SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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JARDEL PEDRA DASILVA,

Plaintiff,

- v -

CNY CONSTRUCTION CJS LLC,BRP JAMSTA TC OWNER LLC,CJ PLAZA ONE LLC,KINGDOM ASSOCIATES INC.,

Defendant.

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INDEX NO. 156486/2019

MOTION DATE 05/17/2023

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

CNY CONSTRUCTION CJS LLC, BRP JAMSTA TC OWNER LLC, CJ PLAZA ONE LLC

Plaintiff,

-against-

Defendant.

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Third-Party
Index No. 596025/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 145

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 146, 148, 149, 151, 152, 153, 154, 155, 156, 157, 158, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 138, 139, 140, 141, 142, 143, 144, 147, 150, 159, 160, 161, 162, 170

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action against CNY Construction CJS LLC (CNY), BRP Jamsta TC Owner LLC (Jamsta) and CJ Plaza One LLC (CJ, collectively CNY defendants)[1] on July 1, 2019, alleging he was injured on August 22, 2017, while changing a drill piece at the jobsite located at 147-40 Archer Avenue in Jamaica, Queens (the Project). Plaintiff alleges causes of action for negligence and violations of Labor Law Sections 200, 240(1) and 241(6).

On November 21, 2019, Defendants/Third-Party Plaintiffs commenced a third-party action against, Kingdom Associates Inc. (Kingdom). On December 17, 2019, Plaintiff served a Supplemental Summons and Amended Verified Complaint (the Amended Verified Complaint) naming Kingdom as a defendant in the main action.

ALLEGED FACTS

Plaintiff's Account of the Accident

Plaintiff, who was born in Brazil, testified through an interpreter that his native language is Portuguese, and that while he cannot speak or understand English, he does understand some Spanish. At the time of the accident, plaintiff was employed by KHC Equipment Corporation (KHC), an affiliate of Kingdom. While working on the Project plaintiff's supervisor Marcin Hulewicz (Marcin), a foreman from KHC, only spoke English so other co-workers would translate for him. Beginning in July 2017, plaintiff was assigned to work exclusively with an orange drilling machine (the drill), which was operated by a crew of three, including an operator who would sit in the cabin, and two people (including plaintiff) working outside to position the drill. He had no prior experience on this type of machine and learned by observing others.

[1] CNY defendants were initially each sued under different names, however by decision and order dated December 1, 2022, the court granted plaintiffs motion to amend the complaint to correct this mistake.

He testified that the day prior to the accident, the drill experienced a mechanical problem that caused it to be taken out of service for repair. On the day of the accident, plaintiff and the rest of his team were attempting to repair the drill by replacing a broken part, which he needed to climb a wooden platform that he estimated was 4-6 feet high to access. While unscrewing a piece that he guessed weighed 100 pounds to access the broken part, the piece fell on his hand, pressing it against the platform and breaking his finger, and causing him to fall off the platform where he landed on some 4 x 4 pieces of wood lying on the ground. He was not wearing a harness and had no place to attach one to even if he was, and there were no railings or barriers around the platform. However, he said that he did not need it at the time of the accident, but that it would be required for when he would go up to the top of the platform, and that he was required to wear a harness when he went above five feet.

After his fall, the machine operator picked him up and indicated that he should be quiet so that the "operator of safety" wouldn't see that he had fallen. Plaintiff was then taken to a trailer, where he encountered Marcin and the "daughter of the owner of [his] company," among others. He described what happened to them with the help of a man named Osmar, who spoke Spanish but not Portuguese, which plaintiff asserts was done incorrectly and incompletely.

Plaintiff then went to a nearby urgent care clinic accompanied by Osmar, who told him to not to say that the accident occurred at work because it would close down the project and put everyone out of a job. Osmar then spoke to personnel at the clinic in English and told them that Mr. DaSilva had injured his hand while moving a refrigerator.

After setting up an appointment for surgery, he and Osmar returned to the jobsite, and Osmar reiterated that he should tell the specialist the same story of the accident, and plaintiff acquiesced to avoid losing his job. He remained in the van for the rest of the day "so that the

people from safety and security wouldn't see [he] had an accident." He then went with Osmar to see the specialist and Osmar, speaking on his behalf, reiterated the account that plaintiff's injury was caused by moving a refrigerator. As he could not pay for surgery there, he sought treatment at a hospital in Newark, where they reset his finger but told him he still needed surgery. He then saw another specialist, who he told his present version of what happened, including that he was suffering from neck and back pain as well. The specialist subsequently performed surgery on his finger and referred him to another specialist for his neck and back. He eventually underwent spine surgery.

