At an IAS Term, Part 73 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of August, 2023.

P R E S E N T:

HON. PETER P. SWEENEY,
Justice,

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ANTHONY URANO,
Plaintiff,

- against -

UNITED STATES TENNIS ASSOCIATION INCORPORATED, USTA NATIONAL TENNIS CENTER INCORPORATED, and EPIC GAMES, INC.,
Defendants.

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EPIC GAMES, INC.,
Third-Party Plaintiff,

- against -

ENVY CREATE LTD., FAR-RIGHT PRODUCTION, LLC, and IMG WORLDWIDE, LLC,
Third-Party Defendants.

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ANTHONY URANO,
Plaintiff,

- against -

FAR RIGHT PRODUCTION LLC, ROOFTOP MANAGEMENT INC., TAIT TOWERS MANUFACTURING LLC, and ENVY NYC CONSTRUCTION CORP.,

Defendants.

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DECISION AND ORDER

Index No. 518621/19

Mot. Seq. No. 1-6

Action No. 1

Index No. 519768/22

Action No. 2

The following e-filed papers read herein:	NYSCEF Doc. No.:
Notice of Motion/Cross Motion, Supporting Affirmations, Memoranda of Law, and Exhibits Annexed	18-30; 43-50; 51-52; 54-59; 66-68; 96-102
Affirmations in Opposition and Exhibits Annexed	60-65; 71; 72-79; 80-87; 88-95; 103-108; 109; 110
Reply Affirmations and Memoranda of Law	111; 112; 113; 114; 115
Additional Documents:	
Epic Games-Far Right Productions Agreement with Schedule of Work	
Epic Games-IMG Worldwide Agreement with Schedule of Work	
Fortnite World Cup Final-USTA Center-NY-Production Schedule	Unnumbered

In this action to recover damages for personal injuries, a total of six motions and cross motions have been consolidated for disposition, as rearranged by the Court in three groups to streamline their analysis and disposition:

Group 1 Motions: First-Party Claims. In Seq. No. 1, plaintiff ANTHONY URANO ("plaintiff") moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants UNITED STATES TENNIS ASSOCIATION INCORPORATED and USTA NATIONAL TENNIS CENTER INCORPORATED (collectively, "USTA"), as well as against defendant/third-party plaintiff EPIC GAMES, INC. ("Epic"). In Seq. No. 5, Epic cross-moves for an order, pursuant to CPLR 3212, dismissing all of plaintiff's claims as against it. Plaintiff does not oppose dismissal of (and has since withdrawn) his Labor Law §§ 241 (6) and 200 claims (as well as his common-law negligence claim) as against Epic.[1]

Group 2 Motions: Third-Party Claims. In Seq. Nos. 2-3, third-party defendant ENVY CREATE LTD. ("Envy") moves, pre-answer, for an order, pursuant to

[1] *See* Plaintiff's Reply and Opposition, dated April 17, 2023 (NYSCEF Doc. No. 80), ¶ 2 ("plaintiff hereby withdraws his [Labor Law §§] 241 (6) and 200 [, as well as common-law negligence claims as] . . . against the defendant, EPIC, only").

CPLR 3211 (a) (1) and (7), dismissing: (a) the portion of Epic's third-party complaint asserting claims as against Envy (NYSCEF Doc. No. 32), and (b) the cross claims of third-party defendant IMG WORLDWIDE, LLC ("IMG") as against Envy (NYSCEF Doc. No. 34). Epic does not oppose dismissal of (and has since withdrawn) its third-party claim for breach of contract to procure insurance as against Envy.[2]

Group 3 Motions: Procedural Matters. In Seq. No. 4, Epic moves for an order, pursuant to CPLR 602 (a), consolidating both actions into a single action for discovery and trial under Index No. 518621/19. In Seq. No. 6, plaintiff cross-moves for an order restoring this action to the active status on the discovery calendar, setting a note-of-issue filing deadline, and severing the third-party action from the principal action, pursuant to CPLR 603 and 1010.

