

Mejia v 770 Broadway Owner, LLC

2023 NY Slip Op 32044(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 160479/2016

Judge: Francis A. Kahn III

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

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

-----X

PEDRO MEJIA,

Plaintiff,

- v -

770 BROADWAY OWNER, LLC, QUEST BUILDERS
GROUP, INC., LHOTSE CONTRACTING CORP., LHOTSE
CORP., AVALANCHE CONSTRUCTION GROUP INC., NEW
M&M GROUP INC., RB NY ENTERPRISES, INC.,

Defendant.

-----X

LHOTSE CORP.

Third-Party Plaintiff,

-against-

ROCK GROUP NY CORP.,

Third-Party Defendant.

-----X

ROCK GROUP NY CORP.,

Second Third-Party Plaintiff,

-against-

NEW M&M GROUP, INC. and RB NY ENTERPRISES, INC.,

Second Third-Party Defendants.

-----X

INDEX NO. 160479/2016

MOTION DATE

004 005 006

007 008 009

MOTION SEQ. NO. 010

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595346/2017

The following e-filed documents, listed by NYSCEF document number (Motion 004) 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 441, 442, 443, 444, 590, 591, 596, 597, 598, 599, 619, 620, 621, 622, 623, 624, 631, 640, 647, 648, 657

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 445, 558, 559, 560, 561, 562, 592, 593, 594, 595, 625, 632, 641, 649, 650, 658, 668, 669, 670

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 446, 626, 633, 642, 653, 659, 667

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 563, 564, 565, 566, 567, 605, 606, 608, 615, 627, 634, 638, 639, 643, 651, 652, 660, 665

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 008) 568, 569, 570, 571, 572, 573, 574, 575, 602, 603, 604, 611, 612, 613, 614, 628, 635, 644, 654, 661

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 009) 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 629, 636, 645, 655, 662, 671

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 010) 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 600, 601, 607, 609, 610, 616, 617, 618, 630, 637, 646, 656, 663, 666

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are determined as follows:

In this action, Plaintiff, Pedro Mejia, seeks to recover for injuries sustained on September 22, 2016, while present at a construction project at 770 Broadway, New York, New York. Plaintiff claimed at the time of his accident he was employed as a driver and flagman with Third-Party Defendant Rock Group NY Corp. (“Rock Group”). On the day of the accident, Plaintiff and other workers were tasked with reinforcing an existing sidewalk shed/scaffold at the site. Plaintiff claims he was injured when a cross-brace that was to be installed on the shed fell from where it had been leaned against the shed and struck him in the head and shoulder. Defendant 770 Broadway Owner LLC (“Broadway”) was the owner of the premises at issue and retained Defendant Lhotse Contracting Corp. (“Lhotse”) as a contractor to perform required repairs pursuant to New York City’s Façade Inspection Safety Program. Lhotse sub-contracted with Defendants Rock Group and Avalanche Construction Group Corp¹ to provide trade services and supplies on the project. Rock Group sub-contracted with RB NY Enterprises, Inc. (“RB NY”) and New M&M Group Inc. (“M&M”) to install and dismantle scaffolding and sidewalk sheds. Defendant Quest Builders Group, Inc. (“Quest”) was apparently engaged by non-party AOL, a tenant at the subject premises, to perform interior demolition and renovation of its office space on the ninth floor.

¹ Plaintiff’s complaint and all crossclaims against this Defendant were dismissed without opposition by order of this Court dated July 14, 2022 (NYSCEF Doc No 338).

Regarding the occurrence, Plaintiff testified that just prior to the accident he was acting as a flagman controlling pedestrian traffic where the other Rock Group employees were installing the cross-bracing on the scaffold. He averred that Jose Diaz (“Diaz”) was Rock Group’s foreman on-site that day and he directed him to hold a straight ladder on which Diaz was standing. Plaintiff stated that he only took instructions from Diaz and Rocky a/k/a Mr. Singh. The ladder was leaning against the scaffold and Plaintiff said Diaz was said standing about two feet above him. Plaintiff stated that he was standing with one foot on the bottom rung of the ladder and the other on the sidewalk holding the ladder for roughly three minutes before he was struck in the head, then the shoulder with a sixteen-foot-long metal pipe. He did not know the weight of the pipe, but stated that he could lift it, perhaps with one hand, without assistance.

Plaintiff admitted that his knowledge concerning how the pipe came to strike him was based upon what a witness to the accident, another Rock Group employee, told him afterwards. He claims he was informed that a Rock Group worker that was working on top of the scaffold contacted or kicked the pipe which was on the sidewalk and leaning vertically against the shed. Plaintiff testified that the pipe that struck him had been delivered that day and was to be installed on the scaffold. He also stated a Rock Group worker confessed to placing the pipe against the scaffold. Plaintiff stated that the pipe was in place for at least ten minutes prior to the accident.

Plaintiff commenced this action to recover for injuries he sustained and pled in his second amended complaint causes of action for violation of Labor Law §§ 200, 240[1] and 241[6] as well as common law negligence. Defendant Broadway answered and pled ten [10] affirmative defenses as well as crossclaims against Defendants Quest, Lhotse, M&M and RB NY for common-law indemnification and contribution and contractual indemnification. Defendants Lhotse and Lhotse Corp. answered jointly and asserted nine [9] affirmative defenses as well as crossclaims against Defendants Broadway, Quest, M&M, RB NY for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to obtain insurance. Quest answered and pled thirteen [13] affirmative defenses as well as crossclaims against Broadway, Lhotse, New M&M and RB NY for common-law indemnification and contribution. Defendant M&M answered and pled sixteen [16] affirmative defenses as well as a crossclaim against RB NY for common-law indemnification and contribution. Defendant RB NY answered and pled seventeen [17] as well as a crossclaims against all co-Defendants for common-law indemnification, contribution and breach of contract for failure to obtain insurance.

Lhotse commenced a third-party action against Rock Group before it was added as a direct defendant whereby it pled causes of action for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to obtain insurance. Also, before its joinder as a direct defendant, Rock Group commenced a third-party action against M&M and RB NY for common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to obtain insurance. The crossclaims and counterclaims contained in the answers to these impleader actions are all duplicated in the answers served to Plaintiff’s second amended complaint.

Now, Defendant Lhotse moves (Mot Seq No 4) pursuant to CPLR §3212 for summary judgment dismissing the Plaintiff’s complaint and on its crossclaims against Rock Group, M&M and RB NY. Defendant M&M moves (Mot Seq No 5) pursuant to CPLR §3212 for summary judgment dismissing Plaintiff’s complaint as well as all crossclaims and third-party claims. Quest moves (Mot Seq No 6) for summary judgment dismissing the Plaintiff’s complaint as well as all crossclaims. Defendants RB NY moves (Mot Seq No 7) pursuant to CPLR §3212 and §3211 for summary judgment dismissing Plaintiff’s complaint as well as all crossclaims and third-party claims. Plaintiff moves (Mot Seq No 8)

pursuant to CPLR §3212 for partial summary judgment on liability under the Labor Law §240[1] cause of action. Defendant Broadway moves (Mot Seq No 9) pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint and against Lhotse on the crossclaim for contractual indemnification. Defendant Rock Group moves (Mot Seq No 10) pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint and counterclaims as well as for summary judgment against M&M and RB NY on its contractual indemnification claims. All the motions, in one form or another, are opposed.

“[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” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law §240[1]

I. Plaintiff's and Defendants' Lhotse, M&M, Quest, RB NY and Broadway motions for summary judgment on the Labor Law §240[1] claim.

Labor Law § 240[1] imposes “upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work’ for failure to provide workers proper protection from elevation-related hazards” (*see Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635 [2d Dept 2020] quoting *Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] quoting *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). “The purpose of the statute is to protect workers... ‘from the pronounced risks arising from construction work site elevation differentials’” (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]).

“In order to prevail on summary judgment in a Labor Law §240[1] “falling object” case, the injured worker must demonstrate the existence of a hazard contemplated under that statute “and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658, 662 [2014]). Specifically, a Plaintiff must prove when the object fell it was being “hoisted or secured” or “required securing for the purposes of the undertaking” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). This is because “not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240[1]” (*Narducci v Manhasset Bay Assoc.*, *supra* at 267). Conversely, a defendant seeking accelerated dismissal of a Labor Law “falling object” cause of action must demonstrate that a Plaintiff “was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240[1]” (*see Toefer v Long Island R.R.*, 4 NY3d 399, 407 [2005] quoting *Rodriguez v Margaret Tietz Ctr. For Nursing Care, Inc.*, 84 NY2d 841, 843 [1994]).

In this case, the metal pipe which was leaning against the scaffold was not material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell nor was it expected that the pipe required securing when it fell (*see Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]; *Atkinson v State*, 20 AD3d 739 [3d Dept 2005]; *see also Ruiz v Ford*, 160 AD3d 1001 [2d Dept 2018]; *Novak v Del Savio*, 64 AD3d 636 [2d Dept 2009]; *Zirkel v Frontier Communications of Am., Inc.*, 29 AD3d 1188 [3d Dept 2006]). Plaintiff's reliance on *Diaz v Raveh Realty, LLC*, 182 AD3d 515 [1st Dept 2020] is misplaced since in that case there was evidence that the falling object "would be secured by a rope when being removed from near the building's edge" and "that safety devices were required due to the risk that the formwork would fall" (*id.*). Here, Plaintiff admitted at his deposition that he had never seen a pipe tied to a sidewalk bridge before its installation. Thus, absent under the circumstances is proof the pipe fell because of the inadequacy or absence of a safety device of the kind contemplated by the statute (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Gualpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 418 [1st Dept 2014]).

Accordingly, Plaintiff's claim pursuant to Labor Law §240[1] fails as a matter of law.

Labor Law §241[6]

To establish liability on a Labor Law §241[6], a claimant must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable to the situation (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Each section of the Industrial Code relied upon by a claimant must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]).

To be entitled to summary judgment, Defendants were required to show that all the sections pled by Plaintiff were not concrete, inapplicable or did not cause his injuries (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020]).

As cited in the bill of particulars, Plaintiff relies on alleged violations of 12 NYCRR §23-1.7 and OSHA Reg §450[a]. However, in opposition to Defendants motions, Plaintiff offers no argument in support of these sections. In fact, no argument at all is proffered in support of the Labor Law §241[6] cause of action². By failing to raise any argument in support of these sections, Plaintiff abandoned reliance on same (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1st Dept 2022]; *Digirolomo v 160 Madison Ave LLC*, 294 AD3d 640 [1st Dept 2021]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

Even considering the above section on its merits, it is not applicable under the present circumstances. Industrial Code §23-1.7[a][1] requires that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects . . . be provided with suitable overhead protection". "As plainly expressed, this regulation only applies to places normally exposed to

² In opposition, Plaintiff cites Industrial Code §§23-2.1[a][1] and [2], which are not pled in his bills of particulars, but only to oppose dismissal of the Labor Law §200 and common-law negligence claims.

falling material or objects. Thus, where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply (*see Buckley v. Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]; *Amato v State*, 241 AD2d 400 [1st Dept 1997]). Here, the deposition testimony established that the area where the accident occurred, on the sidewalk next to the sidewalk shed, is not an area where workers are normally exposed to falling objects (*see Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49 [1st Dept 2012]; *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473 [4th Dept 2011]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824 [2d Dept 2009]; *McLaughlin v Malone & Tate Builders, Inc.*, 13 AD3d 859 [3d Dept 2004]; *Sears v Niagara County Indus. Dev. Agency*, 258 AD2d 918 [4th Dept 1999]). Moreover, the existence of the shed is proof Defendants provided the protection required under this section (*see Griffin v Clinton Green S.*, supra). To the extent Plaintiff may have been relying on subdivision [a][2] of section 23-1.7 of the Industrial Code, that provision is not applicable where, as here, to areas where employees are “required to work” (*see eg Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 831 [2d Dept 2012]).

