

**Kryk v City of New York**

2023 NY Slip Op 32118(U)

January 23, 2023

Supreme Court, Richmond County

Docket Number: Index No. 152751/2017

Judge: Orlando Marrazzo, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK** Part C2  
**COUNTY OF RICHMOND**

-----X  
ROMAN KRYK,

Present:

**Hon. Orlando Marrazzo, Jr.**

*Plaintiffs,*

**DECISION AND ORDER**

*-against-*

**Index No. 152751/2017**

THE CITY OF NEW YORK, and NEW YORK CITY  
DEPARTMENT OF PARKS & RECREATION,

**Motion Nos. 003**

**004**

*Defendants.*

**005**

**006<sup>1</sup>**

-----  
THE CITY OF NEW YORK, AND NEW YORK CITY  
DEPARTMENT OF PARKS & RECREATION,

*Third-Party Plaintiffs,*

*-against-*

UTB-UNITED TECHNOLOGY INC., AECOM USA,  
INC., REGIONAL MANAGEMENT & CONSULTING,  
INC.,

*Third-Party Defendants.*

-----X  
The following papers numbered 1 to 12 including e-filed documents listed by NYSCEF documents numbers 99-180, were marked fully submitted on the 16<sup>th</sup> day of November, 2022:

**Notice of Motion for Partial Summary Judgment**

By Plaintiff, with Supporting Papers and Exhibits  
(dated July 21, 2022) ..... 1

**Notice of Motion for Summary Judgment**

By Third-Party Defendant AECOM USA, INC., with Supporting Papers and Exhibits  
(dated September 28, 2022)..... 2

**Notice of Motion for Summary Judgment**

\_\_\_\_\_  
<sup>1</sup> The Court allowed the late submission of the cross-motion by defendants/third-party plaintiffs THE CITY OF NEW YORK and NEW YORK CITY PARKS & RECREATION.

By Third-Party Defendant UTB-UNITED TECHNOLOGY, INC. with Supporting Papers, Exhibits and Memorandum of Law (dated September 28, 2022)..... 3,4

**Affirmation in Opposition**

By Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS and RECREATION to the Motions for Summary Judgment by Third-Party Defendants AECOM USA, INC., and UTB-UNITED TECHNOLOGY, INC., with Supporting Papers and Exhibits (dated November 10, 2022)..... 5

**Notice of Cross-Motion**

By Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS and RECREATION, with Supporting Papers and Exhibits and Affirmation in Opposition to Plaintiff’s Motion (dated October 19, 2022)..... 6

**Affirmation in Opposition**

By Third-Party Defendant UTB-UNITED TECHNOLOGY, INC. to the Cross-Motion by Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS and RECREATION, (dated October 25, 2022).....7

**Reply Affirmation**

By Plaintiff (dated October 25, 2022).....8

**Affirmation in Opposition**

By Third-Party Defendant REGIONAL MANAGEMENT & CONSULTING, INC. to the Cross-Motion by Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS and RECREATION, (dated November 9, 2022) ..... 9

**Reply Affirmation**

By Third-Party Defendant AECOM USA, INC. to the Cross-Motion by Defendants/Third-Party Plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS and RECREATION, (dated November 15, 2022).....10

**Reply Affirmation**

By Third-Party Defendant AECOM USA, INC. (dated November 15, 2022).....11

**Reply Affirmation**

By Third-Party Defendant UTB-UNITED TECHNOLOGY, INC. (dated November 15, 2022).....12

---

Upon the foregoing papers, the motion (No. 003) for partial summary judgment by plaintiff ROMAN KRYK and the motions (Nos. 004 and 005) for summary judgment by third-party defendants AECOMUSA, INC., and UTB-UNITED TECHNOLOGY, INC., seeking dismissal of the third-party complaint by defendants THE CITY OF NEW YORK and NEW YORK CITY PARKS & RECREATION, are granted. The cross-motion (No. 006) by defendants/third-party plaintiffs THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION for summary judgment as against third-party defendants AECOM USA, INC., UTB-UNITED TECHNOLOGY, INC. and REGIONAL MANAGEMENT & CONSULTING, INC. is denied.

#### FACTS

Plaintiff ROMAN KRYK (hereinafter "plaintiff") commenced this action to recover damages for injuries he sustained when he fell from a ladder while removing asbestos from the ceiling inside a restroom/comfort station located at the Grandview Playground in Staten Island. By way of background, defendant/third-party plaintiffs THE CITY OF NEW YORK and NEW YORK CITY PARKS & RECREATION (hereinafter THE CITY and PARKS) were renovating the Grandview Playground restroom and hired third-party defendant AECOM USA, INC. (hereinafter "AECOM") as the construction manager for the renovation project, and UTB-INTERNATIONAL TECHNOLOGY, INC. (hereinafter "UTB") as the general contractor responsible for the demolition and renovation of the restroom. It appears that during said renovation, asbestos was discovered in the ventilation system in the ceiling of the restroom. As a result, renovation stopped immediately and THE CITY hired plaintiff's employer, third-party defendant REGIONAL MANAGEMENT & CONSULTING, INC. (hereinafter "REGIONAL") to remove the asbestos condition.

As part of the asbestos removal, plaintiff was required to use a six-foot high, A-frame ladder provided to him by his employer, which he placed on a demolished and unfinished concrete floor inside the restroom. According to plaintiff, he was descending from the ladder while holding the ladder with both hands and had both feet on the fourth rung when the ladder suddenly tilted to the right, causing him to fall to the floor.

As a result of said fall, plaintiff alleges to have sustained, *inter alia*, serious injuries to his right knee, requiring surgery; injuries to his cervical, lumbar and thoracic spine including disc herniations and bulges, radiculopathy, severe pain, swelling and tenderness and restriction of range of motion. Plaintiff also alleges that he required surgery and may need further surgery in regard to the aforementioned injuries. He further alleges to have sustained a traumatic brain injury; injury to his right shoulder including rotator cuff tear, biceps tear, labral tear, adhesion, synovitis; and comminuted, mildly displaced fracture of the distal radius. According to plaintiff, all of said injuries have directly affected the bones, tendons, tissues, muscles, ligaments, *etc.* in the surrounding areas and are claimed to be permanent and progressive in nature and affected his activities of daily living and his future employment.

In the current application, plaintiff moves for partial summary judgment on the issue of liability under Labor Law §240(1) against THE CITY as the owner of the property and PARKS as the project manager/agent of THE CITY. According to plaintiff, both THE CITY and PARKS are statutorily liable under this section of the Labor Law §240(1), which mandates liability against the owner and general contractor/agent of the owner when it is shown that a worker fell from an elevated worksite due to the absence of, or a defect in a safety device which was a contributing cause of his fall (*see* Blake v. Neighborhood Hous. Servs. of NY City 1 NY3d 280 [2003]). Moreover, under Labor Law §240(1), a worker's contributory negligence is not a defense for an owner/agent's failure to provide necessary, proper safety device.

Here, plaintiff argues that it is undisputed that plaintiff fell from an unsecured, six-foot A-frame ladder without being provided any safety device that would have prevented the accident from occurring, such as a harness or lanyard with proper tie-off points. Plaintiff further argues that the subject ladder was not properly secured or braced and, therefore, it did not adequately protect him from the elevation-related risk to which he was exposed at the time of his accident. Accordingly, said failures demonstrate plaintiff's *prima facie* entitlement to judgment as a matter of law on the issue of liability against both THE CITY as owner of the subject property and PARKS as the general contractor/statutory agent of THE CITY.

In support, plaintiff argues there is an abundance of case law in which owners, agents and general contractors have been held statutorily liable under Labor Law §240(1) for construction accidents occurring when a worker falls from a height from an unsecured ladder. Plaintiff also submits the affidavit of an expert engineer, James Pugh, Ph.D., P.E. who corroborated his claim by concluding that the ladder used by plaintiff was inadequate to perform the required asbestos work and that he was not provided with any safety devices which would have allowed him to secure the ladder to the floor or to the wall, *e.g.*, tethers affixed to attachment points to stabilize the ladder which would have allowed him to secure the ladder to the floor or the wall of the room he was working in. In his opinion, the use of an A-frame ladder without any supplemental safety items violated the basic principles of construction safety and practice and also violated basic and accepted ergonomic principles intended to naturally guide workers into a safe manner of performance of their duties without having to concern themselves with incipient instabilities of equipment and associated hazards.

In addition, Mr. Pugh stated that plaintiff did not contribute to the happening of the accident in that the ladder was in an opened and locked position; that plaintiff was holding on to the ladder with both hands; he also had both feet on the same rung when the ladder tipped. Thus, it cannot

be said that plaintiff was the proximate cause of his own injuries. According to plaintiff, this proof, together, establishes his right to partial summary judgment against THE CITY and PARKS, as both are statutorily liable for his fall and his resulting injuries.

Third-party defendants AECOM and UTB also move (Nos. 004 and 005) for summary judgment dismissing the third-party action against them by THE CITY and PARKS who asserted claims for indemnification, contribution and breach of contract for failing to procure sufficient liability insurance on their behalf.

AECOM explained that it was hired as a construction manager for the subject renovation project and was responsible for, *inter alia*, documenting and reporting on the progress of the construction, inspecting the work performed, monitoring the construction schedule and tracking costs against the project's budget. According to AECOM, its contract with THE CITY expressly disclaimed any supervisory responsibility for the means and methods employed by other contractors, which included plaintiff's employer, REGIONAL, who was hired to perform the subject asbestos removal.

AECOM explained that UTB began its renovation by demolishing the floor of the restroom and removing the existing tiles. Once completed, the floor was inspected by AECOM, THE CITY and UTB, and it was determined that the floor did not pose any safety concerns. However, when asbestos was discovered inside the restroom, construction activity immediately stopped and THE CITY hired plaintiff's employer, REGIONAL to perform asbestos abatement. It is undisputed that neither AECOM nor UTB had any involvement with the asbestos work.

According to AECOM, the subject indemnification agreement contained within its contract with THE CITY pertains only to liability that arises as a result of AECOM'S negligence or tortious actions in connection with its duties existing under the contract. Here, since AECOM had no involvement with plaintiff's asbestos work or was negligent or contributed in any way to the work

plaintiff was performing at the time of the subject incident, the subject indemnification clause was never triggered. Moreover, AECOM did not supervise or control plaintiff's work, nor did it provide him with any tools or equipment, including the ladder that he used to perform asbestos removal. Accordingly, THE CITY is not entitled to indemnification from AECOM for injuries resulting from asbestos work performed by plaintiff.

Insofar as THE CITY asserts a claim for breach of contract for the failure to procure proper insurance, AECOM argues that it had procured additional commercial liability coverage indemnifying THE CITY defendants to the extent THE CITY was held vicariously liable for AECOM's negligence (but not for THE CITY's negligence). Again, since AECOM played no role in the causing plaintiff's injury, and the occurrence did not arise out of AECOM's negligence, there is no breach of any agreement and, therefore, no issue in regard to procuring satisfactory coverage.

For similar reasons, AECOM argues that there can be no claim for common-law indemnification or contribution, as there is proof of any negligence on its part. It did not control or supervise plaintiff's work, nor did it provide any materials, tools or equipment to plaintiff, including the subject ladder. In fact, AECOM was not even permitted in the area where the asbestos work was being performed. Moreover, there is no proof suggesting that an unsafe condition even existed on the floor in the restroom or that AECOM created it. Accordingly, the claim for indemnification and/or contribution against AECOM is without merit as is the breach of contract claim.

UTB also moves for summary judgment dismissing the third-party complaint by THE CITY and PARKS for indemnification, contribution and for breach of contract for failing to procure proper insurance. First, UTB argues that plaintiff has not established a violation of Labor

Law §240(1) since there was no evidence that the ladder used by plaintiff was defective or that floor beneath the ladder was uneven or otherwise defective.

Nevertheless, in regard to the third-party action for indemnification and contribution by THE CITY and PARKS, UTB argues that the General Obligations Law precludes a party from being indemnified for its own negligence and that any contract purporting to indemnify a party for its own negligence is void and unenforceable. Accordingly, the party seeking indemnification must prove itself free from negligence.

In this case, PARKS had inspected the floor of the restroom where plaintiff worked along with AECOM and REGIONAL, both before and after the asbestos removal and at no time was it noted that a defective or unsafe condition existed on the floor. Therefore, THE CITY and PARKS cannot now argue that UTB failed to notify it of the existence of a defective condition since it, too, had inspected the floor and found it to be satisfactory. Accordingly, it would not be considered free from fault and cannot seek indemnification from UTB under its contract with UTB. For the same reasons, any claim for common-law indemnification must be dismissed.

In regard to THE CITY and PARKS claim for contribution, UTB argues that it was not hired to perform any work pertaining to asbestos abatement, nor did it oversee the asbestos work, but that it was REGIONAL who was specifically hired to remove the asbestos discovered in the restroom. UTB further argues that it had no involvement in plaintiff's work and it did not supervise nor control his work. Instead, the work performed by UTB in regard to the restroom took place more than three months prior to plaintiff's accident and involved the demolition of the floor in the restroom and the removal of the tile floor. Once the removal of the tiles was completed, UTB's work had been inspected and approved by AECOM and PARKS prior to REGIONAL performing any asbestos work. Also, proof indicates that REGIONAL (plaintiff's employer) also had

inspected the floor when it was hired to conduct its asbestos removal. Accordingly, any claim that the flooring was defective or unsafe, is without merit.

In addition, at no point during its work in the restroom, were any complaints made to UTB or anyone else regarding its work, or that a dangerous or defective condition existed following the completion of its work. In fact, if it was determined that the flooring was unsafe or defective, REGIONAL had the materials, *i.e.*, planks to cover the floor and provide a proper working surface. It should also be noted that neither plaintiff nor his coworkers made any complaints regarding the condition of the floor when they were working in the restroom prior to the accident. Noteworthy here is the fact that THE CITY and PARKS could have shut down operations at any time if it was discovered that the dangerous condition existed or that the means or methods used by a contractor was unsafe. Thus, there is no indication that UTB caused or contributed in any way to plaintiff's accident and, therefore, it cannot be responsible to THE CITY and PARKS for contribution.

Finally, there is no proof that UTB was involved in any way with plaintiff's asbestos work or that UTB was otherwise negligent in the performance of its duties under its contract with THE CITY and PARKS. Accordingly, THE CITY and PARKS cannot establish the elements of a breach of contract claim against it and, therefore, said claim must be dismissed.

THE CITY and PARKS oppose plaintiff's motion and cross-move (No. 006) for summary judgment against AECOM, UTB and REGIONAL on their claim for indemnification, contribution and breach of contract for failing to procure necessary insurance to cover liability for injuries sustained by plaintiff in this case. According to THE CITY and PARKS, UTB was hired as the general contractor responsible for the demolition and renovation of the subject park renovation project. In addition, UTB was required to take all reasonable precautions to protect all persons and property of THE CITY and of others from damage, loss or injury resulting from the contractors' and/or its subcontractors' operations under its contract. UTB was also required to

comply with the notification requirements in the event of any loss, damage or injury to work, persons, or property or any accidents arising out of the operations of the contract. In addition, UTB was required to defend and indemnify THE CITY for claims arising from the work done by UTB or of any of its subcontractors should they fail to comply with the law or the terms of the contract.

In regard to AECOM, THE CITY and PARKS contend that AECOM was hired to perform “construction supervision services”. As part of this role, AECOM was required to inspect and inform THE CITY on the progress of the work on a daily basis, including, but not limited to any issues maintaining a safe work site. According to THE CITY, if the means and methods of a contractor constituted or created a hazard to the work, person or property, AECOM was to report such problems to THE CITY. In this regard, THE CITY and PARKS argue that both AECOM and UTB failed to notify them of the existence of a defective condition on the floor in the restroom.