On May 8, 2023, the Court heard oral argument, reserving decision. At the Court's request to clarify the record, the parties submitted three additional documents: (1) the Epic Games-Far Right Productions Agreement with Schedule of Work; (2) the Epic Games-IMG Worldwide Agreement with Schedule of Work; and (3) the Fortnite World Cup Final-USTA Center-NY-Production Schedule.

[2] *See* Epic's Memorandum of Law in Opposition to Third-Party Defendant [Envy]'s Motion to Dismiss the Third-Party Complaint, dated May 1, 2023 (NYSCEF Doc. No. 109), page 4 ("Epic hereby withdraws its claim for Breach of Contract for Failure to Procure Insurance [as against Envy].").

Background

(1)

On Sunday, July 14, 2019, plaintiff, a union-affiliated stagehand carpenter with nonparty 360 Production Management ("360-PM"), was assisting his coworkers in moving two large, heavy wooden crates, measuring 7 feet tall and 2 feet wide,[3] from the tractor-trailer bed which was positioned approximately 5 to 6 feet above the ground[4] on the sloped surface of the parking lot[5] at the Arthur Ashe Stadium in Flushing, New York (the "stadium").[6] According to plaintiff's coworker, the two "crates were filled with component parts for the massive stage that needed to be erected on site. [Those] crates were filled with the different structural components like steel, metal and were extremely large and heavy, weighing at least 1,000 pounds each."[7] While plaintiff's coworker was backing the crate-loaded forklift (the "forklift") away from the tractor-trailer, plaintiff and his other coworkers were using their bare hands in an attempt to steady the crates on the forklift. Despite the efforts of plaintiff (and those of his coworkers) at steadying the crates on the forklift, one of the crates shifted, fell off the forks, and struck plaintiff, allegedly causing

[3] *See* Plaintiff's May 14, 2021 EBT tr ("Plaintiff's EBT tr") at page 44, line 24 to page 45, line 9.

[4] *See* Plaintiff's EBT tr at page 49, lines 14-16; page 54, line 25 to page 55, line 3; *see also id.*, at page 107, lines 14-15 ("the top of the crate was . . . 13 feet from the ground").

[5] The unloading (and the movement of the crates away) from the tractor-trailer was performed in one of the parking lots of the stadium, rather than at the stadium's main loading dock because the latter was tied up with other tractor-trailers which were transporting additional crates.

[6] *See* Plaintiff's EBT tr at page 42, lines 4-6 ("Teamsters [*i.e.*, the truck crew would] unload the truck and [would] load the trucks. When the items come off the trucks, it's now my item [*i.e.*, the responsibility for the item passes to 360-PM].").

[7] *See* Affidavit of Plaintiff's Coworker Henry Beckman, dated July 20, 2022, at page 1 (NYSCEF Doc. No. 27).

injuries to his right arm/shoulder/elbow and his left foot/ankle (the "accident").[8] Neither crate (including the crate at issue which fell on plaintiff) had been attached (nor had either crate been otherwise secured) to the mast of the forklift. At the time of the accident, plaintiff was 37 years old, stood 6 feet, 2 inches tall, and weighed 295 pounds.

The crate at issue contained several (of at least 100 in total) of the pre-fabricated stage components to be assembled (akin to a Lego set) into a very large, two-story main stage[9] for the video-game entertainment event, known as the "Fortnite World Cup Finals," which was organized and run by Epic as the game developer and promoter (the "main event"). Subsequently held at the stadium from Friday, July 26, to Sunday, July 28, 2019, the main event featured the top 100 solo players and the top 50 duo teams from around the world competing for a total of $30 million in prizes.[10]

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[8] *See* Fourth Supplemental Verified Bill of Particulars, dated September 8, 2021 (NYSCEF Doc. No. 20).

[9] *See* Plaintiff's EBT tr at page 30, line 7 to page 31, line 3; EBT tr of Jeremy Hoffman (director of video production at Epic) ("Hoffman's EBT tr"), at page 47, lines 14-16 ("The main stage was on the main tennis court that held all hundred[s] of our competitors."); page 48, lines 19-21 ("It was designed as a travel stage, and each time it had to be constructed. But it was not uniquely built just for this event."); page 49, lines 6 and 11 ("[The main stage] filled the entire tennis court" and "the entire floor of the stadium."); page 51, lines 17-20 ("[I]t was almost like a LEGO set where . . . on the side of the [crate] it would say, this is piece of 100 of 120 of this section, and the stage went up.").