Accordingly, Plaintiff’s claim pursuant to Labor Law §241[6] fails as a matter of law.

Labor Law §200 and Common Law Negligence

Defendants also seek to dismiss Plaintiff’s Labor Law §200 and common-law negligence claims. Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). “A claim for common-law negligence may lie even though there is no Labor Law § 200 liability” (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). “Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, supra at 143-144 [1st Dept 2012]). Although “[t]hese two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute as overlapping conditions frequently arise (*see eg Cackett v Gladden Props., LLC*, 183 AD3d 419, 420-421 [1st Dept 2020]; *Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018]). Here, the condition at issue seemingly presents a combination of the above categories (*see Cackett v Gladden Props., LLC*, supra).

Where the accident is a consequence of a defective condition on a premises “a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). “A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition ‘only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it’” (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], citing *Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). “Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca v Skanska USA Bldg. Inc.*, supra at 144; *see also Prevost v One City Block LLC*, supra [1st Dept 2017]). “[A] subcontractor . . . may be held liable for negligence where the work it performed created the condition that caused the plaintiff’s injury even if it did not possess any authority to supervise and control the plaintiff’s work or

work area” (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2d Dept 2011], citing *Tabickman v Batchelder St. Cond. by the Bay, LLC*, 52 AD3d 593, 594).

To be entitled to summary judgment dismissing Labor Law §200 and common-law negligence claims, Defendants were required to demonstrate, *prima facie*, that one or more of the essential elements of these claims are negated as a matter of law (*see Poon v Nisanov*, 162 AD3d 804 [2nd Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2nd Dept 2017]). A common-law negligence claim may also fail where it is shown a defendant owed no duty to the plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

It is unquestioned that neither Lhotse nor Broadway placed the pipe or caused it to fall. Broadway demonstrated with the testimony of Daniel Ruanova, its property manager, that it lacked actual or constructive notice of the leaning pipe. Further, his testimony demonstrated Broadway lacked control over the work site and the work performed by Rock Group. Plaintiff acknowledged, concerning supervision of his work, that he was unaware Broadway existed prior to the accident. As to notice of the condition, Plaintiff could only recall that pipe was leaning for ten minutes prior to the accident, an insufficient period to constitute constructive notice (*see generally Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.*, 185 AD3d 671 [2d Dept 2020]; *see also Gordon v American Museum of Natural History*, 67 NY2d 839 [1986]). With respect to Lhotse, its witness, Zbigniew Chrzanowski, demonstrated that, at most, Lhotse had oversight responsibility for Rock Group’s work which is insufficient to impose Labor Law §200 liability and that Lhotse lacked any notice of the condition at issue (*see Griffin v Clinton Green S., LLC*, *supra* at 48-49).

Defendants Quest and RB NY, both subcontractors, demonstrated with the deposition testimony of their representatives that neither had the authority to control the work site, direct Plaintiff’s work or created the condition that resulted in the accident. Therefore, Labor Law §200 was not applicable to Quest and RB NY (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Johnsen v City of New York*, 149 AD3d 822 [2d Dept 2017]) and neither owed a common-law duty of care to Plaintiff (*see Espinal v Melville Snow Contrs.*, *supra*).

