

Ferreira-Mendes v RS JZ Driggs, LLC

2023 NY Slip Op 31997(U)

June 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 505351/2020

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of June, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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VALDETE FERREIRA-MENDES,

Plaintiff,

- against -

RS JZ DRIGGS, LLC, RS JZ DRIGGS HOLDINGS, LLC, REDSKY CAPITAL, LLC, COMMON GROUND MANAGEMENT CORPORATION, FOREMOST CONTRACTING AND BUILDING, LLC, and FOREMOST CONTRACTING, LLC,

Defendants.

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RS JZ DRIGGS LLC, RS JZ DRIGGS HOLDINGS, LLC, REDSKY CAPITAL, LLC, and FOREMOST CONTRACTING AND BUILDING, LLC,

Third-Party Plaintiffs,

- against -

CONCRETE COURSES CONCEPTS CORP.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Cross Motion and Affidavits (Affirmations)

Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

44-61, 62-72, 73-99

106-109, 110-115, 116-120

121-127, 128-132

Upon the foregoing papers, plaintiff Valdete Ferreira-Mendes moves (in motion sequence [mot. seq.] 3) for an order, pursuant to CPLR 3212, granting him partial summary judgment against defendants/third-party plaintiffs RS JZ Driggs, LLC (Owner or RS JZ Driggs) and Foremost Contracting and Building, LLC (Foremost) on the issue of liability pursuant to Labor Law § 240 (1) and against Foremost only on the issue of liability pursuant to Labor Law § 200 and common-law negligence. Defendants/third-party plaintiffs RS JZ Driggs, RS JZ Driggs Holdings, LLC, Redsky Capital, LLC, and Foremost (collectively, defendants) move (in mot. seq. 4) for an order, pursuant to CPLR 3212, granting them partial summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims; and granting them summary judgment on their claims for contractual and common-law indemnification against third-party defendant Concrete Courses Concepts Corp. (CCC). Lastly, CCC moves (in mot. seq. 5) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all third-party claims.¹

Background

Plaintiff commenced this action by electronically filing a summons and a verified complaint with this court on March 3, 2020. As relevant to the instant motions, the pleadings indicate that on July 11, 2019, plaintiff was employed by CCC as a carpenter and sustained injuries while stripping forms from a wall² while working on a six-story building under construction at 625 Driggs Avenue in Brooklyn. Specifically, plaintiff claims that

¹ Defendants Common Ground Management Corporation and Foremost Contracting, LLC have not appeared in this action. A default judgment order was entered on March 16, 2021.

² A form is a frame, made of metal and plywood, used to shape concrete, into which wet concrete is poured, which then solidifies into a floor, a wall or a column.

the accident occurred while he stood on the sixth step of an A-frame ladder, approximately four feet above the third floor, while removing the forms.³ Plaintiff asserts that the accident occurred when he grasped the bottom of the plywood form to remove it. As he pulled on it, an approximately two-and-a-half inch piece of concrete fell from the top of the form and struck the protective goggles plaintiff wore and his right eye. Despite the goggles, plaintiff states the concrete injured his eye, because the position of his head at the time enabled the concrete to fall between the goggles and his face. Moreover, he claims that, after he was struck, the unsecured ladder upon which he was standing shifted, causing him to lose his balance, fall from the ladder and strike the floor, and sustain additional injuries.

The record shows that at all relevant times, RS JZ Driggs owned the subject premises, and hired Foremost as general contractor to oversee the construction of a six-story building thereon. Foremost retained plaintiff's employer, CCC, to perform concrete superstructure work. The pleadings allege that defendants violated Labor Law §§ 240 (1) and 241 (6), as well as certain specified provisions of the Industrial Code (12 NYCRR Ch 1, sub. A), by failing to provide plaintiff with adequate protection against the risk of falling from a height and the risk of being struck by a falling object. Additionally, the pleadings assert that the ladder provided, which was unsecured, constituted insufficient protection against workplace falls. Plaintiff also alleges that the goggles provided did not adequately protect his eyes from the risk of falling objects. Plaintiff asserts that, although he wore a safety harness and lanyard to prevent falls, there was no safe anchor point to attach or tie it off to. In sum,

³ A task also referred to as "stripping forms."

plaintiff concludes that defendants' failure to adequately protect him from falling from a height and from being struck by falling objects violated Labor Law § 240 (1) and § 241 (6).

With regard to Labor Law § 200 and common-law negligence, plaintiff claims that Foremost is vicariously liable for violating Labor Law § 200 and the common-law duty of care, without regard to fault or responsibility. Plaintiff avers in his complaint that these Labor Law violations and negligent acts or omissions proximately caused his personal injuries. Lastly, plaintiff states that there is no dispute that he was on a construction site performing construction work. Accordingly, plaintiff seeks damages against defendants for these violations.

After the defendants answered the complaint, discovery, motion practice, and the commencement of a third-party action followed. As relevant here, the third-party claims involve indemnification, both contractual and common-law, contribution, and breach of contract, specifically referring to the covenant to purchase and maintain insurance coverage. On June 28, 2022, plaintiff filed a note of issue with a trial by jury demand, certifying that discovery is complete and that this matter is ready for trial. The instant motions for summary judgment ensued.

Plaintiff's Motion for Summary Judgment

In support of the instant motion, plaintiff initially argues that the record demonstrates that Labor Law § 240 (1) was violated, and that said violation proximately caused his injuries. Plaintiff claims that it is undisputed that an unsecured piece of concrete fell from an elevated height, striking him in the eye, and that, consequently, he then fell from an unsecured A-frame ladder that shifted underneath him. Plaintiff also contends that the

statute required the defendants, owner and contractor, to have provided him with protective equipment against both the risk of falling and the risk of being struck by a falling object. Plaintiff asserts that these facts demonstrate that the statute was violated and that the violation proximately caused his injuries.

Plaintiff asserts that he was employed by CCC as a carpenter in connection with the concrete superstructure work at the subject building. Plaintiff also asserts that immediately prior to the accident, he was removing (stripping) previously-installed concrete forms used to construct the superstructure. Plaintiff argues that, for purposes of Labor Law § 240 (1), he was a protected worker performing a protected activity. Accordingly, plaintiff conclude that the defendants were required to provide him with proper protection against elevation-related risks he might encounter while performing his work. Lastly, plaintiff emphasizes that this duty to provide proper protection is non-delegable, and defendants, as statutorily defined “owner” and “contractor,” are subject to absolute vicarious liability for the breach of this duty without regard to responsibility or fault.

Regarding the ladder, plaintiff contends that it was not secured (i.e., not tethered, bolted or held by a co-worker) when he was removing the forms and associated material from the concrete wall. He emphasizes that although he wore a safety harness and lanyard, there was no place to attach his lanyard to so that he could employ this fall arrest system.

Plaintiff also contends that it is undisputed that the ladder shifted underneath him immediately after he was struck by the piece of concrete. Plaintiff claims that this caused both him and the ladder to fall to the ground, and argues that because the unsecured ladder failed to remain steady and erect, or to otherwise perform its function in supporting him, the

defendants violated § 240 (1) by failing to supply an appropriate and properly placed safety device to protect plaintiff against the risk of falling.

Plaintiff avers that appellate courts have held that, in the construction context, when a protected worker who was using a ladder shows that the ladder was unsecured and shifted, causing the worker to fall, a prima facie Labor Law § 240 (1) case is established. Plaintiff emphasizes that he is not required to prove that the unsecured ladder was defective to establish his prima facie entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim. Accordingly, plaintiff reasons that the defendants, to avoid liability, must demonstrate that he was either a recalcitrant worker or that his own unwise actions were the sole cause of the accident. Plaintiff contends that there is no evidence herein that he committed any wrongful act or omission, and as such, there is no material issue of fact. In sum, plaintiff concludes, the defendants' breach of the nondelegable duty imposed by Labor Law § 240 (1), the duty to provide him with a properly secured ladder that would have allowed him to safely perform his work at an elevated height, was a proximate cause of his fall and resulting injuries. For these reasons, plaintiff concludes that his motion should be granted insofar as it seeks summary judgment on the issue of defendants' liability pursuant to Labor Law § 240 (1).

Plaintiff next points out that Labor Law § 240 (1) also requires "owners" and "contractors" to provide their workers with proper protection against the risks associated with falling objects. Plaintiff notes that he was not only exposed to the risk of falling from an unsecured ladder, but that his work, which involved removing forms and related materials from concrete, included the risk of an object striking him from above. Plaintiff claims that

it is undisputed that he was struck in the eye by a piece of concrete that fell from an elevated height. He asserts that the defendants' failure to provide him with proper protection against the risks from falling objects also constitutes a violation of Labor Law § 240 (1).

Specifically, plaintiff asserts that, in a falling object case, Labor Law § 240 (1) imposes absolute and nondelegable liability on owners, contractors and their agents for failing to provide adequate safety devices against the risks of either an object that falls during the course of being hoisted or secured or an object that required securing for the purposes of the undertaking at the time it fell. In either case, Labor Law § 240 (1) liability is imposed if the falling object was either unsecured or inadequately secured by a safety device of the kind enumerated in the statute. Here, plaintiff contends that the record establishes that the foreseeable risk of falling pieces of concrete required the defendants to provide him with proper protection against that risk, and that the safety device (goggles) provided to him was not adequate to protect against the risk of falling objects. Plaintiff also claims that it is undisputed that the object struck and injured his eye. Therefore, plaintiff reasons, the record establishes (in the falling-object context) that the defendants violated Labor Law § 240 (1) and that the violation proximately caused his injuries. Plaintiff concludes that he is entitled to summary judgment against the defendants on the issue of liability pursuant to Labor Law § 240 (1) on this ground as well.

Anticipating defendants' arguments in opposition, plaintiff alleges that the record establishes that he was not the sole proximate cause of his accident. Plaintiff acknowledges that an injured worker is not entitled to recover damages pursuant to Labor Law § 240 (1) if the worker's foolish acts or omissions were the sole proximate cause of the worker's injuries.

However, plaintiff continues, a Labor Law defendant's burden of proof for this defense is high. Plaintiff emphasizes that a Labor Law § 240 (1) violation is excused only if the worker's acts were the "sole" proximate cause of the plaintiff's injuries. Plaintiff contends that otherwise, if a Labor Law § 240 (1) violation is established as a proximate cause of an injury to a worker, absolute statutory liability is imposed irrespective of the worker's contributory fault. Plaintiff also emphasizes that defendants' duty to provide proper protection against elevation-related risks is nondelegable, and thus cannot be transferred to the injured worker. Here, plaintiff reasons, given that there was no equipment to prevent the falling piece of concrete from injuring his eye, and that the subject ladder was unsecured and shifted while he stood on it, the record establishes that his actions cannot be deemed the sole proximate cause of his accident. Plaintiff further argues that appellate courts have held that the Labor Law does not require an injured worker to have acted in a manner that is completely free from negligence, and if a statutory violation is a proximate cause of an injury, the injured worker cannot be held solely to blame. In sum, plaintiff concludes that because the defendants breached their absolute, statutory, nondelegable duty to provide him with proper protections against elevation-related hazards, he has established his prima facie entitlement to judgment as a matter of law against the defendants on the issue of liability pursuant to Labor Law § 240 (1).

Plaintiff also alleges that he is entitled to summary judgment against Foremost with respect to his Labor Law § 200 and common-law negligence claims, arguing that Foremost, the general contractor, had the authority to control the injury-producing work; that a general

contractor has a nondelegable duty to keep a construction site safe; and that its contractual relationship with a subcontractor cannot modify that duty.

Plaintiff notes that Labor Law § 200 codifies the common-law duty to keep the workplace safe and acknowledges the two broad categories of Labor Law § 200 which the cases fall into: those involving dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. Plaintiff claims that, to the extent that his injuries are considered to have arisen a result of the manner in which his work was performed, Foremost breached the applicable duty. He further claims that in order to complete his assigned task, he was required to utilize an unsecured ladder in an area without a spot where he could attach his lanyard. Plaintiff also asserts that Foremost, as general contractor, had the authority to control the manner in which the work at the site, including the work of its subcontractors, was performed. Plaintiff contends that it is undisputed that Foremost hired all subcontractors for the project, had its principals and staff present at its field office on the ground floor of the construction site, held daily meetings for foremen and project managers, and was contractually responsible for all construction means, methods, sequences and techniques. Plaintiff also contends that the record shows that Foremost's supervisory personnel would inspect the site daily when they would check for general progress, or unsafe conditions, and would create daily inspection logs. Plaintiff argues that Foremost would typically have its agents inspect and evaluate the condition of ladders and other subcontractor equipment during their walkthroughs, and would also inform foremen if any equipment was found to be in bad shape. Plaintiff further argues that Foremost was responsible for ensuring that all workers were wearing appropriate personal protective

equipment, for logging and reporting any violations, and for restricting access to the site to any violators. Plaintiff additionally argues that Foremost's supervisory personnel had full authority to stop the work if they believed anything was being done in an unsafe manner. Plaintiff concludes that the record thus demonstrates that Foremost had the authority to oversee and control the work of the on-site subcontractors with respect to the means and methods of their work, and, therefore, is subject to liability pursuant to both Labor Law § 200 and common-law negligence principles.

Defendants' Motion for Summary Judgment

In support of their motion for summary judgment, defendants initially argue that plaintiff does not have sustainable Labor Law § 200 and common-law negligence claims against them. Defendants note that Labor Law § 200 codifies the common-law duty to keep workplaces safe, and that, as applied to a construction site, this duty requires the premises owner and contractors to keep work areas and equipment reasonably safe and in good condition.

Defendants assert that there are two types of Labor Law § 200 claims. In the first type, if an accident occurs as a result of the means or methods of the work, a party that had both the authority to supervise or control the work, and the responsibility for how the work is performed, is subject to liability pursuant to Labor Law § 200. However, the defendants argue that this authority is narrowly defined, and that the right to generally supervise the work, stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications, is insufficient to impose liability under Labor

Law § 200. Instead, defendants contend, only actual supervision, direction or control of the work performed by the plaintiff qualifies for such liability.

The second category involves a hazardous premises condition, where an owner or contractor is subject to liability pursuant to Labor Law § 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it.

In either case, the defendants argue that the plaintiff's claims are unsustainable. Defendants assert that it is uncontroverted that they did not control or supervise the means and methods of the plaintiff's work, and argue that the plaintiff's testimony establishes that it was his foreman at CCC, rather than any agent of the defendants, who supervised the means and methods of plaintiff's work. Defendants note that the plaintiff testified that the ladder was in good condition. The defendants maintain that they did not create any condition on the premises, let alone a hazardous one, that contributed to the plaintiff's accident. The defendants further argue that, to the extent that the concrete wall and forms or related materials constituted a dangerous condition (which defendants do not concede), the record shows no facts from which this court can find that defendants had actual notice of the same. Lastly, to the extent plaintiff alleges that defendants had constructive notice of a dangerous condition, the defendants argue that plaintiff must show that the subject hazard was apparent for an appreciable length of time prior to the accident. Here, the defendants contend there is no such showing. Thus, defendants conclude that plaintiff's Labor Law § 200 and common-law negligence claims are unsustainable, irrespective of

plaintiff's legal theory, and therefore this court should award defendants summary judgment dismissing such claims.

Defendants also argue that they are entitled to summary judgment on their third-party claims with respect to defense and indemnity against CCC. They note that Foremost hired CCC, pursuant to a written construction agreement, to perform concrete superstructure work. They point out that the subject agreement contains a broad indemnification clause, through which CCC agreed to hold defendants harmless for all claims that arise under CCC's work. Further, defendants state that the subject indemnity provision contains the qualifier that the obligation to indemnify is to the fullest extent permitted by law, and that as such, the provision is enforceable under the General Obligations Law.

The defendants contend that it is undisputed that plaintiff was employed by CCC at all relevant times, and that plaintiff's accident arose out of the concrete superstructure work performed by CCC. Defendants claim that the subject indemnity provision was applicable and in effect at all relevant times, and is enforceable to the fullest extent permitted by law. The defendants additionally argue that the issue of whether CCC's negligence contributed to causing the accident is a non-issue and is irrelevant. Defendants reiterate that their agents committed no negligent acts or omissions that contributed to causing the subject accident, and, as such, if they are liable for plaintiff's injuries, their liability is merely vicarious and passive; they would be held vicariously responsible for another company's active negligence. Lastly, defendants reiterate their contention that none of their agents supervised or controlled plaintiff's work. In sum, defendants reason that based on this record, the subject written indemnity provision contained in the agreement executed by CCC

was valid, enforceable, and in effect at all relevant times. Accordingly, defendants conclude that they are entitled to partial summary judgment on their claim for contractual indemnification against CCC.

Lastly, defendants contend that they are also entitled to summary judgment against CCC on their claim for common-law indemnification. Defendants argue that the common-law principle of indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. Defendants characterize their potential liability as purely vicarious under Labor Law § 240 (1) and assert that common-law indemnification is warranted where a defendant's role in the plaintiff's injury is solely passive, leading to purely vicarious liability.

Defendants claim that CCC was the only entity responsible for, or exercised control over, the concrete superstructure work, including worker safety. They also claim that plaintiff testified that all his work was supervised by his foreman, Mauricio, from CCC, and that no agent of the defendants supervised plaintiff's work. As such, the defendants contend that none of their agents could have committed a negligent act or omission which could have contributed to the subject accident, and that only CCC could have been the actively negligent party. For these reasons, the moving defendants conclude that this court should grant the branch of their motion seeking common-law indemnification against CCC.

CCC's Motion for Summary Judgment

In support of its motion for summary judgment dismissing plaintiff's complaint and dismissing all third-party claims asserted against it, third-party defendant CCC contends that

plaintiff's claims lack merit and must be dismissed. With respect to Labor Law § 240 (1), CCC argues that not every worker who falls at a construction site automatically qualifies for the extraordinary protections of Labor Law § 240 (1). CCC claims that a successful Labor Law § 240 (1) plaintiff must show not only that the plaintiff suffered injuries as a result of either a fall from a height or being struck by a falling object, but also that the gravity-related accident was caused by a violation of the statute—in other words, caused by a failure to provide adequate protection against such risks.

CCC contends that the record establishes that it provided plaintiff with adequate protection against gravity-related risks. CCC first points to the subject ladder, an eight-step, fiberglass, A-frame ladder provided by CCC, and argues that according to plaintiff's sworn testimony, the ladder was in perfect condition immediately prior to the accident. CCC also claims that the record indicates that the ladder was stable and had anti-skid feet. CCC further argues that plaintiff testified that he placed the open ladder on a debris-free concrete floor, and that it was acceptable for him to work by himself while performing the job that precipitated the accident. CCC contends that the ladder was placed correctly and at the correct height for plaintiff to reach the material he was tasked with removing. CCC asserts that the subject ladder was adequate protection against the risk of falling, and therefore no other safety device was necessary. CCC also asserts that, since the ladder that was provided was free of defects and was properly placed and secured, the record demonstrates no violation of Labor Law § 240 (1).

CCC notes that plaintiff testified that he did not lose his balance at any time before the piece of concrete hit his goggles and his eye, and that the subject ladder shifted only after

the piece of concrete hit him. CCC further notes that the subject ladder was still open when it fell to the floor. CCC argues that applicable appellate authority holds that when a ladder falls because of an intervening cause, there is no Labor Law § 240 (1) violation. CCC contends that the accident happened because plaintiff was startled when he was hit by the concrete and lost his balance, thereby causing the ladder to shift and fall over. CCC claims that this is undisputed, and argues that the record demonstrates that the ladder did not fail because of a defect or because it was improperly placed. As such, CCC maintains that Labor Law § 240 (1) was not violated.

With respect to plaintiff's Labor Law § 241 (6) claim, CCC first asserts that in order for an owner, contractor or agent to be liable under Labor Law § 241 (6), a plaintiff is required to establish a breach of an applicable rule or regulation of the Industrial Code that gives a specific, positive command and that any such violation proximately caused the alleged injuries. CCC further asserts that even if the worker alleges a breach of a specific Industrial Code rule, the Labor Law § 241 (6) claims are unsustainable if the identified rule is not applicable to the facts of the case. Here, CCC notes that plaintiff's bill of particulars alleges violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.11, 23-1.15, 23-1.16, 23-1.21, 23-1.30 and 23-3.3, but argues that these provisions are either inapplicable to the instant facts, are applicable to the facts but were not violated, and/or were not the proximate cause of the plaintiff's injuries.

With respect to § 23-1.5, CCC claims that the applicable subsections require that all employees are competent and that all available equipment and tools are kept sound and operable. Here, CCC argues that plaintiff testified that he was an experienced carpenter

who previously worked on concrete framing with at least three years of experience, and that plaintiff also testified that the subject ladder was in perfect condition. CCC notes that there is no allegation that plaintiff's (self-supplied) tools and equipment were unsound or inoperable. For these reasons, CCC contends that the record establishes that no actionable subsection of § 23-1.5 was violated.

CCC also claims that the record shows no violation of § 23-1.7, which applies to overhead hazards, arguing that plaintiff's testimony demonstrates that he was not injured by an overhead hazard. CCC further argues that a subsection of § 23-1.7 only applies to work areas where people may lawfully be frequenting, but where such employees are not required to work or pass, and that since plaintiff was an employee working in the area, this additional provision of § 23-1.7 does not apply.

CCC additionally claims that the record demonstrates that § 23-1.11 is either not applicable or was not violated, as this section addresses lumber and nail fastenings, and plaintiff does not claim that defects in lumber or nail fastening caused the accident. CCC argues that this provision only addresses the condition and dimensions of lumber used in construction of equipment or temporary structures, none of which are implicated here.

CCC further argues that § 23-1.15, which addresses the standards for safety railings, is also inapplicable, as the record shows that the ladder used was sufficient for plaintiff to perform his work. CCC contends that the work did not require a device that had a safety rail and maintains that it would neither be feasible nor necessary for such a device to have been utilized. As such, CCC concludes that this Industrial Code provision is also inapplicable to the plaintiff's accident.

CCC also asserts that § 23-1.16, which concerns safety belts, harnesses, tail lines, and lifelines, was not violated, and maintains that none of the subsections contained therein apply to the work being performed by plaintiff when the accident happened. CCC reiterates its contention that the only device required was the defect-free, A-frame ladder with anti-skid feet that plaintiff himself placed in the work area. CCC additionally notes that plaintiff's testimony indicates that when he fell, he was approximately four feet above the concrete floor, and argues that no combination of safety belt, harness, tail line or lifeline would have had the ability to engage and arrest plaintiff's four-foot fall, and that this equipment prevents falls of approximately six feet or more. Based on the foregoing, CCC concludes that plaintiff's reliance on § 23-1.16 is meritless.

CCC also claims that there was no apparent violation of § 23-1.21, noting that subsection (b) addresses the general requirements for ladders. However, CCC argues that plaintiff's testimony indicates that the fiberglass A-frame ladder he used was in perfect condition; that he placed the ladder on the concrete floor where there was no debris or construction materials; and that he tested the ladder before he climbed on it and confirmed it was stable where he placed it. CCC reiterates its contention that the record establishes that the ladder did not fail. CCC further argues that § 23-1.21 (c), which concerns rung and cleat ladders, is also inapplicable to the subject A-frame ladder. As plaintiff does not identify any other subsection of § 23-1.21 that is applicable, CCC concludes that plaintiff's reliance on this Industrial Code provision is meritless.

Finally, with regard to § 23-3.3, CCC notes that this provision, by its terms, applies only to demolition, arguing that plaintiff was not performing demolition when his accident

happened, and that he was removing forms and associated materials that are part of concrete installation. Accordingly, CCC reasons that § 23-3.3 is inapplicable to the facts of this case.

In sum, CCC claims that the Industrial Code provisions cited by plaintiff are all inapplicable to the instant facts, or, if applicable, were not violated. CCC concludes that since plaintiff cannot show that the violation of an applicable provision of the Industrial Code proximately caused his injuries, his Labor Law § 241 (6) claim lacks merit and must be dismissed.

CCC also asserts that plaintiff's Labor Law § 200 and common-law negligence claims against defendants are meritless. CCC notes that § 200 is merely a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work, and maintains that § 200 and common-law negligence claims are sustainable in only two situations: first, where the allegedly liable party supervised or controlled the work that produced the injury, and second, when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. CCC contends that, based on the record, neither situation existed here.

CCC claims that the record establishes that it alone supervised and controlled the performance of plaintiff's work at all relevant times, arguing that the plaintiff's deposition testimony indicates that he only received instructions from the CCC foreman, Mauricio Decosta, and that the foreman was the sole person with the authority to supervise and control the means and method of plaintiff's work. CCC also notes that plaintiff testified that he did not know who the owner of the subject premises was.

CCC argues that, to the extent the record shows that other persons/firms had any authority with respect to the work performed at the premises, such authority was limited to stopping work performed by CCC personnel if they saw its workers doing something on the worksite that was unsafe. CCC agrees that such activity is consistent with general supervisory authority, but argues that case law holds that such general supervisory authority is insufficient for imposing common-law negligence or Labor Law § 200 liability. CCC reasons that, to the extent plaintiff's Labor Law § 200 and common-law negligence claims are based on a "supervised or controlled" theory against defendants, such claims must be dismissed.

CCC further argues that if plaintiff is alleging that a dangerous or defective premises condition existed on the premises, Labor Law § 200 and common-law negligence claims require a showing that the owner (or its agents) either created the dangerous condition that caused the accident or had actual or constructive notice of same. CCC contends that two possible defective or dangerous conditions could have caused the accident: the subject ladder and/or the piece of concrete that allegedly struck him. CCC re-iterates its claim that plaintiff testified that the subject ladder was in perfect condition, and that he testified that he inspected the ladder the morning before and found it free of defects. Thus, CCC reasons that the subject ladder is not a dangerous or defective condition that contributed to the accident.

CCC contends that the second potential claim is related to the piece of concrete that allegedly struck the plaintiff. CCC claims that the concrete and related materials were an integral part of plaintiff's work, and argues that since it would not be unusual for a piece of

concrete to become dislodged while plaintiff was working, the piece of concrete cannot properly be considered a dangerous or defective premises condition. CCC contends that the record shows that neither the ladder nor the piece of concrete constituted a dangerous or defective premises condition sufficient to support a Labor Law § 200 or common-law negligence claim. Coupled with the lack of defendants' supervision or control of plaintiff's work, CCC argues that plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed.

CCC additionally notes that when asked at his EBT if he had requested additional safety equipment for his tasks prior to the accident, plaintiff demurred. CCC further notes that the plaintiff testified that he didn't need help from any co-workers in order to complete his assignment. CCC also contends that it is not believable that plaintiff's injuries are a consequence of his falling approximately four feet from a defect-free, stable ladder solely because he was startled when a small piece of concrete fell and struck his safety goggles.

CCC emphasizes that there were no witnesses to the subject accident, and that numerous supervisors and employees were at the worksite daily to enforce safety rules, conduct safety meetings, provide personal protective equipment, and maintain detailed daily safety logs. CCC points out that its foreman, Mauricio Decosta, who was the CCC representative that workers would generally report accidents to at the site, has averred that he did not learn about plaintiff's claim that he fell from the subject ladder until this litigation was commenced⁴. Mr. Decosta further averred that no incident or accident report

⁴ Plaintiff testified that he had several conversations with Mauricio Decosta about his accident [Doc 56 Page 123-126] as well as with another foreman at the worksite who he only knew as "cowboy" [id. Page 126], who told him to call the owner of CCC, which he did, and learned that the owner

corroborating plaintiff's allegations exists and that, after the alleged incident, plaintiff never advised him that he had been injured after falling from a height. Moreover, CCC continues, two other CCC supervisors—Mike Harmon, the project manager, and Louis Iannico, the safety manager—have both said that although they were present onsite daily and kept logs of all reported accidents, neither had any corroborating documentation of plaintiff's accident. Indeed, Mr. Iannico stated that he did not learn of plaintiff's allegations until well after the instant action was commenced. At his deposition, he testified that CCC employees are instructed to tell him if they are involved in a worksite accident; he authenticated his daily log and, specifically, the log entry for July 11, 2019, the date of the alleged accident; and he testified, and his log reflects, that he reported that no accidents occurred that day.

CCC also points out that Foremost's project manager, James Maddaloni, testified that none of his daily logs reflect that an accident occurred on July 11, 2019. During his deposition, he authenticated two Foremost records from the day of the accident and neither indicates that an accident occurred. He also testified that Foremost's July 11, 2019 daily report lacks any reference to plaintiff's alleged accident. Moreover, his testimony indicates that Foremost's owner, Anthony Piscione, completed a "Superintendent Inspection Log" on July 11, 2019 that similarly contains no corroboration of plaintiff's claims. Mr. Lastly, Maddaloni testified that he did not learn of plaintiff's alleged accident until after the instant action was commenced.

already knew about the accident [id].

CCC further argues that documents relating to plaintiff's medical complaints and workers' compensation claims stemming from the accident also belie his current allegations. CCC notes that its deposition witness testified that bills for plaintiff's medical treatment indicate that, one day after the accident, plaintiff underwent an eye examination and was only prescribed eye drops. CCC also argues that plaintiff's workers' compensation claim form, which he completed a month after the accident, does not indicate that he fell from a ladder. CCC points out that in the section of the form that asks: "How did the injury/illness happen?" plaintiff wrote "Cement pieces fell on eye[.]" CCC emphasizes that noticeably absent from plaintiff's response is any reference to a fall from a ladder.

In short, CCC accuses plaintiff of altering his testimony in order to "transform" the injury to his eye into a gravity-related accident under Labor Law § 240 (1). CCC claims that the record does more than merely demonstrate the existence of material issues of fact concerning plaintiff's veracity, but establishes that plaintiff's uncorroborated testimony about an unwitnessed fall from a ladder is incredible as a matter of law. CCC argues that the evidence, including plaintiff's own statement on a workers' compensation claim form, shows that he did not fall from a ladder on the date of the accident. Based on the foregoing, CCC contends that this court should grant its motion for summary judgment dismissing the complaint.

Turning to the third-party complaint, which asserts claims sounding in contribution, indemnity and breach of contract for failing to procure insurance, CCC argues that the defendants/third-party plaintiffs are not entitled to common-law indemnification or contribution because, at all relevant times, plaintiff was a CCC employee, and as such the

Workers' Compensation Law prohibits defendants' common-law claims for indemnification and contribution against CCC, the employer of an allegedly injured worker.

CCC notes that an exception to the Workers' Compensation Law prohibition exists if the employee alleges to have sustained a "grave" injury, as that term is defined therein, but argues that plaintiff is not alleging that the subject accident caused such an injury. Plaintiff claims that he has suffered injuries to his cervical spine, left shoulder and right eye, none of which, according to CCC qualifies as a "grave" injury for purposes of the Workers' Compensation Law prohibition against common-law contribution and indemnity. As such CCC argues that any third-party claims against it for common-law contribution and indemnity must be dismissed.

Alternatively, CCC contends that common-law contribution and indemnity against it are not available because the record establishes that CCC was not responsible for the accident. CCC notes that common-law indemnification arises in favor of one who is compelled to pay for another's wrong, pointing out that the doctrine applies when a party who is vicariously liable for injuries seeks reimbursement from a party whose negligent acts and omissions were the proximate cause of the injuries. CCC contends that the record shows that its agents committed no negligent act or omission that lead to plaintiff's accident, reiterates that the ladder provided to plaintiff had no defects and did not fail, and argues that if plaintiff's recitation of the facts of the accident is true, he only fell from the ladder because he was startled by the piece of concrete that struck him. CCC also claims that the record establishes that there were no hazardous conditions at the site. Therefore, CCC reasons that

it cannot be considered negligent, and that the defendants are not entitled to common-law indemnification or contribution from CCC.

Addressing the defendants' breach of contract claim for CCC's alleged failure to procure insurance, CCC contends that the record belies this claim and offers a copy of a general commercial liability policy, a copy of a certificate of insurance that identifies defendants as additional insureds, and a copy of its insurer's letter [Doc 95] dated July 13, 2020 agreeing to provide a defense to the owner and general contractor. Based upon the foregoing, CCC argues that it has complied with any contractual provisions requiring it to obtain insurance coverage to protect defendants.

Turning to the third-party claims seeking contractual indemnification, CCC maintains that this court should dismiss these claims. Specifically, CCC asserts that the anti-subrogation rule precludes these claims, pointing out that it and the defendants are all insured entities pursuant to the same general commercial liability policy, which insures against the same risks (in this case, the claim of a CCC employee stating that he was injured on the subject construction site). Accordingly, CCC reasons that allowing the defendants to obtain contractual indemnification against it would create a potential conflict of interest, and that situations like this implicate the anti-subrogation rule, which generally bars indemnity claims among parties covered by the same insurance policy for the same risk. However, CCC acknowledges that the rule only prevents indemnification claims for amounts up to the limit of the subject liability insurance policy. Accordingly, CCC concludes that it is entitled to summary judgment dismissing the third-party contractual indemnification claim to the

extent that plaintiff's recovery does not exceed the limits of the commercial general liability insurance policy purchased by CCC.

Lastly, CCC alternatively argues that the defendants are not entitled to contractual indemnification against it because plaintiff's claims do not implicate the indemnity provision contained in the written subcontract between CCC and Foremost. CCC acknowledges that the subject indemnity provision was in effect and enforceable at relevant times, but contends that the provision is not broadly worded. Specifically, CCC points out that the indemnity provision requires CCC to hold Foremost and "applicable entities" harmless only if the alleged negligent acts of CCC (or CCC's subcontractors) at the worksite resulted in an injury claim. In contrast, CCC argues that the record shows that CCC's agents committed no negligent act or omission that could have led to plaintiff's accident. Accordingly, CCC argues that, even assuming that the anti-subrogation rule does not apply, this court should grant CCC summary judgment dismissing the third-party claim for contractual indemnification on the additional ground that the written indemnity provision was not triggered.

Plaintiff's Arguments in Opposition

In opposition to defendants' and CCC's respective motions, plaintiff initially asserts that even if this court does not award him summary judgment against Foremost with respect to his Labor Law § 200 and common-law negligence claims, the record nevertheless demonstrates the existence of issues of fact with respect to same that warrant denial of Foremost's motion. Plaintiff reiterates that there are two categories of Labor Law § 200

claims: those where workers are injured because of a workplace hazard, and those involving the manner in which the work is performed. Plaintiff argues that his Labor Law § 200 claims are sustainable in both of these categories.

With respect to the “manner-of-work” category, plaintiff claims that it is sufficient to show that Foremost had the authority to control the injury-producing work for his § 200 claim to be viable. Plaintiff states that the record establishes that he was required to use an unsecured ladder at a part of the worksite where he could not attach his harness and lanyard to accomplish his directed task of removing formwork materials. Plaintiff notes that Foremost and its agents had broad authority to supervise and control the work on the construction site, as demonstrated by its written construction agreement with the premises owner. Specifically, plaintiff continues, the record shows that Foremost’s agents were present at the construction site daily, made daily inspections while checking for unsafe conditions, and filled out daily inspection logs, and plaintiff points out that if they witnessed anything unsafe about the superstructure work, they would direct CCC to remedy said condition. Plaintiff argues that Foremost had the authority to supervise or control the work that precipitated his injuries, and contends that since Foremost had such authority to direct or control his work, whether Foremost actually did so is irrelevant. Plaintiff claims that it is undisputed that Foremost was contractually responsible for the means, methods, sequences and techniques, and that Foremost’s agents engaged in daily job site inspection to check for and remedy unsafe conditions. As such, plaintiff avers that Foremost had the requisite authority to be subject to Labor Law § 200 liability.

Alternatively, plaintiff argues that a hazardous condition on the construction site caused his injuries and that Foremost had constructive notice of it. Plaintiff characterizes both the unsecured ladder and the unsecured piece of concrete that struck him as hazardous premises conditions, and claims that Foremost had constructive notice of both conditions. Given the expansive presence of Foremost's agents on the site, plaintiff claims that Foremost had a duty to discover and remedy these hazards. Plaintiff reasons that Foremost's failure to do so exposed it to Labor Law § 200 liability in the dangerous premises condition category. Plaintiff concludes that, therefore, not only should the defendants' and CCC's motions be denied insofar as they seek summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims, but also that plaintiff has established prima facie entitlement to summary judgment with respect to liability on said claims.

Plaintiff next opposes defendants' and CCC's arguments with respect to Labor Law § 240 (1). Initially, plaintiff claims that since the record establishes that defendants failed to provide him with adequate safety devices against both the risk of falling from an elevated height and the risk of being injured from a falling object, defendants breached their nondelegable duty, imposed by Labor Law § 240 (1), to provide him with adequate protective equipment against elevation-related risks. Plaintiff contends that none of the arguments proffered by his opponents rebut these facts.

Plaintiff claims that, in order to complete his directed task of removing formwork materials, he was required to stand on the sixth step of the subject eight-step ladder, and points out that his unrebutted testimony is that the subject ladder was not held in place while he used it. As such, plaintiff argues that the opinion proffered by defendants' engineer,

which mainly focuses on how the subject ladder was in excellent condition, are immaterial to his argument. Plaintiff states that, to the contrary, he is not required to prove that the ladder was defective in order to establish his prima facie entitlement to judgment as a matter of law. Instead, plaintiff contends that it is defendants' failure to secure the subject ladder, to ensure that it did not slip, shift or fall while plaintiff stood on it and performed his work, that constitutes the violation of Labor Law § 240 (1). Plaintiff claims that it is undisputed that the ladder that he was provided was unsecured, and that he had no co-workers present to stabilize the ladder for him. Thus, plaintiff continues, the § 240 (1) violation is evident from the record.

Plaintiff further argues that the defendants' contention that since he lost his balance before he fell from the ladder somehow precludes recovery pursuant to Labor Law § 240 (1) is meritless. Plaintiff notes that he testified that the ladder shifted when he was struck in the face by falling debris, causing him to fall and strike the ground. Plaintiff contends that appellate courts have held that a worker who is injured in a fall from a ladder that shifts or moves while he is working on it, as it did here, is entitled to judgment, as a matter of law, on the issue of liability under Labor Law § 240 (1). Indeed, plaintiff continues, the case decisions state that if an unsecured ladder moves, it is immaterial whether the worker slipped or otherwise lost his balance, and a loss of balance is not proof that plaintiff was the sole proximate cause of his injuries. Accordingly, plaintiff contends that, whether he lost his balance, and when he lost his balance relative to his fall, are irrelevant for Labor Law § 240 (1) purposes.

Plaintiff acknowledges that defendants claim that he was provided with a safety harness and lanyard, nevertheless, he claims that given the record, this fact is irrelevant. Plaintiff notes that he testified that there was no place to attach the lanyard to while he worked. Plaintiff also points out that his opponents' testimony and affidavits do not indicate any knowledge of where he was working on the date of the accident. Plaintiff also notes that one of defendants' experts stated that the harness, lanyard and an anchorage point would not have prevented plaintiff from falling. Alternatively, plaintiff reiterates that the failure to secure the ladder violated Labor Law § 240 (1) and contributed to the accident, and, therefore, for the purpose of analyzing proximate cause, the harness and lanyard are irrelevant.

Plaintiff claims that defendants' and CCC's remaining arguments are likewise meritless. He notes that CCC suggests that he could or should have asked for either additional safety equipment or help from a co-worker, an argument that, plaintiff avers, if accepted, would essentially delegate the duty imposed by Labor Law § 240 (1) to the injured worker. Plaintiff contends that this argument is foreclosed by the purpose of the statute. Plaintiff then addresses the defendants' and CCC's contentions that, aside from himself, there were no witnesses to the subject accident, asserting that applicable appellate authority rejects the contention that an eyewitness is required, and that such a claim is meritless. Similarly, plaintiff argues that CCC's contention that, despite the lack of any sworn testimony to the contrary, his recitation of the facts of the accident are "incredible as a matter of law," is wholly insufficient as a defense to plaintiff's prima facie showing of defendants' liability pursuant to Labor Law § 240 (1). Plaintiff also notes that CCC makes much of the

fact that neither its agents nor the defendants' agents documented his accident, to which plaintiff points to his uncontradicted testimony that the defendants failed to take his post-injury reporting seriously, which, plaintiff avers, likely led to their failure to document his accident. Plaintiff further states that his claim that an object fell and struck him in the eye is, in fact, documented, and argues that the defendants and CCC cannot defeat his prima facie showing merely by labelling his testimony "incredible" or "feigned." For these reasons, plaintiff concludes that, not only should defendants' and CCC's motions be denied with respect to Labor Law § 240 (1), but plaintiff's motion for summary judgment with respect to defendants' liability pursuant to Labor Law § 240 (1) should be granted.

CCC's Arguments in Opposition

In opposition to plaintiff's motion, CCC initially argues that plaintiff failed to comply with a procedural requirement in moving for summary judgment. CCC notes that 22 NYCRR § 202.8-g states that a party who moves for summary judgment must submit a separate concise statement of material facts in support of the motion. Here, CCC states that plaintiff failed to do so. As such, CCC claims that the plaintiff's motion should be denied on this procedural ground.

CCC also argues that plaintiff's motion should be denied because plaintiff did not satisfy his initial burden of proof for summary judgment, in that he failed to demonstrate that a violation of Labor Law § 240 (1) proximately caused his accident. CCC contends that the record establishes that it furnished plaintiff with an adequate and defect-free ladder, which he placed on a debris-free concrete floor to allow him to reach the area where he needed to work, and that plaintiff testified that the ladder was in perfect condition. CCC

notes that plaintiff testified that the fiberglass A-frame ladder was stable after he opened it and placed it on the concrete floor before starting to work. Additionally, CCC continues, plaintiff should not now be heard to suggest that the subject ladder was inadequate because, at his deposition, he suggested that no equipment other than the ladder was necessary for him to work.

CCC argues that plaintiff's testimony demonstrates that there is no prima facie showing that Labor Law § 240 (1) was violated in this case. CCC acknowledges that the subject ladder fell over, but claims that it was only as the result of a piece of concrete hitting plaintiff in the face which caused him to lose his balance. As such, CCC claims that the record shows that the ladder did not fall over because of a defect or because it was not appropriately placed, and argues that plaintiff has not demonstrated that Labor Law § 240 (1) was violated.

If the court finds that plaintiff has demonstrated prima facie entitlement to judgment as a matter of law, CCC alternatively claims that the record establishes that it has raised the existence of triable issues of fact. CCC offers the affidavit of a professional engineer who opines that the ladder was sufficient protection against the risk of falling, that other equipment (e.g., a personal fall arrest system consisting of a safety harness, lanyard and anchorage point) would not have prevented the accident, and that a scaffold would not have been appropriate. CCC additionally argues that the dislodged piece of concrete was the sole cause of the accident, and that because falling pieces of concrete were a risk integral to the work, the subject accident is not the type of construction site accident that qualifies for the extraordinary protections of Labor Law § 240 (1).

Lastly, CCC reiterates its position that plaintiff's testimony is feigned and designed to invoke Labor Law § 240 (1) protection. CCC characterizes plaintiff's testimony about how the alleged accident happened as incredible as a matter of law. CCC emphasizes that, prior to the summons and complaint, none of the paperwork relating to the subject accident mentioned a fall from a ladder. CCC also reiterates its contention that no witnesses or documents corroborate plaintiff's current version of events. For these reasons, CCC argues that this court should grant its motion insofar as it seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. In the alternative, CCC urges that this court deny plaintiff's motion for summary judgment, because the record shows the existence of material issues of fact as to whether Labor Law § 240 (1) was violated, and if so, whether the violation proximately caused plaintiff's alleged injuries.

Regarding plaintiff's Labor Law § 241 (6) cause of action, CCC argues that plaintiff has abandoned this claim, noting that while the complaint asserts a Labor Law § 241 (6) claim, plaintiff fails to address this cause of action in his motion for partial summary judgment. As such, CCC concludes that this court should dismiss the Labor Law § 241 (6) claim as abandoned.

