1 million policy that SIG procured.

Accordingly, the City movants are entitled to summary judgment on their breach of contract claim as against SIG for failing to procure \$5 million in commercial general liability

insurance and their damages are limited only to those damages fixed at trial in excess of the \$1 million policy procured by SIG.

The parties remaining arguments have been considered and are unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Luis Niera-Bernal's motion (motion sequence number 002), pursuant to CPLR § 3212, for summary judgment on his Labor Law § 240 (1) claim is granted as against defendants/third-party plaintiffs The City of New York, The New York City Department of Sanitation (together, the City defendants), Skanska Inc., Skanska USA Civil Inc., Skanska USA Civil Northeast Inc. (together, the Skanska defendants), Trevcon Construction Company, Inc. (Trevcon), Skanska Inc. and Trevcon Construction company, Inc. a Joint Venture (the STJV) (collectively the STJV defendants) (the City defendants and the STJV defendants are collectively the City Movants); and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants URS Corporation New York (and that part of URS Corporation that has an interest in URS-Liro, a Joint Venture [the ULJV]), URS Corporation, and AECOM (f/k/a AECOM Technology Corporation (collectively URS) (motion sequence number 004), pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims against them is granted to the extent that the complaint and all common-law indemnification and contribution cross-claims against them are dismissed; and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Liro Program & Construction Management, PE P.C. (Liro), and that part of Liro that has an interest in ULJV (motion sequence number 005), pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims

against it is granted to the extent that the complaint and all common-law indemnification and contribution cross-claims against them are dismissed; and the motion is otherwise denied; and it is further

ORDERED that the part of the City Movants' motion (motion sequence number 006), pursuant to CPLR § 3025 (b), for leave to amend the third-party complaint to add the proper contract as an exhibit thereto, is granted, and it is further

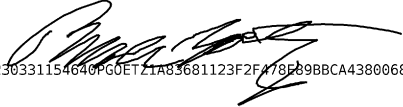
ORDERED that the part of the City Movants' motion, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims against them is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claims asserted against them, as well as those portions of the Labor Law § 241 (6) claim against them predicated upon OSHA violations and violations of Industrial Code 12 NYCRR §§ 23-1.7, 1.8 and 2.1, as well as dismissing all cross-claims and counterclaims asserted against them, and this part of their motion is otherwise denied; and it is further

ORDERED that the part of the City Movant's motion, pursuant to CPLR § 3212, for summary judgment in their favor on their third-party claims against third-party defendant SIG Contracting Corp. (SIG) and their cross-claims against URS/AECOM, Liro, ULJV and Certified Site Safety of NY, LLC. (Certified) is granted only as to the City Movant's contractual indemnification third-party claim against SIG and cross-claim against Certified, and this part of their motion is otherwise denied; and it is further

ORDERED that SIG's motion (motion sequence number 007), pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint and all cross-claims against it is granted to the extent that the common-law negligence and contribution claims are dismissed as against it, and the motion is otherwise denied; and it is further

ORDERED that Certified’s motion (motion sequence number 008), pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross-claims against it is granted to the extent that the complaint and all common-law indemnification and contribution claims are dismissed as against it; and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and continued.


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3/31/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE