

**Da Silva v Porter Ave. Holdings LLC**

2023 NY Slip Op 32166(U)

June 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 510764/2019

Judge: Robin S. Garson

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 75 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 23<sup>rd</sup> day of June, 2023.

P R E S E N T:  
HON. ROBIN S. GARSON, Justice.  
-----X  
LUCAS ALVES DA SILVA,

Plaintiff,

-against-

Index No.: 510764/2019  
**Decision & Order**  
(Mot. Seq. 4 & 5)

(Mot. Seq. 4 & 5)

PORTER AVE. HOLDINGS LLC, BRUMAN REALTY LLC, APARTMENT DEVELOPERS LLC, EMPIRE MANAGEMENT & CONSTRUCTION LLC and BROOKLYN GC LLC,

Defendants.

-----X  
PORTER AVENUE HOLDINGS LLC and EMPIRE MANAGEMENT & CONSTRUCTION LLC,

Third-Party Plaintiffs

-against-

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>78-83, 84-106</u>
Opposing Affidavits (Affirmations)	<u>112-113,114-120,121, 122, 123</u>
Affidavits/ Affirmations in Reply	<u>126, 127</u>
Other Papers:	_____

Upon the foregoing papers, defendants/third-party plaintiffs Porter Avenue Holdings, LLC (Porter) and Empire Management & Construction, LLC (Empire)

(collectively, defendants) move (in motion [mot.] sequence [seq.] 4) for an order awarding them summary judgment dismissing plaintiff Lucas Alves DaSilva's (plaintiff) complaint against them. Defendants further move for summary judgment under their third-party contractual indemnification claim against third-party defendant Magellan Concrete Structures Corp. (Magellan). Plaintiff cross-moves (in mot. seq. 5) for summary judgment against Porter and Empire under his Labor Law §§ 240 (1) and 241 (6) causes of action. The motion and cross-motion are each granted to the extent as follows:

***Background Facts and Procedural History***

The instant action arises out of a construction site accident that occurred on March 9, 2018 at the premises located at 1134 Fulton Street, Brooklyn, New York (the building). Prior to the accident, Porter, which owned the building, hired Empire to serve as the general contractor on the underlying construction project, which involved the construction of a multi-story structure containing both commercial space and residential apartment units. Thereafter, in a subcontract agreement dated March 20, 2017, Empire hired plaintiff's employer Magellan to perform concrete work on the project. This work included assembling vertical and horizontal wooden forms, pouring concrete into these forms, and disassembling or "stripping" the formwork once the concrete had sufficiently cured. Among other things, the subcontract agreement contained a clause whereby Magellan agreed to indemnify Empire and Porter "from and against all liability or claimed liability for bodily injury ... arising out of or resulting from the Work covered by this Contract Agreement to the extent such work was performed by or contracted through [Magellan]."

At the time of the accident, Magellan was the only subcontractor working at the jobsite and the construction project was in its early stages. In particular, the building's foundation had been excavated and the concrete that would ultimately form the ground floor/basement ceiling of the structure had been poured into the aforementioned forms. On the morning of the accident, plaintiff was directed by his Magellan supervisor, Jaala Olivieri, to assist in stripping the formwork in the basement of the building. According to plaintiff, this work involved stacking and organizing pieces of the forms that had already been removed by his coworkers. Immediately before the accident, plaintiff was asked by his coworker, Fernando Rezende, to assist him in removing a piece of 2" x 8" wooden planking from the basement ceiling which was part of the formwork. In order to reach this planking, plaintiff set up a 16-foot A-frame ladder and climbed to the second or third highest rung. Mr. Rezende also set up an A-frame ladder approximately 10 feet away from plaintiff and climbed his ladder with the intention of removing the other end of the planking.<sup>1</sup> However, as plaintiff reached for the piece of planking, it unexpectedly broke free from the ceiling and struck the ladder. This in turn caused the ladder to topple over and collapse. As a result, plaintiff fell to the basement floor and sustained various injuries.<sup>2</sup> There is no evidence before the court regarding what caused the plank to fall.

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<sup>1</sup> There is no direct testimony regarding the length of the plank. However, inasmuch as plaintiff testified that Mr. Rezende was positioned approximately 10 feet away from him, the plank was presumably at least 10-feet long.