Contrary to Defendant M&M’s arguments, there are issues of fact concerning its control of the work, notice and creation of the condition. Gil Menashe (“Menashe”), M&M’s president, testified that it subcontracted with Rock Group to perform scaffold work at the project. Although Menashe could not recall whether M&M performed any work at the project in September 2016, he admitted that it was “probable” M&M performed work for Rock Group at some “job site prior to September 26, 2016”. Menashe also averred that it was “possible” that M&M employed someone named Jose Diaz in September 2016. Prabhjit Singh (“Singh”), the general manager for Rock Group, confirmed that M&M was engaged to install sidewalk sheds at the project and provided laborers to facilitate same. Singh also stated that, to his knowledge, Rock Group never employed anyone named Jose Diaz. He also denied knowing who supervised the Plaintiff on the day at issue.

The finding of the Worker’s Compensation Board that Plaintiff was an employee of Rock Group is not automatically preclusive on this subject as against all parties and on all issues (*see Vera v Low Income Mktg. Corp.*, 145 AD3d 509 [1st Dept 2016] *O’Gorman v Journal News Westchester*, 2 AD3d 815 [2d Dept 2003]). A plaintiff is barred from relitigating a finding of the Worker’s Compensation Board concerning their employment status in a subsequent action (*see Chen v 111 Mott LLC*, 200 AD3d 594 [1st Dept 2021]). However, with respect to M&M, the issue before the Workers’ Compensation

Board is disparate from whether it can be liable under Labor Law §200 and the common-law. The Labor Law and Workers' Compensation Law have differing definitions of employer and employee (*see Vera v Low Income Mktg. Corp.*, supra at 510-511). The determination of the Workers' Compensation Board was not based on immutable facts but concerned a mixed question of law and facts which was founded predominantly in a determination that Plaintiff was a credible witness and Singh and Romel Balbuena of RB NY were not (*see O'Gorman v Journal News Westchester*, supra at 817). More importantly, absolutely no finding was made concerning M&M, its role at the site and its control, or lack thereof, over Plaintiff and his work.

Based on the above, and the testimony of Plaintiff, there are issues of fact as to who the other workers were employed and supervised by on the day of the incident. Without a definitive answer to this question, whether the offending condition was created or accident caused by an M&M employee is unresolved. Likewise, conflicting testimony regarding who Jose Diaz worked for renders it possible M&M exercised control over Plaintiff's work.

Accordingly, Plaintiff's Labor Law §200 and common-law negligence claims fail as against all Defendants except M&M.

Indemnification/Contribution and Insurance

I. Common-Law Indemnification

A claim for common-law indemnity can only be sustained by a non-negligent party whose liability is purely vicarious (*see Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 [1st Dept 2009]). Contribution is an apportionment of rights among wrongdoers who share responsibility for an injury (*see CPLR §1401; Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258 [1983]). Therefore, a *prima facie* case for dismissal of the indemnification and contribution claims requires the moving party to establish it was not negligent or that the claims are otherwise inviable as a matter of law (*see Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 511 [1st Dept 2020]; *CONRAIL v Hunts Point Terminal Produce Coop. Ass'n*, 11 AD3d 341, 342 [1st Dept 2004]).

Based on the foregoing determinations, the branch of M&M's motion for dismissal of the claims against it for common-law indemnification and contribution fail since it has not demonstrated an absence of negligence on its part as a matter of law (*see eg Hammer v ACC Constr. Corp.*, 193 AD3d 455 [1st Dept 2021]). However, with the finding that Defendants Lhotse, Broadway, Quest and RB NY were not negligent the common-law contribution and indemnification claims against these parties fail (*see Herrero v 2146 Nostrand Avenue Associates, LLC*, 193 AD3d 421 [1st Dept 2021]).