AECOM’s contract with THE CITY also contained an indemnification clause which THE CITY and PARKS claim required AECOM to indemnify and hold THE CITY harmless for any claims arising from or in any way to related to their work at the premises. THE CITY and PARKS argue that plaintiff’s accident clearly arose out of and/or resulted from the performance of his work on the job site which was to be supervised and coordinated by REGIONAL, his employer, along with the other contractors, such as AECOM and UTB. Also, it is argued that REGIONAL failed to inspect the floor in the restroom which made the premises unsafe. In addition, it is argued that REGIONAL failed to properly supervise plaintiff as he indicated that he was working alone with no supervisor present at the site of the accident.

Also, THE CITY and PARKS claim they are free from fault as they were not responsible for the instruction or supervision of either AECOM or UTB and that it was REGIONAL who was responsible for supervising, controlling, and directing plaintiff’s work and supplying the subject

ladder. Accordingly, there is no proof of any negligence on the part of THE CITY or PARKS in this regard. Finally, in regard to the breach of contract claim, THE CITY argues that neither AECOM nor UTB procured the necessary excess insurance coverage as required by their contracts.

In its opposition to plaintiff's motion, THE CITY and PARKS argue that plaintiff was provided with a safety device, *i.e.*, an A-frame ladder in good condition, so there was no violation of the statute for failing to provide a safety device. Moreover, there is no proof that the ladder was defective but, instead, that plaintiff, himself, may have placed it unsafely on a rough, uneven surface. In addition, the expert opinion of THE CITY and PARKS' expert, Anthony Kelly, indicates that his review of the records in this case confirms that the ladder was not defective or inadequate and that the accident was caused, instead, by plaintiff's failure to properly setup the ladder. He opined that plaintiff was provided with a safe place to work and that there were no violations of Labor Law §240(1).

THE CITY and PARKS further argue that plaintiff was the sole proximate cause of the incident at issue in that he chose where to place the ladder knowing all the circumstances and conditions existing at the premises and that he made the ladder unsafe. Accordingly, there is no statutory liability since plaintiff has opened himself up to comparative liability. At the very least, triable issues of fact are presented in regard to plaintiff's own negligence in causing the accident. Thus, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §240(1) must be denied.

REGIONAL also opposes the cross-motion by THE CITY and PARKS for contractual indemnification, as well as its claim for breach of contract and argues that the motion must be denied based on triable issues of fact. REGIONAL argues that in order to sustain their burden of establishing its entitlement to judgment as a matter of law on the issue of contractual indemnification, THE CITY and PARKS cannot merely rely on the language contained in the

indemnification agreement which they claim supports their right to indemnification, but they must also demonstrate they are free from fault.

In this case, REGIONAL argues that THE CITY and PARKS would only be entitled to indemnification from REGIONAL if REGIONAL created the condition which caused plaintiff's injury. However, it is THE CITY's argument in opposition to plaintiff's motion that it was plaintiff, who was the sole proximate cause of his own accident and that there was nothing wrong with the ladder or the condition of the ground where the ladder was placed. Therefore, there are triable issues of fact as to how the accident happened. Accordingly, any determination on the issue of indemnification would be premature. If the action against THE CITY is dismissed, then THE CITY's claim for indemnification must also be dismissed.

Regardless, THE CITY and PARKS cannot seek indemnification by claiming it was REGIONAL's negligence that caused the subject accident, but then further arguing that plaintiff was the sole proximate cause of the accident. In support, REGIONAL relies on the EBT testimony of its employee, Mr. Ronauld Dymkowski, who testified that he brought the safety equipment including 6-8 foot ladders to the job and a harness for each worker but that none were necessary for this job. He also testified that he walked around the site and did not notice any unsafe conditions in regard to the placement of the ladder. Moreover, plaintiff never made any complaints regarding the ladder or the condition of the floor in the restroom. Mr. Dymkowski also testified that if there was an unsafe condition or that work was being performed improperly, THE CITY had its own inspector who could shut down the work if a dangerous condition existed or that something was not done correctly.

REGIONAL also argues that THE CITY has not provided any evidence that it did not meet its contractual obligations to secure the necessary insurance. According to REGIONAL, the

“Purchase Order” confirms that it maintained the applicable coverage required for the subject project and reflected in its policy. Thus, any claim for breach of contract is without merit.