<sup>2</sup> It is unclear whether plaintiff was struck by the planking. In particular, plaintiff testified at his deposition that he was not struck by the planking. However, an accident report that was signed by plaintiff states that he was struck in the head by the plank. In any event, it is undisputed that the ladder collapsed, and that plaintiff fell from the ladder.

At his deposition, plaintiff testified that he was wearing a safety harness at the time of the accident. However, plaintiff was never questioned as to whether he affixed the harness to an anchor point using a lanyard, if there were any anchor points in the ceiling in the location where he was working, or if he was even provided with a lanyard. In an affidavit submitted by plaintiff, his co-worker Mr. Rezende states that “[s]afety harnesses were provided to us, but we could not tie off because the pieces to attach the harnesses were not provided. There was nothing to attach the harness to.” Magellan’s principal, Jonathan Rocchio, testified that all of Magellan’s workers were provided with lanyards that could be attached to fixed holding points and that they were required to use this safety equipment when working at heights greater than six feet. When asked if there was an anchor point for plaintiff to use at the time of the accident, Mr. Rocchio testified that, “I wasn’t at the location to know exactly where this incident occurred. So I don’t recall exactly. But typically there is – within a 10-foot radius you typically have an attach point.”

By summons and complaint dated May 13, 2019, plaintiff commenced the instant action against Porter and Empire alleging that the underlying accident was caused by their negligence, as well as their violation of Labor Law §§ 240 (1), 241 (6), and 200.<sup>3</sup> Subsequently, plaintiff filed a bill of particulars which alleged that Porter and Empire violated 12 NYCRR 23-1.7 (a), 23-1.11, 23-1.22 (c), 23-2.1, 23-2.2, 23-2.7, 23-3.3, 23-

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<sup>3</sup> Plaintiff also named Apartment Developers LLC (Apartment), Brooklyn GC LLC (Brooklyn), and Bruman Realty LLC (Bruman) as party defendants. On or about January 14, 2021, plaintiff, Apartment, and Brooklyn entered into a stipulation discontinuing plaintiff’s action against these defendants. Bruman, which apparently managed the building at some point, has never appeared in this action.

5.1, and 23-5.3. After being served with the summons and complaint, Porter and Empire joined issue by filing a joint answer generally denying the allegations in the complaint. On or about December 11, 2019, Porter and Empire commenced a third-party action against Magellan seeking contractual indemnification, common-law indemnification, and damages for breach of contract to procure liability insurance. Discovery is now complete and the instant motions are now before the court.

*Plaintiff's Labor Law § 240 (1) Cause of Action*

Porter and Empire move for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action. At the same time, plaintiff cross-moves for summary judgment against Porter and Empire under this cause of action. In support of this branch of their motion, Porter and Empire note that the plank, which fell from the ceiling, was not an object that was being hoisted or secured at the time of the accident. In addition, Porter and Empire argue that there is no evidence that the plank fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Thus, according to Porter and Empire, the work that plaintiff was performing arose out of the ordinary and usual dangers associated with construction work, and did fall under the extraordinary protection offered under Labor Law § 240 (1) against gravity-related risks. In addition, Porter and Empire argue that plaintiff was not engaged in work protected under the statute at the time of the accident. In this regard, Porter and Empire note that plaintiff was merely climbing the ladder at the time of the accident and was not engaged in stripping work. In addition, Porter and Empire argue that there is no evidence that the ladder that plaintiff fell from was defective. In support of this contention, Porter and Empire note that plaintiff

testified that he checked the ladder before climbing it and determined that it was safe and in good working order.

Porter and Empire also argue that plaintiff's own actions were the sole proximate cause of the accident. In support of this contention, Porter and Empire point to the deposition testimony Mr. Rocchio. In particular, as previously noted, Mr. Rocchio testified that all Magellan workers were provided with harnesses and lanyards, that there were tie-off points to which Magellan's workers could attach their safety harness lanyards within a 10-foot radius of locations where the workers were required to work, and that these workers were instructed to use this safety equipment elevations above six feet. In addition, Mr. Rocchio testified that if there was nowhere to tie off, Magellan's workers were expected to "do something else." Finally, Mr. Rocchio testified that stripping work was to be performed by three workers, with one of those workers holding the ladder used by the other workers. Thus, Porter and Empire maintain that plaintiff's actions in failing to affix his harness to a tie off point and in failing to ensure that the ladder that he climbed was being held by a coworker was the sole proximate cause of the accident.

In opposition to this branch of Porter and Empire's motion, and in support of his own cross motion for summary judgment under Labor Law § 240 (1), plaintiff maintains that the accident was caused by two separate violations of the statute. In particular, plaintiff argues that the failure to secure the plank that fell from the ceiling constituted a violation of Labor Law § 240 (1) and that under relevant caselaw, there is no need for him to prove what exactly caused the plank to fall. In addition, plaintiff avers that the accident was caused by Porter and Empire's failure to properly secure the ladder as required under the

statute. In this regard, plaintiff notes that he fell some 16 feet to the ground after the ladder collapsed.

In further support of his cross motion for summary judgment under Labor Law § 240 (1), and in opposition to defendants' motion dismissing this claim, plaintiff argues that there is no merit to their claim that he was the sole proximate cause of the accident inasmuch as he failed to secure his safety harness to an anchor point using a lanyard. In this regard, plaintiff points to Mr. Rezende's affidavit, wherein he states that they were not provided with lanyards and that there were no anchor points in the area where the accident took place. Further, plaintiff notes that when asked whether there were any anchor points available for plaintiff to use, Mr. Rocchio testified that he was not at the location where the accident occurred and that he could not "recall exactly." As a final matter, plaintiff argues that, given the fact that the ladder collapsed, any failure on his part to tie off to an anchor point could not have been the sole proximate cause of the accident, but instead constituted comparative negligence, which is not a defense to a Labor Law § 240 (1) claim.

Labor Law § 240(1) provides, in pertinent 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, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker

from harm directly flowing from the application of the force of gravity to an object or person” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who “are best situated to bear that responsibility” (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, “[t]he duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In falling object cases, “the claimant must demonstrate that, at the time the object fell, it either was being hoisted or secured, or required securing for the purpose of the undertaking” (*Houston v State of New York*, 171 AD3d 1145, 1146 [2019], citing *Fabrizi v 1095 Avenue of the Ams., LLC*, 22 NY3d 658, 662-663 [2014]). In addition, the statute “does not automatically apply simply because an object fell and injured a worker; ‘[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute’” (*Fabrizi v 1095 Avenues of the Ams., LLC*, 22 NY3d at 663, quoting *Narducci v Manhasset Bay Assoc.*, 96 N2d 259, 268 [2001]). In falling worker cases, “[w]hether a device provides proper protection is a question of

fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his or her materials” (*Melchor v Singh*, 90 AD3d 866, 868). Thus, the fact that a scaffold or ladder collapses constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Exley v Cassel Vacation Homes, Inc.*, 209 AD3d 839, 841 [2022]; *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2021]).

As a final matter, “[a]lthough comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her injuries [or otherwise recalcitrant], there can be no liability under Labor Law § 240 (1)” (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2020]). The sole proximate cause defense applies “when plaintiffs: ‘(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice’” (*Biacco-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Here, inasmuch as the plank fell from the ceiling and struck the ladder, which in turn caused the ladder to collapse and plaintiff to fall from the ground, the underlying accident involved both a falling object and a falling worker. With respect to the falling object component of the accident, the court notes that the plank was not being hoisted or secured at the time of the accident. However, in the absence of any evidence as to what caused the piece of planking to fall and strike the ladder, there are issues of fact as to whether the plank was an object that required securing and as to whether the plank fell due to the inadequacy of safety devices of the type enumerated in Labor Law § 240 (1)

(*Castano v Algonquin Gas Transmission, LLC*, 213 AD3d 905, 908 [2023]; *Henriquez v Grant Hous. Dev. Fund Co., Inc.*, 186 AD3d 577, 577-578 [2020]; compare *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708).

With regard to the falling worker theory of liability, plaintiff has made a prima facie showing of his entitlement to summary judgment under Labor Law § 240 (1). In this regard, as the respective owner and general contractor on the project, it is undisputed that Porter and Empire are subject to liability under the statute. Further, as noted above, a fall caused by the collapse of an unsecured ladder constitutes prima facie proof of a Labor Law § 240 (1) violation. This is true even when the collapse of the apparatus is caused by it being struck by an object, as occurred in the instant case (*Mora v 1-10 Bush Terminal Owner, L.P.*, 214 AD3d 785, 786 [2023]; *Guaman v Ansley & Co., LLC*, 135 AD3d 492 [2016]; *Kun Sik Kim v State St. Hospitality, LLC*, 94 AD3d 708, 710 [2012]). Accordingly, the burden shifts to Porter and Empire to submit sufficient evidence to raise a triable issue of fact regarding the violation of the statute.

Porter and Empire have failed to meet this burden. In particular, there is no merit to the defendant's claim that plaintiff was not performing work covered under the statute since he was climbing the ladder at the time of the accident. In this regard, it is undisputed that plaintiff was climbing the ladder in order reach the formwork being stripped. Clearly this stripping work, which took place in the context of a construction project, was covered under Labor Law § 240 (1). In addition, the fact that plaintiff climbed the ladder without first enlisting a co-worker to hold the device was not the sole proximate cause of the accident since a co-worker is not considered a safety device under the statute (*Rodriguez*

*v BSREP UA Heritage LLC*, 181 AD3d 537 [2020]). In any event, there is no evidence that plaintiff was ever directly instructed that he was not to climb a ladder unless it was being held by a co-worker.

Finally, plaintiff's alleged actions in failing to affix his safety harness and lanyard to an anchor point did not constitute the sole proximate cause of the accident. In this regard, such a failure may only form the basis of a sole proximate cause defense when there is evidence that a safety harness and lanyard were available to the plaintiff, that he or she was aware or otherwise instructed that they were required to use this equipment, and there were anchor points available that would have prevented the plaintiff from falling (*Bascombe v West 44<sup>th</sup> St. Hotel, LLC*, 124 AD3d 812, 813 [2015]; *Yedynak v Citnalta Constr. Corp.*, 22 AD3d 840, 841 [2005]). Here, it is undisputed that plaintiff was provided with a harness. Further, there is evidence in the form of Mr. Rocchio's testimony that plaintiff was provided with a lanyard and that Magellan's workers were instructed to use this device when working at heights above six feet. However, there is no evidence that there was an anchor point in the area where plaintiff was working which would have prevented the fall. In particular, Although Mr. Rocchio testified in general terms regarding the availability of anchor points, when asked about the specific area where plaintiff was working at the time of the accident, he admitted that he wasn't at this location and did not know if anchor points were available. Further, for whatever reason, Porter and Empire did not ask plaintiff during

his deposition whether there were any anchor points to which he could have tied off.<sup>4</sup> In any event, where, as here, the accident involves the complete collapse of a scaffold or ladder, any failure on plaintiff's part to use a safety harness could not have been the sole proximate cause of the accident (*Kehoe v 61 Broadway Owner LLC*, 186 AD3d 1143, 1144 [2020]; *Garzon v Viola*, 124 AD3d 715, 716 [2015]; *Fabiano v State of New York*, 124 AD3d 1262, 1263 [2014]; *Berrios v 735 Avenue of the Americas, LLC*, 82 AD3d 552, 553 [2011]). Accordingly, that branch of Porter and Empire's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied. That branch of plaintiff's cross motion which seeks summary judgment against Porter and Empire under his Labor Law § 240 (1) cause of action is granted.

***Plaintiff's Labor Law § 241 (6) Claim***

Plaintiff cross-moves for summary judgment under his Labor Law § 241 (6) cause of action. At the same time, Porter and Empire move for summary judgment dismissing this cause of action. In support of this branch of his cross motion, plaintiff maintains that the defendants violated 12 NYCRR 23-1.7 (a) (1) and 23-2.1 (a) (2). Plaintiff further contends that the defendants' violation of these provisions proximately caused his accident.

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<sup>4</sup> In determining that the sole proximate cause defense is not applicable, the court notes that it does not rely upon Mr. Rezende's affidavit, wherein he states that no anchor points were available for plaintiff to use. In this regard, the translator's affidavit states that she met with Mr. Rezende and translated the affidavit "from English to Portuguese." Thus, presumably the affidavit was created in English and translated to Mr. Rezende in Portuguese so that he could understand what it stated. However, "[f]alse swearing is an intent crime, so a sworn statement must be created in a language the signing witness understands in order to ensure the witness faces the perjury risk for false swearing" (Thomas F. Gleason, 2015 Supp Prac Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 2101[b]). Thus, the affidavit is defective (*Raza v Gunik*, 129 AD3d 700 [2015]).

In support of their motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, Porter and Empire argue that the Industrial Code provisions which plaintiff alleges were violated are either too general to support a claim under the subject statute, or inapplicable given the circumstances of the accident.

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

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.”

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a specific standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]).

As an initial matter, Porter and Empire have made a prima facie showing that 12 NYCRR 23-1.11, 23-1.22 (c), 23-2.2, 23-2.7, 23-3.3, 23-5.1, and 23-5.3 are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances of the accident. In any event, plaintiff has not discussed these regulations in his motion papers

or opposition papers and has therefore abandoned his Labor Law § 241 (6) claim to the extent that they are based upon alleged violations of these provisions (*Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [2012]).

Turning to the two Industrial Code Regulations at issue, 12 NYCRR 23-1.7 (a) (1) requires that:

“Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.”

It is undisputed that this regulation is sufficiently specific to support a Labor Law § 241 (6) cause of action. However, neither defendants nor plaintiff have pointed to or otherwise submitted any evidence such as deposition testimony or affidavits which indicates whether or not the area in which the accident took place was “normally exposed” to falling material or objects during stripping work. Consequently, neither side has met their prima facie burden in moving for summary judgment with respect to this regulation and both defendants’ motion and plaintiff’s cross motion for summary judgment on the Labor Law § 241 (6) cause of action must be denied to the extent that this claim is predicated upon a violation of 23-1.7 (a) (1) of the Industrial Code.

12 NYCRR 23-2.1 (a) (2) requires that “[m]aterials and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any

person beneath such edge.” Although this regulation is sufficiently specific to support a Labor Law § 241 (6) claim, it is inapplicable in this case. In particular, by its unambiguous terms, the subject regulation prohibits storing equipment and materials near the edges of floors, platforms, and scaffold which might pose a risk to individuals working beneath this edge. Here, the plank that struck plaintiff was not being stored, nor was it placed near the edge of floor, platform or scaffold (*see Rodriguez v D&S Builders, LLC*, 98 AD3d 957, 959 [2012]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 272 [2007], *lv denied* 10 NY3d 710 [2008]). Rather, the plank was part of the formwork in the basement ceiling that unexpectedly fell during stripping work.

Accordingly, that branch of Porter and Empire’s motion which seeks summary judgment dismissing plaintiff’s Labor Law § 241 (6) cause of action is granted. That branch of plaintiff’s cross motion which seeks summary judgment against Porter and Empire under his Labor Law § 241 (6) cause of action is denied.

***Plaintiff’s Labor Law § 200/Common-Law Negligence Claims***

Porter and Empire move for summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims against them. In support of this branch of their motion, Porter and Empire initially note that the underlying accident arose out of the means and methods employed by plaintiff and his Magellan co-workers in carrying out the work. Porter and Empire further maintain that there is no basis for plaintiff’s Labor Law § 200 and common-law negligence claims against them since they did not exercise authority or control over this work. In this regard, Porter and Empire point to plaintiff’s deposition testimony, wherein he stated that he was supervised solely by his Magellan foreman, Jaala

Olivieri. Porter and Empire further note that plaintiff testified that he had never heard of Porter or Empire and that he had no interaction with any persons or entities on the jobsite other than Magellan and its workers. In addition, Porter and Empire point to the deposition testimony given by Empire's construction site manager, Chaim Weiss. In particular, Mr. Weiss testified that Empire was not in charge of overall worksite safety and that individual subcontractors were responsible for overseeing their own employees. Finally, Porter and Empire note that Mr. Rocchio testified that Magellan controlled the means and methods of the work done by its own workers and that Magellan supplied its workers with ladders and other safety equipment.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability 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 plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). On the other hand, "[w]here a plaintiff's claims implicate the means and methods of the work, an owner or a contractor

will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law” (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

Here, the accident arose out of the means and methods that Magellan used in carrying out its work, including stripping/disassembling the forms. Further, Porter and Empire have made a prima facie showing that they did not have the authority to control and supervise this work by pointing the relevant deposition testimony of plaintiff, Mr. Weiss, and Mr. Rocchio. In this regard, Mr. Weiss’s general authority to inspect and oversee the progress of the work, and the authority to stop the work and ensure compliance with safety regulations is insufficient to impose liability under a Labor Law § 200 or common-law negligence claims (*see Flores v Crescent Beach Club, LLC*, 208 AD3d 560, 563 [2022]; *Murphy v 80 Pine, LLC.*, 208 AD3d 492, 495 [2022]).