Rock Group argues, pursuant to Workers' Compensation Law §11, that the common law indemnification and contribution claims are not viable since it was Plaintiff's employer, and he did not sustain a grave injury. Within the narrow definition of the Workers' Compensation Law, the moving papers demonstrate Plaintiff did not sustain a "grave injury" (*see Castro v United Container Machinery Group*, 96 NY2d 398 [2001]; *Clarke v Empire General Contracting & Painting Corp.*, 189 AD3d 611, 612-613 [1st Dept 2020] *citing Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]). Further, the determination of the Worker's Compensation Board Panel (NYSECF Doc No 564) establishes that, within the meaning of the Workers' Compensation Law, Plaintiff was an employee of Rock Group (*see Konior v Zucker*, 299 AD2d 320 [2^d Dept 2002]; *see also Decavallas v Pappantoniou*, 300 AD2d 617 [2^d Dept 2003]). In opposition, the co-Defendants failed to demonstrate Rock Group's workers'

compensation coverage was not in effect at the time of the accident (*see Boles v. Dormer Giant, Inc.*, 4 NY3d 235 [2005]).

II. Contractual Indemnification

A claim for contractual indemnification claim is dependent upon the specific language of the contract (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel Service*, 194 AD3d 675, 678 [2d Dept 2021]). “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], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Wai Cheung v 48 Tenants’ Corp.*, 192 AD3d 503 [1st Dept 2021]). Where there is no legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, supra).

Generally, “[t]o obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability” (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020][internal quotation marks and citations omitted]). This is because “to the extent [a party’s] negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 A.D3d 660, 662 [2d Dept 2009]; *see General Obligations Law* § 5–322.1).³

Additionally, the proof necessary to establish a *prima facie* case on a claim for contractual indemnification depends on scope of the provision at issue. Broad indemnity clauses which are triggered when an accident arose out of or was related to a contractor’s work are “triggered solely by virtue of an accident occurring in the course of the employee's work” (*see Pimentel v DE Frgt. LLC*, 205 AD3d 591, 594 [1st Dept 2022]). Narrowly drawn indemnification provisions, for instance where negligence or some other act or omission by a contractor is compulsory, will require proof in the first instance of the indemnitor’s neglect or causal connection to the accident (*see Quiroz v. New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]).

Section 10.4 of the trade contract between Broadway and Lhotse provides, in pertinent part, as follows:

To the fullest extent permitted by law, Contractor shall indemnify, defend, save and hold Owner and Consultant, and all additional insureds set forth on Exhibit C and their respective partners, trustees, officers, members, directors, employees and anyone else acting for or on behalf of any of them (herein collectively called "Indemnitees") harmless from and against all liability, damage, loss, claims, demands and actions (including attorneys' fees as well as attorneys' fees incurred in connection with the enforcement of this indemnity) relating to personal injury, property damage, wrongful death or economic

³ However, if contemplated by the indemnity provision, partial indemnification may be available (*see Frank v 1100 Avenue of Americas Associates*, 159 AD3d 537, 538 [1st Dept 2018]).

loss (or any other matter for which insurance coverage is required of Contractor) which arise out of or are connected with, or are claimed to arise out of or be connected with:

- .1 Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (i) while Contractor is performing the Work, either directly or indirectly through a Contractor or materials Contract, or (ii) while any of Contractor's (of any tier) property, equipment or personnel are in or about such place or the vicinity thereof, provided the foregoing arise or result from the performance of the Work;

Section 4.6.1 of the terms and conditions subcontract between Lhotse and Rock Group reads, in pertinent part, as follows:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

The subcontracts Rock Group entered with RB NY and M&M have, in section 38, identical indemnification provisions which provide, in pertinent part, as follows:

To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor as well as all parties Contractor is required to name as additional insureds in connection with the subject jobsite, their officers, directors, agents, employees and partners (hereafter collectively "Indemnitees") from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought against any of the Indemnitees by any person or entity, arising out of or in connection with or as a result or consequence of the performance of the Work of the Subcontractor, as well as any additional work, extra work or add on work, whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor including any subcontractors thereof and their employees. Attorneys' fees, court costs, expenses and disbursements shall be defined without limit to include those fees, costs, etc. incurred in defending the underlying claim and those fees, costs, etc. incurred in connection with the enforcement of this Subcontract Agreement.