CCC also argues that the record establishes that plaintiff's Labor Law § 200 and common-law negligence claims are meritless. CCC notes that only its foreman supervised, controlled or directed plaintiff's work, and that Foremost did not control the means and methods of the injury-producing work. Moreover, CCC adds that Foremost's agents neither had notice of nor created the allegedly dangerous condition that caused the accident. CCC further argues that the evidence shows that the on-site agents of Foremost, that is, its

owner, superintendent and project manager had, at most, the authority to stop the work if they witnessed an unsafe practice or condition. CCC claims that this sort of authority and agent's presence on a construction site does not constitute control over the manner in which the work is performed for Labor Law § 200 purposes. CCC also contends that the record belies any suggestion that a hazardous premises condition led to the accident. CCC maintains that, if plaintiff is to be believed, only two allegedly dangerous conditions could have caused the accident: the subject ladder and the piece of concrete that allegedly struck plaintiff. CCC reiterates that plaintiff testified that the subject ladder was in good condition, and thus, it should not be considered a hazard. Regarding the piece of concrete, CCC contends that it was not unusual for a piece of concrete to fall while plaintiff worked, and that having pieces of concrete dislodge and come off from a form is an integral and usual part of the work of removing forms and the associated materials. For these reasons, CCC concludes that this court should grant its motion to the extent that it seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. In the alternative, CCC argues that the record demonstrates material issues of fact as to whether a premises condition contributed to the alleged accident and whether any of defendants' agents had the requisite supervision and control of the work that precipitated the injury.

With respect to the third-party claims, CCC reiterates its argument that the Workers' Compensation Law bars any claim for common-law contribution or indemnity against it. CCC notes that it was the plaintiff's employer at all relevant times, and as such, no common-law indemnity claim is sustainable unless plaintiff suffered a "grave injury" while employed. CCC points out that Workers' Compensation Law § 11 defines "grave injury" and argues

that the pleadings in this case indicate plaintiff suffered injuries to his cervical spine, left shoulder, and right eye, which CCC contends, do not qualify as a “grave injury” under the statute, and, therefore, § 11 bars the third-party claims for common-law contribution and indemnification.

Alternatively, CCC claims that the third-party claims for common-law contribution and indemnification are unsustainable because CCC’s agents committed no negligent acts or omissions that led to the subject accident. CCC asserts that it provided plaintiff with defect-free equipment and did not direct plaintiff to use dangerous means and methods to perform his work. CCC argues that common-law indemnification and contribution are available only against a negligent party and, here, there is no evidence of CCC’s negligence. CCC contends that defendants’ arguments to the contrary are conclusory and unsupported by fact. For this additional reason, CCC argues that this court should dismiss the common-law contribution and indemnity claims against it.

CCC also reiterates its argument that this court should dismiss the third-party claim alleging CCC’s breach of contract and failure to procure and maintain applicable insurance coverage. CCC initially claims that by failing to address this claim in their motion for summary judgment, the defendants have abandoned it. Alternatively, CCC reiterates its claim that it has submitted proof of commercial general liability insurance coverage that names defendants as insureds and that it complies with the contract and was in effect at relevant times. Accordingly, CCC argues that the record belies any assertion that it breached the contract provision requiring it to maintain insurance coverage for defendants

in connection with the superstructure work, and, as such, the third-party breach of contract claim must be dismissed.

Lastly, CCC argues that the third-party claim for contractual indemnification is also not viable. First, CCC repeats its argument that the anti-subrogation rule precludes parties (here, defendants) from obtaining indemnification from another party (here, CCC) if all parties are insured under the same insurance policy for the same risk. CCC points out that there is no meaningful dispute that this is the case, and adds that the relevant insurer has already tendered a defense of this action to defendants. Since the factual basis for application of the anti-subrogation rule exists here, CCC contends that the third-party claim for contractual indemnification must be dismissed.

In the alternative, CCC argues that the pertinent indemnification provision contained in its written subcontract agreement with Foremost is inapplicable to the instant action. Specifically, CCC notes that the subject hold harmless provision states that CCC will indemnify Foremost and other applicable entities for negligent acts that result in injury. Here, CCC argues that no wrongful act or omission attributable to its agents led to the subject accident. As such, CCC reasons that the hold harmless provision in the subcontract has not been triggered. CCC also reiterates its position that plaintiff's testimony is inherently incredible and asserts that the subject accident did not happen as plaintiff now alleges. For these reasons, CCC urges this court to deny defendants' motion for summary judgment with respect to the third-party claims, and to instead grant CCC's motion for summary judgment dismissing all third-party claims.

Defendants' Arguments in Opposition

In opposition to plaintiff's motion, defendants initially argue that plaintiff's Labor Law § 200 and common-law negligence claims are not viable. The defendants point out that plaintiff testified at his deposition that only Mauricio, the CCC foreman, supervised his work and told him what work to perform. Defendants note that the plaintiff testified that he had never heard of either RS JZ Driggs or Foremost, and that the subject ladder was owned by CCC. Lastly, and contrary to plaintiff's assertion, the relevant written agreements specify that CCC was solely responsible for site safety during the superstructure work.

The defendants argue that the record demonstrates that only CCC directed and controlled the superstructure work, including plaintiff's work, and that, as such, there is no merit to any suggestion that defendants are subject to Labor Law § 200 or common-law negligence liability under the "means and methods" category. The defendants further add that only CCC's agents controlled the means and methods of the relevant work. The defendants conclude that, to the extent that plaintiff is asserting a "means and methods" argument, such an argument should be rejected as contrary to the record.

The defendants also argue that, to the extent that plaintiff is claiming that a premises hazard caused the accident, which defendants do not concede, the record demonstrates that defendants neither created nor had notice of any defective condition. The defendants reiterate their contention that CCC alone was responsible for its equipment and the superstructure work, and that the defendants' agents did not use or maintain either the subject ladder or the area where the accident occurred. The defendants maintain that their agents

could not have created or exacerbated any defect in either the ladder (which, according to plaintiff, was free of defects) or the concrete walls which plaintiff was removing formwork materials from. The defendants additionally maintain that there is nothing in the record that suggests that defendants' agents were apprised of a defect that led to the accident, or that the alleged defects were overtly visible for an appreciable length of time. For these reasons, and irrespective of which theory plaintiff relies on, the defendants aver that plaintiff's claims pursuant to Labor Law § 200 and common-law negligence lack merit and must be dismissed.

With respect to Labor Law § 240 (1), defendants adopt the reasoning and arguments submitted by CCC. The defendants note that certain documents, such as the form ostensibly executed by plaintiff in connection with attempting to secure Workers' Compensation Law benefits, have a narrative of the accident that omits any reference to ladders or falling. The defendants contend that this creates an issue of fact with respect to plaintiff's credibility. Defendants conclude that, as no party witnessed the accident, and no document corroborates plaintiff's present recitation of the facts, plaintiff has failed to demonstrate prima facie entitlement to judgment as a matter of law with respect to defendants' liability pursuant to Labor Law § 240 (1). Finally, the defendants also aver that plaintiff's motion should be denied because it was not supported by a statement of material facts.

In opposition to CCC's motion, defendants first assert that they are entitled to contractual indemnification against CCC because the accident arose while CCC was performing superstructure work at the construction site. Defendants accuse CCC of ignoring the language in the applicable written agreement that requires CCC to defend and indemnify defendants. Contrary to CCC's argument, the defendants claim that in order to

be entitled to contractual indemnification from CCC, they do not need to prove that CCC's negligent acts or omissions contributed to the accident. Instead, the defendants assert that all that is required to trigger CCC's contractual responsibility to indemnify defendants is a connection between the plaintiff's accident and the superstructure work. Defendants point out that such a connection is demonstrated in the record, and as such, CCC is contractually required to defend and indemnify the defendants in the instant matter.

The defendants contend that CCC's arguments about the anti-subrogation rule lack merit. Defendants note that CCC bases its argument on the allegation that its insurer is also covering the defendants, who are additional insureds under the same policy, that covers the same risks. The defendants acknowledge that CCC has provided a copy of a purported tender letter from its insurer, however, the defendants argue that a close reading of the letter indicates that the insurer has only agreed to tender a defense "subject to a reservation of rights." Accordingly, the defendants reason that, since the carrier may later take the position that the defendants are not covered with respect to the instant matter, the anti-subrogation rule does not apply. If the court finds that the anti-subrogation rule does in fact apply, the defendants alternatively argue that the claim for contractual indemnity is barred only up to the limits of the CCC policy.

Finally, the defendants reiterate their contention that they are entitled to common-law indemnification against CCC. Defendants point out that the doctrine of common-law indemnification allows a party that is only vicariously liable for the negligent acts or omissions of another to recover damages from the negligent party. As previously mentioned, the defendants claim that their agents committed no negligent acts or omissions

that led to the accident, but note that they are subject to vicarious liability pursuant to the Labor Law. Defendants argue that the record demonstrates that the accident occurred because CCC failed to ensure that plaintiff was provided with a secured ladder with which he could complete his assigned task of removing forms and materials, as required by the Labor Law. Defendants claim that CCC's negligence led to the subject accident for which defendants are subject to mere vicarious liability. For these reasons, the defendants maintain that they are entitled to common-law indemnification from CCC. The defendants conclude that this court should deny both plaintiff's and CCC's motions, and instead grant defendants' motion for summary judgment as against CCC.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[T]he 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be

granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]). Then, the court must evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Nevertheless, summary judgment “should not be granted where there is any doubt as to the existence of such issues or where the issue

is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman*, 3 NY2d at 404 [internal citations omitted]). “The court's function on a motion for summary judgment is ‘to determine whether material factual issues exist, not resolve such issues’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

However, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [1999]). More specifically, “averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). With these principles in view, the court turns to the substance of the motions.⁵

Labor Law § 200 and Common-Law Negligence

Regarding the portions of the motions that seek summary judgment with respect to plaintiff’s Labor Law § 200 and common-law negligence claims, the court notes that Labor Law § 200 states, in applicable part:

“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

⁵ The court’s reasoning is based on the sworn testimony and documents in the record other than the affidavits of the purported experts, which consist of little more than legal conclusions and justifications to support them; accordingly, these affidavits were disregarded (see e.g., *Wass v County of Nassau*, 166 AD3d 1052 [2018]).

shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons.”