Plaintiff has not addressed this branch of Porter and Empire’s motion in opposition. Accordingly, that branch of Porter and Empire’s motion which seeks summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims is granted.

***Porter and Empire’s Contractual Indemnification Claim***

Porter and Empire move for summary judgment under their contractual indemnification claim against Magellan. In support of this branch of their motion, Porter and Empire point to the aforementioned indemnification clause in the subcontract

agreement between Empire and Magellan. In particular, Porter and Empire note that this clause requires that Magellan indemnify them from and against all liability for injuries “arising out of or resulting from the Work covered by this Contract Agreement to the extent such work was performed by [Magellan].” According to Porter and Empire, given the fact that plaintiff was employed by Magellan and stripping forms as part of the concrete work that Magellan was subcontracted to perform, the accident and injuries clearly arose out of Magellan’s work. In addition, Porter and Empire maintain that since they did not control or supervise plaintiff’s work and were not otherwise negligent, the subject indemnification provision is fully enforceable.

In opposition to this branch of Porter and Empire’s motion, Magellan argues that the defendants failed to demonstrate that the obligation to indemnify was triggered. In particular, Magellan argues that it has not been demonstrated that the accident arose out of its negligent conduct. In addition, Magellan maintains that there are issues of fact as to whether Empire’s negligence contributed to the accident. In particular, Magellan notes that Empire was responsible for safety at the construction site. Furthermore, Magellan maintains that Empire failed to ensure that there was adequate lighting in the basement of the building. Finally, Magellan argues that Porter and Empire’s motion for contractual indemnity is premature since there has been no judicial finding as to liability.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3d 925, 930

[2009]). Finally, a party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; General Obligations Law § 5-322.1).

Here, the subject indemnification clause is broad, and requires that Magellan indemnify Porter and Empire for any accident arising out of Magellan's work. Thus, contrary to Magellan's argument, the clause did not require a showing of negligence on its part in order to trigger the obligation to indemnify. Moreover, the accident clearly arose out of Magellan's work since plaintiff was performing concrete work that Magellan was hired to carry out at the time of the accident. Furthermore, there is no merit to Magellan's argument that questions of fact regarding Empire's negligence preclude awarding it contractual indemnification. The court has already determined that there is no basis for plaintiff's negligence claim against Empire, as the general authority to inspect and oversee the progress of the work, and the authority to stop the work and ensure compliance with safety regulations is insufficient to impose liability under a Labor Law § 200 or common-law negligence claim. In addition, although plaintiff testified that the lighting in the basement was inadequate, there is nothing in his testimony which indicates that poor lighting played a role in the accident. As a final matter, Porter and Empire's motion for contractual indemnification is not premature. In the absence of triable issues of fact regarding whether they were negligent or whether an indemnification clause was triggered, owners and general contractors are routinely awarded summary judgment on their contractual indemnification claims against subcontractors (*Mejia v Cohn*, 188 AD3d 1035,

1038-1039 [2020]; *Jara v Costco Wholesale Corp.*, 178 AD3d 687, 691-692 [2019]; *Shea v Bloomberg, L.P.*, 124 AD3d 621, 623 [2015]). This is true even when the owner or general contractor’s underlying liability to the plaintiff has yet to be established (*Mejia*, 188 AD3d at 1035; *Shea*, 124 AD3d at 621). Accordingly, Porter and Empire are entitled to indemnification from Magellan Concrete Structures Corp.

For the foregoing reasons, it is hereby:

ORDERED that the second cause of action for claims alleging violations of Labor Law § 200 and claims alleging common law negligence are hereby dismissed; further it is

ORDERED that Porter Ave. Holdings LLC and Empire Management & Construction LLC are entitled to indemnification from Magellan Concrete Structures Corp.; further it is

ORDERED that summary judgment on the issue of liability is granted to plaintiff on the third cause of action for violations of Labor Law § 240 (1); further it is

ORDERED that in relation to the fourth cause of action premised on violations of Labor Law § 241 (6), the motion and cross motion are denied.

Plaintiff shall serve a copy of this Order along with notice of entry on all parties within 20 days of the date of this Order.

The above is the Decision and Order of the Court.

Dated: June 23, 2023

ENTER,



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J. S. C.

**HON. ROBIN S. GARSON**  
**A.J.S.C.**