At the outset, as Defendant Quest demonstrated that no contract containing an indemnification provision existed between it and Lhotse, that claim fails as a matter of law (*see Royland v McGovern & Co.*, 203 AD3d 677, 679-680 [1st Dept 2022]).

Broadway demonstrated that under the very broad indemnification clause it is entitled to contractual indemnification from Lhotse. In any event, that branch of Broadway's motion was not opposed by Lhotse.

With dismissal of all Plaintiff's claims against Lhotse, it is absent negligence. However, the contract limits Rock Group's obligation to indemnify the covered parties to negligent acts or omissions caused by Rock Group, its "Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable". Here, the deposition testimony raises issues of fact as to exactly whose personnel, Rock Group or M&M, were working in the area of Plaintiff's accident. Even assuming the worker who placed the pipe and the one that caused it to fall acted negligently, absent determinative proof by whom they were employed and/or supervised, Lhotse failed to establish a *prima facie* case on this claim against Rock Group or M&M. This conclusion is unchanged even when the broader indemnification language of the Rock Group/M&M subcontract is considered since it still requires proof the accident arose out of, was connected with, resulted from or was the consequence of the performance of M&M's work.

As to RB NY, it demonstrated that Plaintiff's accident was not connected to its role at the site and, as such, the indemnification provision in its contract with Rock Group was not triggered.

As to Rock Group, the branches of its motion for summary judgment dismissing Lhotse's contractual indemnification claim and for summary judgment against M&M and RB NY are denied. Rock Group has not demonstrated it was not negligent or Lhotse was negligent. Entitlement to summary judgment against M&M and RB NY was not proven based upon the reasoning supra.

III. Breach of Contract for Failure to Procure Insurance

To be entitled to dismissal of Lhotse, RB NY and Rock Group's claims for failure to procure insurance, movants were required to demonstrate, *prima facie*, that the requisite insurance in accordance with their contracts was obtained or that no contractual obligation existed (*see eg Georges v Resorts World Casino New York City*, 189 AD3d 1549, 1551 [2d Dept 2020]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). Defendants Broadway, Quest, M&M and RB NY failed to address this issue in their moving papers at all. Rock Group offered no proof it obtained the required insurance.

Accordingly, it is

ORDERED that the branches of Motion Sequence Numbers 4, 5, 6, 7, and 9 for summary judgment dismissing Plaintiff's Labor Law §240[1] and §241[6] causes of action are granted, and it is

ORDERED that the branches of Motion Sequence Numbers 4, 5, 6, 7, and 9 for summary judgment dismissing Plaintiff's Labor Law §200 and common-law negligence claims are granted, except as to Defendant M&M, and it is

ORDERED that the branch of Lhotse's motion (MS# 4) for summary judgment on its claims for contractual indemnification against Rock Group, M&M and RB NY is denied, and it is

ORDERED that the branch of M&M's motion (MS# 5) to dismiss the contractual indemnification, common-law indemnification and contribution claims against is denied, and it is


ORDERED that the branch of Quest's motion (MS# 6) to dismiss the contractual indemnification, common-law indemnification and contribution claims against is granted, and it is

ORDERED that the branch of RB NY's motion (MS# 7) to dismiss the contractual indemnification, common-law indemnification and contribution claims against is granted, and it is

ORDERED that the branch of Broadway's motion (MS# 9) to for summary judgment on its contractual indemnification claim against Lhotse is granted, and it is

ORDERED that Rock Group's motion (MS #10) is granted only to the extent that all claims for common-law negligence and contribution against it are dismissed, otherwise the motion is denied, and it is

ORDERED that the branches of Motion Sequence Numbers 5, 6, 7, 9 and 10 to dismiss the claims of Lhotse, RB NY and Rock Group for breach of contract for failure to procure insurance are denied.

<u>6/16/2023</u> DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED	<input type="checkbox"/> FIDUCIARY APPOINTMENT	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.