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]). This duty “applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it” (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’” (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability “will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury” (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

“Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed” (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Here, irrespective of whether the instant matter should be analyzed as a “means and methods of work” case, or as a “hazardous condition” case, the court finds that plaintiff’s Labor Law § 200 and common-law negligence claims must be dismissed.

Under the “manner of work” analysis, “[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work” either the work that was performed by plaintiff or the work that produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, the record establishes that defendants did not control or supervise plaintiff, his work, or any CCC workers performing concrete superstructure tasks. Plaintiff specifically testified that he did not know who or what defendants RS JZ Driggs or Foremost were. Plaintiff’s testimony shows that he did not take instruction from defendants’ agents, and that, to the contrary, only Mauricio from CCC supervised his work and assigned him tasks. Therefore, if plaintiff’s injuries are considered a consequence of the manner of his work removing concrete forms and materials or, more generally, of CCC’s concrete superstructure work, the defendants are not subject to liability for causes of action sounding in common-law negligence and/or for violations of Labor Law § 200.

Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are sustainable against the defendants only if the claims are viable according to ordinary premises liability principles (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] [{"(w)here 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, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident"}]). Here, no premises hazard contributed to the accident. The only two instrumentalities of the accident are the subject ladder which plaintiff testified was in excellent condition, and the piece of concrete that struck him. Neither is a premises hazard.

The fact that plaintiff used the subject ladder and placed his tools in the work area where the concrete piece fell contradicts any suggestion that there was a visible defect on the premises for an appreciable length of time (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [{"a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"}]). Accordingly, and contrary to plaintiff's arguments, the court finds that no constructive notice of a hazardous condition exists in this record. The court also notes that there is no indication that any agent of the defendants had actual knowledge of any hazard, and there is no evidence in the record that anyone caused or exacerbated the complained-of dangerous conditions. Accordingly, since the record demonstrates that defendants' agents neither had notice (constructive or actual) of any defect, nor created or

worsened a dangerous premises condition, no defendant is subject to Labor Law § 200 or common-law negligence liability with respect to the plaintiff's accident.

Plaintiff's arguments to the contrary lack merit. The fact that the defendants had a duty (contractual or otherwise) to inspect the site, and actually did so, (even if inspections were daily) is insufficient to demonstrate an issue of fact as to the requisite supervision and control (*see Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [1998]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Enos v Werlatone, Inc.*, 68 AD3d 712, 713 [2009]; *Loiacono v Lehrer, Mcgovern, Bovis, Inc.*, 270 AD2d 464 [2000]; *Richichi v Constr. Mgt. Tech.*, 244 AD2d 540, 542 [1997]).

The fact that defendants had authority over site safety and had the right to stop work if a safety violation existed is immaterial, because the authority to enforce safety standards is insufficient to establish the control necessary to impose liability pursuant to Labor Law § 200 or common-law negligence (*Biance v Columbia Washington Ventures, LLC*, 12 AD3d 926, 927 [2004] ["(t)he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability"], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [2001]). Specifically, the right to generally supervise the work, to stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or common law negligence (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2012]).

The court finds that plaintiff's contention that an issue of fact exists regarding constructive notice similarly lacks merit, as plaintiff fails to identify anything in the record that indicates the alleged hazards existed for an appreciable length of time. It is insufficient for plaintiff to merely assert that defendants had constructive notice of hazards, and a general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*see e.g. Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]), as is vague testimony that does not establish the length of time an allegedly hazardous condition existed before the subject accident (*see e.g. Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]). Evidence of notice of a premises hazard must be specific in order to create an issue of fact (*see e.g., Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]), and no such evidence exists here. Based on the foregoing, the court finds that plaintiff has failed to demonstrate that defendants supervised or controlled his work or CCC's work, that they had any notice of any hazardous condition, or that they either created or exacerbated a hazardous condition. As such, the defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims (*see e.g., Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]).

Labor Law § 240 (1)

Labor Law § 240 (1) states, in relevant part, that:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the

performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . .”

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). The duty to provide the required “proper protection” against elevation-related risks is nondelegable, therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]).

This statute “is to be construed as liberally as may be” to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] [“a defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability”]).

Nevertheless, an accident alone does not establish a Labor Law § 240 (1) violation. Rather, the plaintiff is required to show that the violation was a contributing cause of the accident and consequent injury (*see e.g., Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]). Indeed, a successful cause of action under Labor Law § 240 (1) requires that the plaintiff establish both “a violation of the statute and that the violation was a proximate cause of his injuries” (*Skalko v Marshall’s Inc.*, 229 AD2d 569, 570 [1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Zimmer*, 65 NY2d at 524). A plaintiff alleging that the provided safety devices were inadequate must show that it was that inadequacy which proximately caused the alleged injuries (*Wilinski*, 18 NY3d 1 [2011]).

Generally, the issue whether a particular safety device provided proper protection is a question of fact for the jury (*see generally Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]). However, exceptions exist, and in certain situations an injured worker may demonstrate prima face entitlement to judgment as a matter of law with respect to Labor Law § 240 (1) (*see e.g. Melchor v Singh*, 90 AD3d 866, 868 [2011] [issue of “proper protection” under Labor Law § 240 (1) is question of fact except when safety device “collapses, moves, falls, or otherwise fails”]; *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2000] [liability pursuant to Labor Law § 240 (1) is a question of fact except when the device collapses, moves, falls]).

Labor Law § 240 (1) requires ladders to be placed and operated to provide proper protection against the risk of falling, and this duty includes the requirement that a ladder be secured. The court finds that, contrary to the contentions of defendants and CCC, the

plaintiff has established his prima facie entitlement to judgment as a matter of law against the defendants by submitting his uncontradicted deposition testimony, which shows that, at relevant times, he was performing “protected” construction work (*see e.g. Vasquez v Minadis*, 86 AD3d 604, 605 [2011]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]), and that the unsecured ladder on which he was standing moved, causing him to fall (*see e.g. Vicuna v Vista Woods, LLC*, 168 AD3d 1124 [2019]; *Gonzalez v AMCC Corp.*, 88 AD3d 945, 946 [2011]; *Blair v Cristani*, 296 AD2d 471, 472 [2002]). “It is well settled that failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [2018], quoting *Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381, 381 [1996]). Since there is no evidence that plaintiff was provided with a ladder that was both defect-free and properly secured, the court finds that the record demonstrates that the defendants violated Labor Law § 240 (1) (*but see Costello v Hapco Realty, Inc.*, 305 AD2d 445, 446-447 [2003] [no § 240 (1) liability if “plaintiff’s fall to the ground was the result of his having merely slipped off of a defect-free and *properly-secured* ladder” (emphasis added)]).⁶

The burden then shifts to the defendants and CCC, as the opponents of plaintiff’s motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), to overcome the motion by demonstrating an issue of fact. Their arguments, however,

⁶ The piece of concrete that struck plaintiff was not an object that “required securing for the purposes of the undertaking” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] and *Outar v City of New York*, 5 NY3d 731, 732 [2005] and did not fall “because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci*, 96 NY2d at 268).

lack merit. The contention that plaintiff is simply not credible is rejected as meritless. While it is true that “[i]t is not the court’s function on a motion for summary judgment to assess credibility” (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]), and “[t]he credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts” (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [1976]), here, no sworn testimony contradicts plaintiff’s version of how the accident occurred. The lack of any corroborating documentation in defendants’ records appears to be more a result of the failure of defendants’ agents to document plaintiff’s statements after the accident. Moreover, the mere fact that the accident was not witnessed by anyone other than plaintiff does not defeat his prima facie showing (*see e.g. Inga v EBS North Hills, LLC*, 69 AD3d 568 [2d Dept 2010]; *Melchor v Singh*, 90 AD3d 866 [2d Dept 2011]; *Rivera v Dafna Constr. Co., Ltd.*, 27 AD3d 545 [2d Dept 2006] [“the fact that the accident was unwitnessed does not preclude granting summary judgment to the plaintiff”], citing *Yurkovich v Kvarner Woodworking*, 289 AD2d 183, 184 [2001]; *Cruz v Turner Constr. Co.*, 279 AD2d 322, 323 [2001]; *Bras v Atlas Constr. Corp.*, 166 AD2d 401 [1990]).