### DISCUSSION

The drastic remedy of summary judgment should be granted only where there are no triable issues of fact (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The moving party on a motion for summary judgment has the burden of demonstrating *prima facie* a right to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form to establish that material issues of fact exists which require a trial (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat the motion (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

In particular regard to the Labor Law, §240(1), more commonly known as the “Scaffold Law”, imposes a non-delegable duty upon owners, contractors, and their agents to provide adequate safety protection for workers at, *e.g.*, an elevated work site, and is to be liberally construed to accomplish its intended purpose: placing the “ultimate responsibility for safety practices” on the owner and general contractor, rather than on individual workers “who are scarcely in a position to protect themselves from accident” (*see Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal quotation marks omitted]). To this end, the duty has been made nondelegable to such an extent that an owner or contractor will be held liable for any injury proximately caused by a violation of the section even though the injuring-producing work was being performed by an independent contractor over which it exercised no supervision or

control, and notwithstanding the injured worker's possible contributory negligence (*see* Gordon v. Eastern Ry. Supply, 82 NY2d 555, 559, 562 [1993]).

More specifically, under this provision, owners and contractors are held absolutely liable whenever a worker's injury is proximately caused by the failure to provide him or her with ladders, scaffolding, hoists or other named devices that are so constructed, placed or operated as to provide proper protection to workers at, *e.g.*, a construction site, from harm directly flowing from the application of the force of gravity to an object or person (*see* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). Accordingly, a *prima facie* case of liability requires a plaintiff to demonstrate both that the statute was violated, and that the statutory violation was a proximate cause of his or her injuries (*see* Zimmer, 65 NY2d at 519).

Notwithstanding the mandated "liberality" in construction, it must be noted that not every worker who falls at a construction site or injured by a falling object is entitled to the extraordinary protections afforded by Labor Law §240(1) (*see* Blake v. Neighborhood Hous Servs of NY City, 1 NY3d 280, 288 [1993]; Narducci v. Manhasset Bay Assoc., 96 NY2d 259, 267 [2001]). Accordingly, the mere fact that, *e.g.*, a worker fell from a scaffold, is insufficient to establish that the device failed to provide proper protection (*see* Alava v. City of New York, 246 AD2d 614, 615 [2<sup>nd</sup> Dept. 1998]). Similarly, the mere fact that an accident occurred does not establish either a statutory violation or causation (*see e.g.*, Rocovich v. Consolidated Edison, Co., 78 NY2d 509, 514-515 [1991]). Nevertheless, strict liability will attach where a violation of the section has been established along with proof of its role in producing plaintiff's injury (*cf* Duda v. Rouse Constr. Corp., 32 NY 2d 405, 410 [1973]).

Here, in the opinion of this Court, plaintiff has met his burden of establishing his *prima facie* right to judgment as a matter of law. In opposition, THE CITY and PARKS have failed raise triable issues of fact regarding the existence of a Labor Law §240(1) violation and proximate cause.

Through the EBT testimony of the parties regarding the condition of the ladder which was provided by plaintiff's employer and the condition of the floor inside the restroom, along with the expert affidavit of plaintiff's expert, James Pugh, there is no indication that something other than the lack of safety devices to either secure the ladder or provide plaintiff with adequate security from falling to the ground, was the proximate cause of plaintiff's injuries.

Viewed from a summary judgment perspective, the opinion of THE CITY and PARKS' expert, Mr. Anthony Kelly in this regard is insufficient to rebut the findings of plaintiff's expert. In his opinion, Mr. Kelly concluded that the subject ladder was not defective or inadequate but that it was plaintiff's failure to set up the ladder properly which caused plaintiff to fall. Said opinion, however, is insufficient insofar as there is no proof supporting his conclusion. Instead, plaintiff's testimony indicated that the ladder was in an open and locked position and that there were no dangerous conditions existing on the floor at the time of the asbestos removal. There is no other proof submitted suggesting that the accident was caused by something other than the fact that plaintiff was using an unsecured ladder at the time of the incident, without the provision of any safety device which would have allowed him to secure the ladder to either the floor or the walls. Mr. Kelly's opinion in opposition can only be viewed as speculative and is insufficient to raise triable issues regarding THE CITY and PARKS statutory liability under Labor Law §240(1). Moreover, there is no EBT testimony or other proof indicating that the condition of the floor in the restroom was defective or otherwise dangerous in regard to the work being performed by plaintiff. Accordingly, the motion by plaintiff must be granted.