[10] *See* Todd Spangler, *Fortnite World Cup Finals 2019 Draws Over 2 Million Live Viewers*, VARIETY, Jul 29, 2019 (online edition) ("Epic[']s first Fortnite World Cup Finals pulled in a live-streaming audience of more than 2 million concurrent viewers on Sunday who watched a 16-year-old wunderkind win the $3 million solo grand prize — the largest cash payout for an individual esports champ.") (available at https://variety.com/2019/digital/news/fortnite-world-cup-finals-2019-live-viewers-championship-1203282771/) (last accessed August 11, 2023).

(2)

In the capacity of the producer of the main event,[11] Epic had licensed the stadium (among other areas) from USTA,[12] a ground lessor of the stadium and the adjacent facilities from the City of New York.[13] Acting in the same capacity, Epic had entered into the Consulting Services Agreements (each, a "CSA") with each of third-party defendants IMG, Envy, and Far Right Production LLC ("FRP")[14] to obtain: (1) from IMG, "venue negotiation and player travel"[15] (designated in the applicable CSA as the "rehearsal event services" and "in-person event services"); (2) from Envy, "[the] outdoor staging and outdoor staging and all of the fan experiences outside [the stadium]"[16] (designated in the

[11] *See* EBT tr of Daniel Zausner, Chief Operating Officer of USTA National Tennis Center Incorporated, at page 15, lines 2-8.

[12] *See* Facility Use License Agreement, dated as of April 19, 2019, between Epic and USTA National Tennis Center Incorporated (NYSCEF Doc. No. 22).

[13] *See* Agreement of Lease, dated as of December 22, 1993, between City of New York as landlord and USTA National Tennis Center Incorporation as tenant (NYSCEF Doc. No. 21).

[14] *See* Agreement, dated as of September 1, 2018, between Epic and IMG (with Schedule 3 – IMG Services Terms and Conditions); Consulting Services Agreement, dated as of February 01, 2019, between Epic and Envy (with the Scope of Work schedule); and Consulting Services Agreement, dated as of November 27, 2018, between Epic and FRP (with the Scope of Work schedule).

[15] *See* Hoffman's EBT tr at page 26, lines 15-18; see also id., at page 33, lines 7-13 ("IMG was a partner that Epic had hired to help us with large-scale events and touring and our E[-]sports and competitive activities. So they would have been the ones that made the first contact with the venue, negotiated . . . the initial terms with the venue. While on-site, they were helping with player management."); at page 34, lines 6-15 ("[IMG] would have been our representative when we [Epic] went out to find venues. We would have provided IMG with a series of dates and possible territories that we would have liked to have a competition in. And [IMG] would have made initial outreach. So they reached out to . . . probably every major venue on the east coast to see who was available within the time frame and who had that space and the technology [Epic] needed to put out the event.").

[16] *See* Hoffman's EBT tr at page 27, lines 9-11; *see also id.*, at page 32, lines 12-16 ("Envy is an experiential company that does marketing events. . . . Envy would have handled any of our fan interaction stuff that would have happened outside . . . the stadium."); at page 32, lines 22-25
(footnote continued)

applicable CSA as the "physical festival experience," "consumer experience," and "project management"); and (3) from FRP, coordination of trucking and freight.[17] According to Epic: (1) FRP was "in charge of the stage and stage design and the install; (2) FRP was "responsible for hiring the teams [*i.e.*, 360-PM] to build the stage on-site; and (3) one "of our subcontractors [*i.e.*, 360-PM] had a carpentry department [which] reported to [FRP] for the interior [*i.e.*, inside the stadium]."[18] FRP, in turn, hired plaintiff's employer, 360-PM, to unload the components of the main stage from the 60+ trailer-trucks and to assemble the stage parts to form (among stages) the main stage inside the stadium.[19] In that regard, FRP's tour-production manager, Paul Lovell-Butt, was supervising truck unloading at the time and place of the accident, although plaintiff was receiving all of his means-and-methods instruction from his employer 360-PM.[20]

(3)

On August 22, 2019 (or approximately one month after the accident), plaintiff commenced this action against USTA and Epic, asserting claims under Labor Law §§ 240 (1), 241 (6), and 200, as well as in common-law negligence. In their respective

("Envy most likely would not have done much fabrication when it comes to staging. They would have done rentals because it was not a custom stage, so there was no reason to do fabrication.").

[17] Statement of Work annexed to the Epic-FRP CSA (Bates-stamped page 092022004556).

[18] See Hoffman's EBT tr at page 26, lines 17-20; page 31, lines 5-6; page 45, lines 8-15.

[19] *See* Plaintiff's EBT tr at page 65, lines 21-24.

[20] *See* Hoffman's EBT tr at page 103, line 19 to page 104, line 16; Plaintiff's May 24, 2021 EBT tr at page 64, line 6 to page 68, line 19; Fortnite World Cup 2019, Staff Contact List; Fortnite World Cup Final - USTA Center - New York - Production Schedule, entry for Sunday, July 14, 2019, 8:00 am to 8:00 pm entry for "Truck off[-]loading," etc.; Category – "Stage"; Group – "FRP"; Vendor – "FRP."

answers, USTA and Epic asserted cross claims against each other (NYSCEF Doc. Nos. 9 and 5, respectively).

On October 7, 2022, Epic impleaded each of IMG, Envy, and FRP for (as relevant herein) common-law contribution/indemnification and contractual indemnification (the first and second causes of action in the third-party complaint). In joining issue in the third-party action, IMG asserted (among other claims) cross claims against Envy for common-law contribution and indemnification (the first and second cross claims). In lieu of an answer, Envy served the aforementioned motions to dismiss. FRP, to date, has not appeared in the third-party action. A copy of FRP's subcontract agreement with 360-PM is not in the record, inasmuch as the parties have been unable to provide it to the Court.

Approximately three months earlier, on July 12, 2022, plaintiff had commenced another personal injury action arising from the same accident (the "related action"). Commenced in this county under index No. 519768/22, the related action named FRP as a direct defendant and, in addition, named as defendants: (a) Tait Towers Manufacturing LLC ("Tait"), the manufacturer of the main-stage parts; (b) Envy NYC Construction Corp. ("Envy NYC"), whose contribution (if any) to plaintiff's accident is unclear; and (c) Rooftop Management, Inc. ("Rooftop"), whose contribution (if any) to plaintiff's accident is likewise unclear. By answer, dated August 3, 2022, Tait joined issue in the related action. By Stipulation of Discontinuance with Prejudice, dated October 10, 2022, Rooftop was dropped from the related action. FRP has not appeared in the related action, which, to date, remains in the pre-RJI stage.

Additional facts are stated when relevant to the discussion below. The well-established summary-judgment standard of review is omitted in this decision and order in the interest of brevity.

Determination of the Group I Motions (Direct Claims)

As noted, plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against USTA and Epic, whereas Epic alone (but not USTA) cross-moves for summary judgment dismissing that claim as against it (Seq. Nos. 1 and 5, respectively).

Plaintiff's Labor Law § 240 (1) Claim Against USTA

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 657 [2d Dept 2021]). "[T]o prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]).

Here, plaintiff has established, prima facie, by way of the affidavit of his coworker with personal knowledge of the facts and in reliance on his pretrial testimony, that: (1) USTA was a proper defendant under Labor Law § 240 (1); (2) the accident stemmed from an elevation-related risk within the scope of the statute, considering that the 1,000-pound crate which injured him fell down approximately five-to-six feet from its unsecured position on the forks; (3) the statute was violated, in that (among other reasons) the subject crate was not secured to the mast of the forklift; and (4) such violation was a proximate

cause of his injuries (*see Minchala v Port Auth. of NY & NJ*, 67 AD3d 978 [2d Dept 2009]; *see also Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 888 [2d Dept 2021]; *McLean v Tishman Const. Corp.*, 144 AD3d 5344 [1st Dept 2016]; *Jordan v City of New York*, 126 AD3d 619, 620 [1st Dept 2015]; *Gould v E.E. Austin & Son, Inc.*, 114 AD3d 1208, 1208-1209 [4th Dept 2014]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]; *Fontaine v Juniper Assoc.*, 67 AD3d 608, 609 [1st Dept 2009]; *Baker v Barron's Educ. Serv. Corp.*, 248 AD2d 655, 655-656 [2d Dept 1998]).[21]

In opposition, USTA has failed to raise a triable issue of fact. USTA's initial contention that plaintiff's motion is premature misses the point. USTA has failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose plaintiff's motion are exclusively within his control (*see* CPLR 3212 [f]; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 457, 460-461 [2d Dept 2022]; *Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 944 [2d Dept 2019]; *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 1297-1298 [2d Dept 2014]; *Robinson v Bond St. Levy, LLC*, 115 AD3d 928, 929 [2d Dept 2014]).

USTA's next contention that plaintiff's motion is procedurally defective for failure to comply with the word-count requirement of 22 NYCRR 202.8-b, elevates form over substance. Plaintiff's non-compliance with 22 NYCRR 202.8-b can (and should) be

[21] *See further Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416, 417 (1st Dept 2022); *Grigoryan v 108 Chambers St. Owner, LLC*, 204 AD3d 534 (1st Dept 2022); *Ali v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 561 (1st Dept 2019).

overlooked as "a technical defect" (*see Anuchina v Marine Transp. Logistics, Inc.*, 216 AD3d 1126, 1127 [2d Dept 2023]).

USTA's final (and more serious) contention that it cannot be held liable under Labor Law § 240 (1) because it was a mere stadium lessee who neither contracted for nor controlled/supervised plaintiff's work, is incorrect as a matter of law. Although Labor Law § 240 (1) applies to "contractors and owners and their agents" at a work site, "[t]he statute may also apply to a lessee, where the lessee had the right or authority to control the work site" (*Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]).[22] "While one way to prove such control of the work site is through evidence that the lessee actually hired the general contractor, the right to control the work site may be proved by other means, such as *contractual . . . provisions granting such right*" (*id*. [internal citation omitted; emphasis added]). Here, the record demonstrates that USTA, as the stadium lessee, had the sole authority to operate and maintain the stadium, including its contractual rights in §§ 2, 5 (b), and 21 of the Facility Use License Agreement with Epic to insist that the on-site workers (irrespective by whom employed) follow proper safety practices (*see Perez v Beach Concerts, Inc.*, 154 AD3d 602 [1st Dept 2017]; *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]; *see also Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Kane v Coundorous*, 293 AD2d 309, 311-312 [1st Dept 2002]; *Lopez-*

[22] *See also Scaparo v Village of Ilion*, 13 NY3d 864, 866 (2009) (The term "owner" under Labor Law § 240 [1] is not limited to the titleholder of the property where the accident occurred and encompasses a person "who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit.") (internal quotation marks and citations omitted).

Dones v 601 W. Assoc., LLC, 26 Misc 3d 1209[A], 2010 NY Slip Op 50018[U], *8 [Sup Ct, Kings County 2010, Kramer, J.], *revd on other grounds* 98 AD3d 476 [2d Dept 2012]). Accordingly, the branch of plaintiff's motion which is for summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against USTA is **GRANTED**.

Plaintiff's Labor Law § 240 (1) Claim Against Epic

As part of its own prima facie showing (and in opposition to the applicable portion of plaintiff's motion), Epic has demonstrated that it lacked the requisite authority to supervise and control plaintiff's work.[23] "Whether [Epic] was a lessee, a licensee or

[23] For the sake of completeness, the Court has reviewed and rejected Epic's remaining contentions. Epic's initial contention that plaintiff's attempt at bracing a 1,000-pound crate with his hand while walking backwards next to the forklift constituted negligence, fails to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident. "[W]here, as here, a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006]). In light of the statutory violation (*i.e.*, that the crates on the forklift were not secured), even if plaintiff was negligent in some respect, his comparative negligence does not preclude Labor Law § 240 (1) liability (*see Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 700 [2d Dept 2013]). Epic's next contention that plaintiff's coworker's operation of the crate-loaded forklift was the sole proximate cause of the accident, is unavailing. Although "[a]n independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the [defendant's] conduct that responsibility for the injury should not reasonably be attributed to [it]" (*Gordon v Eastern Ry. Sup., Inc.*, 82 NY2d 555, 562 [1993]), here plaintiff's co-worker's operation of the forklift was neither of an extraordinary nature nor so attenuated from the statutory violation as to constitute a superseding cause (*see Raia v Berkeley Co-op Towers Section II, Corp.*, 147 AD3d 989, 992 [2d Dept 2017]; *McLean*, 144 AD3d at 534; *Morocho v Plainview-Old Bethpage Cent. School Dist.*, 116 AD3d 935, 936-937 [2d Dept 2014]). Epic's further contention that the lack of a substantial elevation differential between plaintiff and the falling crate was fatal to his Labor Law § 240 (1) claim, oversimplifies the facts of this case. Although the subject crate fell only a short distance, considering its weight and the amount of force it was capable of generating, the height differential was not de minimis (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009]; *Gonzalez v Madison Sixty, LLC*, 216 AD3d 1141, 1142-1143 [2d Dept 2023]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *Gutman v City of NY*, 78 AD3d 886, 887 [2d Dept 2010]).

a permittee, it could be considered an owner for purposes of the Labor Law if it had the ability to control the work site" (*Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 483 [1st Dept 2011]). "The key criterion is the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or non-exercise of control" (*Bart*, 277 AD2d at 5 [internal quotation marks omitted]). Here, all the deposition testimony indicates that Epic had no authority over plaintiff or any other on-site worker, and that FRP (and its subcontractor 360-PM) was exclusively in control of safety and the manner in which the work was performed[24] (*see Grilikhes*, 90 AD3d at 483; *accord Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 945-946 [2d Dept 2019]). Further, nothing in the USTA-Epic Facility Use License Agreement or in the Epic-FRP Consulting Services Agreement authorized Epic to supervise any on-site workers (whether employed by FRP or by 360-PM) or charged it with overseeing the on-site safety (*id.*). In opposition to Epic's prima facie showing, plaintiff has failed to raise a triable issue of fact.

Accordingly, the remaining branch of plaintiff's motion which is for summary judgment on his Labor Law § 240 (1) claim as against Epic is **DENIED**. Conversely, the

[24] *See* Hoffman's EBT tr at page 26, lines 13-20; page 83, lines 4-13; *see also id.*, at page 43, lines 12-13 ("[It] was up to each individual contractor to manage their own hiring."); page 56, lines 6-10 ("Epic did not install any of the stage. [Epic] hired the proper people for the venue through [its] subcontractors. [Its] contractors hired subcontractors to do the work."); page 61, lines 12-14, page 67, lines 2-22, and page 106, lines 3-15 (testifying that the first individual from Epic arrived on site on July 18, 2019, which was four days after the accident). *See also* Plaintiff's EBT tr at page 31, line 12 to page 33, line 15; page 36, line 16 to page 37, line 15.

branch of Epic's cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it is **GRANTED**.

Determination of the Group 2 Motions (Third-Party Claims)

As noted, Envy moves, pre-answer, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing as against it: (a) the portion of Epic's third-party complaint asserting claims for common-law contribution/indemnification and contractual indemnification (the first and second causes of action in the third-party complaint); and (b) IMG's cross claims for common-law contribution and indemnification (the first and second cross claims in IMG's answer).

"A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-1163 [2d Dept 2011]). Although the Consulting Services Agreement between Epic and Envy qualifies as "documentary evidence" within the intendment of CPLR 3211 (a) (1), Envy's remaining submissions (which included the deposition testimony and the affirmation of its co-founder) do not qualify as documentary evidence (*see Jones v Rochdale Vil., Inc.*, 96 AD3d 1014, 1017 [2d Dept 2012]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]).

When a party moves to dismiss a claim or cross claim pursuant to CPLR 3211 (a) (7), the standard is whether the allegations underlying the claim or cross claim state a cause of action, and, in considering such a motion, "the court must accept the

facts as alleged in the complaint as true, accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010] [internal quotation marks omitted]). "Whether [the pleader] can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, dismissal of Epic's claims against Envy pursuant to CPLR 3211 (a) (7) is *not* warranted because Envy's materials have failed to established that a material fact alleged in the third-party complaint "was, undisputedly, not a fact at all" (*Sokol*, 74 AD3d at 1182 [internal quotation marks omitted]).[25] Accordingly, Envy's motion for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing Epic's third-party complaint insofar as asserted against it is **DENIED**.

Turning to Envy's separate motion for dismissal of IMG's cross claims as against it, the Court notes that "the key element of a common-law cause of action for indemnification . . . is a separate duty owed the indemnitee by the indemnitor" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks omitted]). Here, IMG's cross claim for common-law indemnification against Envy is subject to dismissal because it does not allege the existence of any duty owed by Envy to IMG (*see Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, ___ AD3d ___, 2023 NY Slip Op

[25] Envy's contention that the third-party action was commenced in violation of the deadline set forth in the PC order is unavailing (*see Singh v City of New York*, 294 AD2d 422, 423 [2d Dept 2002]).

03913 [2d Dept 2023]). Further, "[a] claim for contribution may be established, among other ways, where the party from whom contribution is sought owed a duty to the injured plaintiff, and a breach of this duty contributed to the plaintiff's alleged injury" (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018]). Thus, IMG's cross claim for contribution against Envy is subject to dismissal because it does not allege the existence of any duty owed by Envy to plaintiff (*see Ramos v 200 W. 86 Apts. Corp.*, 179 AD3d 473 [1st Dept 2020]). Accordingly, Envy's motion for dismissal of IMG's cross claims as against it is **GRANTED**.

Determination of the Group 3 Motions (Procedural Matters)

Next, Epic moves for an order, pursuant to CPLR 602 (a), consolidating both actions for discovery and trial into a single action under Index No. 518621/19, whereas plaintiff cross-moves for an order restoring the principal action to the active status on the discovery calendar, setting a note-of-issue filing deadline in the principal action, and severing the third-party action from the principal action, pursuant to CPLR 603 and 1010.

"Where common questions of law or fact exist, a motion pursuant to CPLR 602 (a) to consolidate or for a joint trial should be granted absent a showing of prejudice to a substantial right of the party opposing the motion" (*Whiteman v Parsons Transp. Group of NY, Inc.*, 72 AD3d 677, 678 [2d Dept 2010]). "Consolidation is [further] appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (*Viafax Corp. v Citicorp Leasing, Inc.*, 54 AD3d 846, 850 [2d Dept 2008]). Here, in the interest of justice and judicial economy, and to avoid inconsistent determinations,

consolidation of both actions for discovery and trial into a single action is appropriate (*see Cusumano v Cusumano*, 114 AD3d 633, 634 [2d Dept 2014]; *Whiteman*, 72 AD3d at 678). Plaintiff's contention that he commenced the second action merely to toll the statute of limitations as against the additional defendants and that *if* he "is granted summary judgment as to the [Labor Law §] 240 (1) violation, stipulations of discontinuance [of the second action] will be immediately filed upon this Court's decision,"[26] is unpersuasive. Accordingly, Epic's motion for an order consolidating both actions for discovery and trial into a single action under Index No. 518621/19 is **GRANTED**.

Lastly, severance of the third-party action from the consolidated action is an appropriate remedy which avoids "prejudice [to] the substantial rights of any party" (CPLR 1010). Plaintiff appears ready to proceed to trial on the sole issue of damages while the third-party defendants have yet to begin discovery. Under these circumstances, the branch of plaintiff's cross motion for an order severing the third-party action from the consolidated action is **GRANTED** (*see e.g. Singh v City of NY*, 294 AD2d 422, 423 [2d Dept 2002]). The balance of plaintiff's cross motion is addressed in the decretal paragraphs below.

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

[26] *See* Affirmation in Support of Plaintiff's Cross Motion & in Opposition to Defendant's Motion to Consolidate, dated April 17, 2023 (NYSCEF Doc. No. 103), ¶ 14.