The court notes that plaintiff testified that it was not until August of 2019 that he first experienced pain in his shoulder, which appears to be after his attorney had completed his application for Worker’s Compensation benefits [Doc 57 Page 55],⁷ and that he did not go for treatment right away. He testified that his neck hurt immediately after the accident, but

⁷ There is no evidence that plaintiff completed this form, and as plaintiff needed an interpreter for his EBT, it cannot be assumed that he in fact filled it out. He was not asked about this at his EBT.

his eye swelled up and hurt the most. He waited a few months to seek treatment for his shoulder and neck. At the time of his second EBT, September 14, 2021, he was still going to the chiropractor several times a week [Doc 57 Page 45]. Plaintiff testified that when he went to the hospital for medical treatment “the [insurance] number they have given me did not match, did not go through” [Doc 56 Page 128]. He also testified that he did not have Mauricio’s phone number, so he returned to the work site the day after the accident to try to talk to Mauricio Decosta, who was not on site at the time of his accident. Mauricio paid for plaintiff’s medications, he said, [id. Page 89] and when he saw plaintiff’s swollen eye, he told him which clinic to go to. Mauricio Decosta was not deposed and his statement is in an affidavit prepared by counsel. The other co-workers who plaintiff testified that he reported his accident to, specifically Luca and Bruno Gonzaga, were not deposed either. The person produced for an EBT by CCC was the concrete safety manager, who spent a good deal of his time doing paperwork in the office.

The court finds that any suggestions that plaintiff’s negligent acts or omissions were the only cause of the accident are also meritless. If an injured worker’s foolish conduct was in fact the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach (*see Tomlins v DiLuna*, 84 AD3d 1064, 1065 [2011]; *Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 642 [2009]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2009]). The proponent of an argument that an injured worker was the sole proximate cause of the his injuries must show that the plaintiff misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available (*see Robinson v East Med. Ctr., LP*, 6 NY3d

550, 555 [2006]; *Saavedra v 64 Annfield Ct. Corp.*, 137 AD3d 771, 772 [2016]). The court finds that the record here contains no evidence that plaintiff misused an otherwise adequate safety device or chose to use an inadequate device when proper devices were available (*see e.g., Gillett v City of New York*, 165 AD3d 1064 [2018]; *Rico-Castro v Do & Co. N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2009]). Likewise, the record fails to show that plaintiff deliberately refused to follow safety instructions or to use safety devices that were provided (*see e.g., Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). Indeed, these defenses are unavailable where, as here, the injuries were “at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential” (*Nunez v Bertelsman Prop., Inc.*, 304 AD2d 487, 488 [2003]; *see also Stolt*, 81 NY2d at 910 [recalcitrant worker defense “has no application where . . . no adequate safety devices were provided”]). Lastly, given the failure to secure the subject ladder while plaintiff stood on it, it is immaterial that the subject ladder was not defective (*Ocana v Quasar Realty Partners L.P.*, 137 AD3d 566, 567 [2016]).

The court finds that the remaining arguments, which attempt to shift responsibility to plaintiff, also lack merit. Given plaintiff's un rebutted sworn testimony that there was no place to attach his safety harness and lanyard, any speculation to the contrary is irrelevant (*see e.g., Gomez v Trinity Ctr. LLC*, 195 AD3d 502 [2021]). Also meritless is any suggestion that liability depends on the timing of when plaintiff lost his balance, since “[i]t is irrelevant whether plaintiff initially lost his balance before or after the ladder wobbled (*Plywacz*, 159 AD3d 543 at 544). Moreover, liability is not precluded because plaintiff

failed to ask a supervisor for a properly secured ladder (or for help from a co-worker). This is because:

“[t]he Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior . . . [t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place . . . [i]ndeed, workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work” (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [2014], citing *Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

Finally, since the defendants have not shown that plaintiff was the sole proximate cause of the accident, and since the plaintiff's uncontradicted sworn testimony indicates that the unsecured ladder shifted while plaintiff stood on it, causing him to fall, plaintiff's actions or inactions are not blameworthy for Labor Law § 240 (1) purposes (*see e.g. Mou Zou v Hai Ming Construction Corp.*, 74 AD3d 800, 801 [2010] [“Where, as here, a violation of Labor Law § 240 (1) is a proximate cause of an accident, the plaintiff's conduct cannot be deemed solely to blame for it”], citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Hugo v Sarantakos*, 108 AD3d 744 [2d Dept 2013]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2006]). Based on the foregoing, and the fact that it is undisputed that RS JZ Driggs LLC and Foremost are an “owner” and “contractor” as those terms are statutorily defined, plaintiff is awarded partial summary judgment with respect to the issue of defendants' liability pursuant to Labor Law § 240 (1).⁸

⁸ Plaintiff has failed to address or oppose the defendants' and third-party defendant's arguments that support summary judgment dismissing plaintiff's Labor Law § 241 (6) claims; accordingly, dismissal of these claims is implicitly conceded by plaintiff (*see Elam v Ryder Sys., Inc.*, 176 AD3d

The Third-Party Claims

The defendants' third-party claim that alleges that CCC breached the covenant to procure and maintain commercial general liability insurance which covers defendants must be dismissed. CCC has provided copies of the applicable policy, the certificate of insurance and a letter from the subject carrier tendering a defense of this action to defendants. The record thus shows that, contrary to the third-party plaintiff's claim, CCC has complied with its contractual obligation to procure and maintain insurance coverage for the defendants.

The defendants' third-party claim for common-law indemnification against CCC must also be dismissed. It is undisputed that plaintiff was an employee of CCC at all relevant times. Employers, such as plaintiff's employer, CCC, are immune from common-law indemnification except in a narrow class of cases in which the plaintiff sustained a "grave injury" (Workers' Compensation Law § 11; *see also Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415-416 [2004]). A "grave injury" is, by statute, "death, 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" (Workers' Compensation Law § 11).

Here, there is no allegation that plaintiff sustained any of the listed injuries. Since plaintiff did not sustain a "grave injury," and since it is undisputed that CCC was plaintiff's

675, 676 [2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]).

employer at all relevant times, defendants' common-law indemnification claim against CCC is unsustainable (*see e.g., Spiegler v Gerken Bldg. Corp.*, 36 AD3d 715 [2006]; *Angwin v SRF Partnership*, 285 AD2d 568, 569 [2001]), and that portion of defendants' motion is denied.

However, the court finds that the defendants are entitled to summary judgment with respect to their contractual indemnification claim against CCC. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Here, the applicable written agreement demonstrates that CCC must hold Foremost and RS JZ Driggs harmless for all personal injury claims which arise or result from the superstructure work [Doc 55 ¶ 1]. It is not disputed that the instant claims arose from CCC's work, but CCC argues that the hold harmless provision is not triggered because the record is devoid of any negligence on its part. The court disagrees with this interpretation of the contract's indemnification clause. CCC, a subcontractor on a construction site, was required by Labor Law § 240 (1) to ensure that the subject ladder was secured while plaintiff used it. CCC's failure to do so constitutes negligence, and, as such, the instant claims are attributable to CCC's negligence. Since the applicable indemnity provision was in effect at all relevant times, and since there is no indication that the defendants are attempting to have CCC indemnify them for their own negligence (*cf. General Obligations Law* § 5-322.1 [1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997] [for a party to be entitled to indemnification, it must demonstrate that no negligent act or omission on

its part contributed to the accident and that its liability is therefore purely vicarious]), the defendants are awarded summary judgment on the issue of contractual indemnification against CCC.⁹ If the parties are unable to resolve any claims for reimbursement for past attorneys' fees, defendants should make a motion for such relief.

Conclusions

Accordingly, it is hereby

ORDERED that the motion of plaintiff Valdete Ferreira-Mendes (mot. seq. 3) is granted solely to the extent that plaintiff is awarded partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against defendants/third-party plaintiffs RS JZ Driggs LLC and Foremost Contracting and Building, LLC, and the remainder of the motion is otherwise denied; and it is further

ORDERED that the motion of defendants/third-party plaintiffs RS JZ Driggs, LLC, RS JZ Driggs Holdings, LLC, Redsky Capital, LLC, and Foremost Contracting & Building LLC (mot. seq. 4) is granted to the extent that plaintiff's Labor Law § 241 (6),¹⁰ Labor Law § 200, and common-law negligence claims are dismissed, and that these defendants are awarded summary judgment on their claim for a defense and for contractual indemnification against third-party defendant Concrete Courses Concepts Corp., and the remainder of the motion is otherwise denied; and it is further

⁹ The court notes, however, that the anti-subrogation rule applies. Defendants are entitled to indemnification only for payments beyond the policy limits of the subject comprehensive general liability policy (*see e.g., ELRAC, Inc. v Ward*, 96 AD2d 58, 78 [2001]; *Lodovichetti v Baez*, 31 AD3d 718, 719 [2006]).

¹⁰ Pursuant to the prayer for "such other and further relief."

ORDERED that the motion of third-party defendant Concrete Courses Concepts Corp., (mot. seq. 5) is granted to the extent that plaintiff's Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims are dismissed, and the third-party claims for common-law indemnification and for breach of the covenant to procure and maintain insurance are dismissed, and the remainder of the motion is denied.

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

E N T E R,



Hon. Debra Silber, J.S.C.