In regard to the motions for summary judgment by third-party defendants AECOM and UTB for summary judgment dismissing THE CITY and PARKS claim for indemnification, contribution and for breach of contract, the Court finds that AECOM and UTB have established their entitlement to judgment as a matter of law dismissing the third-party action against them by

THE CITY and PARKS. In opposition, THE CITY and PARKS have failed to raise triable issue of fact.

It is well-settled that the right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see Kurek v. Port Chester Hous. Autho.*, 18 NY2d 450 [2<sup>nd</sup> Dept. 1966]). Accordingly, such a promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc. v. AGS Computers*, 74 NY2d 487 [1989]).

In this case, the indemnification clause contained within the subject contracts between THE CITY and PARKS, and AECOM and UTB, conditions indemnification upon a finding that AECOM or UTB were negligent; committed an intentional tort; or failed to comply with the provisions of the subject agreement. Here, however, there is no proof of any negligence by AECOM or UTB in causing or contributing to plaintiff's fall, nor is there proof that they committed an intentional tort or that failed to comply with their contracts with THE CITY and PARKS. In this regard, it is clear from the testimony of the parties that neither AECOM nor UTB had any involvement with plaintiff's asbestos work. Accordingly, their motions insofar as they seek summary judgment dismissing the claims against them for contractual indemnification is granted. For the same reasons, without any finding of negligence or that either party caused or contributed to plaintiff's accident, their motions seeking summary judgment dismissing THE CITY and PARKS' claims for common-law indemnification and contribution are granted.

Insofar as THE CITY and PARKS alleged that AECOM, UTB and REGIONAL breached its contract by failing to procure insurance on its behalf, it is well-settled that a party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured, must demonstrate that a contract required that such insurance be procured, and

that the provision was not complied with (*see* Rodriguez v. Savoy Boro Park Assos. Ltd. Partnership, 304 AD2d 738 [2<sup>nd</sup> Dept. 2003]). Here, THE CITY and PARKS' motion in this regard is denied since there is no proof establishing that AECOM, UTB or REGIONAL failed to procure insurance on behalf of THE CITY and PARKS.

Finally, based on the foregoing, the cross-motion by THE CITY and PARKS for summary judgment on its claim for indemnification, contribution and breach of contract, is denied as moot as to AECOM and UTB. That portion of the cross-motion seeking indemnification from REGIONAL is denied as triable issues of fact remain in regard to REGIONAL's potential negligence, if any, in bringing about the subject incident.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (No. 003) by plaintiff ROMAN KRYK for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) is granted; and it is further

ORDERED that the motion (No. 004) by third-party defendant AECOM USA, INC., for summary judgment dismissing the third-party complaint and any cross-claims against it is granted and the third-party complaint is hereby severed and dismissed against it; and it is further

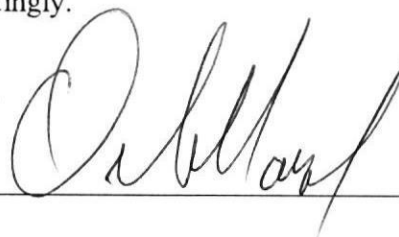
ORDERED that the motion (No. 005) by third-party defendant UTB-UNITED TECHNOLOGY, INC., for summary judgment dismissing the third-party complaint and any cross-claims against it is granted and the third-party complaint is hereby severed and dismissed against it; and it is further

ORDERED that the cross-motion (No. 006) by defendants/third-party plaintiffs THE CITY OF NEW YORK and NEW YORK CITY PARKS & RECREATION for summary judgment on

its third-party claims for indemnification, contribution and breach of contract is denied; and it is further

ORDERED that the clerk enter judgment accordingly.

ENTER,

A handwritten signature in black ink, appearing to read "Orlando Marrazzo, Jr.", written over a horizontal line.

HON. ORLANDO MARRAZZO, JR.

DATED:

Jan. 23, 2023