Conclusion

Accordingly, it is

ORDERED that in *Seq. No. 1*, plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against USTA and Epic is **GRANTED** as to USTA and is **DENIED** as to Epic; and it is further

ORDERED that in *Seq. No. 5*, Epic's cross motion for an order, pursuant to CPLR 3212, dismissing all of plaintiff's claims as against it is **GRANTED**, and all of plaintiff's claims against Epic are dismissed without costs or disbursements, and the action (as consolidated below) is severed and continued as against the remaining defendants; and it is further

ORDERED that in *Seq. No. 2*, Envy's pre-answer motion, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the portion of Epic's third-party complaint as against it is **DENIED**, and Envy is directed to interpose an answer to the third-party complaint within twenty days after electronic service of this decision and order with notice of entry, unless the third-party action is discontinued by Epic in accordance with CPLR 3217 (a) (2) prior thereto; and it is further

ORDERED that in *Seq. No. 3*, Envy's pre-answer motion, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing IMG's cross claims as against it is **GRANTED** and such cross claims are dismissed as against Envy without costs or disbursements; and it is further

ORDERED that in *Seq. No. 4*, Epic's motion for an order, pursuant to CPLR 602 (a), consolidating both actions for discovery and trial into a single action under

Index No. 518621/19 is **GRANTED TO THE EXTENT** that both actions (*but not the third-party action*) are consolidated into a single action for discovery and trial, with the caption of the consolidated action to read in its entirety as follows:

----------X
ANTHONY URANO,

Plaintiff,

- against - Index No. 518621/19

UNITED STATES TENNIS ASSOCIATION INCORPORATED,
USTA NATIONAL TENNIS CENTER INCORPORATED,
FAR RIGHT PRODUCTION LLC,
TAIT TOWERS MANUFACTURING LLC, and
ENVY NYC CONSTRUCTION CORP.,

Defendants.
----------X

; and it is further

ORDERED that in *Seq. No. 6*, plaintiff's cross motion for an order restoring the principal action to the active status on the discovery calendar, setting a note-of-issue filing deadline in the principal action, and severing the third-party action from the principal action, pursuant to CPLR 603 and 1010, is **GRANTED TO THE EXTENT** that:

(1) the third-party action is severed from the principal action (as consolidated), and is continued unless discontinued by Epic in accordance with CPLR 3217 (a) (2);

(2) *if* plaintiff, within twenty days after service of this decision and order with notice of entry, discontinues with prejudice the principal action (as consolidated) *as against each of Far Right Production LLC, Tait Towers Manufacturing LLC, and Envy NYC Construction Corp., then* plaintiff shall file a note of issue in the principal action within sixty days after service of this decision and order with notice of entry, with a trial to proceed

on the issue of damages in the principal action as against USTA at the appropriate time; *provided, however*, that in the *absence of such discontinuance*, defendants in the principal action (as consolidated) are directed to serve (to the extent not already served) any outstanding requests for disclosure, including notices for pretrial deposition, within ninety days after service of a copy of this decision and order with notice of entry, with all such discovery in the principal action (as consolidated) to be completed on or before December 29, 2023, and with the note of issue to be filed in the principal action (as consolidated) on or before January 22, 2024; and

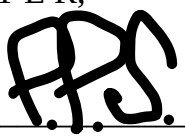
(3) unless the third-party action is discontinued by Epic in accordance with CPLR 3217 (a) (2) prior thereto, the third-party defendants are directed to serve any outstanding requests for disclosure, including notices for deposition, in the third-party action within ninety days after service of a copy of this decision and order with notice of entry, with all such discovery in the third-party action to be completed on or before December 29, 2023, and with the note of issue to be filed in the third-party action on or before January 22, 2024; it is further

ORDERED that to ensure that the record on the instant motions/cross motions is complete, Epic's counsel is directed to electronically file, as a single electronic file, a full copy of: (1) the Epic Games-Far Right Productions Agreement with the Schedule of Work attached; (2) the Epic Games-IMG Worldwide Agreement with the Schedule of Work attached; and (3) the Fortnite World Cup Final-USTA Center-NY-Production Schedule; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,



PETER P. SWEENEY, J.S.C.