Defendants' Account of the Accident

Marcin testified on behalf of Kingdom that the machines used at the site did not have platforms that workers would stand on. He stated that he was first made aware of Plaintiff's accident when he walked into his trailer holding his swollen finger and smiling. He called another employee, who he referred to as Osmin, over to translate, but did not learn at that time how the accident occurred. He asked Osmin to accompany plaintiff to the urgent care and believed that he gave him $200 to pay for the visit. After they left, he learned from the drill operator, named Colton that the accident occurred when plaintiff was changing a part called a "sub saver" and when it was lowered to approximately a foot off the ground plaintiff grabbed his finger and said it got pinched between it and the ground. He notified "the office" that there had been an incident at the jobsite but did not prepare an accident report and did not notify anyone from CNY. He claimed that plaintiff returned to work as a flagman a few weeks after the accident for a couple of days.

Colton Kirby (Kirby), the drill rig operator, testified that at the time of the accident, he, plaintiff and another worker were performing what he described as "routine maintenance"

replacing a part on the drill that failed due to wear and tear. He was running the drill while plaintiff and another worker were changing out the "rod sub" which he described as the part of the head that screwed into the other rods which weighed 40-50 pounds. when it fell from about plaintiff's chin to his waist level and smashed "all four of their hands." He stated that the drill rig had a fixed, elevated "table" or "jaws" that workers would sometimes stand on in the course of the job. He testified that he could not recall whether plaintiff was standing on the table or the ground at the time of the accident, but that he did not see plaintiff fall, and that plaintiff walked away afterward the piece fell on him.

PENDING MOTIONS

On March 8, 2023, Kingdom moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing all of plaintiff's direct claims against it. (Mot. Seq. 5).

On March 9, 2023, plaintiff moved for an order pursuant to CPLR 3212 awarding him partial summary judgment on the issue of liability on its Labor Law § 240(1) claim against CNY defendants. (Mot. Seq. 6).

On March 9, 2023, CNY defendants moved for an order pursuant to CPLR 3212 dismissing plaintiff's claims against them and granting them summary judgment on their common law and contractual indemnification claims against Kingdom. (Mot. Seq. 7).

The motions are consolidated herein for determination as set forth below.

SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible

form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

KINGDOM'S MOTION FOR SUMMARY JUDGMENT

Kingdom contends that while plaintiff was technically employed by non-party KHC Equipment Corp. (KHC) on the project, he was a "special employee" of Kingdom, and thus, plaintiff cannot sustain direct claims against it under Sections 11 and 29 of the Workers Compensation Law.

Absent opposition, Kingdom's motion for summary judgment is granted, and all of plaintiff's direct claims are dismissed against it.

PLAINTIFF'S LABOR LAW 240(1) CLAIM

Contentions

Plaintiff contends that he is entitled to summary judgment on his Labor Law § 240(1) claim. He argues that as BRP and CJ were owners of the premises, and as CNY was the construction manager and agent on the project, they are each responsible parties under the statute. He contends that the drill rig constitutes a structure for the purposes of the statute, and that he was not provided with appropriate elevation safety devices, including a scaffold, ladder, or harness, which caused his fall. He also contends that the elevated rod was improperly secured, arguing that CNY defendants are liable under either a falling object or falling worker theory of liability. In support, he submits an affidavit of professional engineer Anthony Dolhon, who

opines that the failure to provide plaintiff with appropriate elevation safety devices or use hoisting and security devices violated Labor Law § 240(1) and various OSHA regulations.

CNY defendants oppose and seek dismissal of plaintiff's § 240(1) claim. They argue that both the alleged height of the falling object and plaintiff's elevation off the ground at the time of the fall were *de minimis*, based on Kirby's testimony and video evidence showing plaintiff, who is 5'8" tall, standing next to the table at waist height, and that as plaintiff testified that fall-safety equipment would not have prevented his fall, Labor Law § 240(1) does not apply. Additionally, they argue that plaintiff was performing routine maintenance at the time of his accident as opposed to a structural repair, which is not protected under the statute, and that the drill rig does not constitute a structure under the Labor Law. They also note that plaintiff previously reported that the accident occurred while moving a refrigerator, which would clearly not be covered by the Labor Law and undermines his credibility. Additionally, they argue that CNY had no supervisory control over plaintiff's work, and that plaintiff fails to meet its burden of proving that BRP and CJ were owners of the project. They contend that plaintiff's expert affidavit must be disregarded as it omits key facts and improperly makes legal conclusions.

In separate opposition, Kingdom concurs that issues of fact preclude summary judgment for plaintiff and that plaintiff's expert affidavit should be disregarded.

In reply, plaintiff argues that the fact that BRP and CJ were listed as joint "Owners" on their contract with CNY, and ACRIS filings which listed CJ as the beneficial owner and CJ as tenant of the premises at the time of the accident establishes that they are owners within the meaning of the Labor Law, and that CNY assumed authority for the construction project akin to a general contractor or owner's agent notwithstanding its designation as a construction manager. He contends he was engaged in construction or renovation work, rather than routine

maintenance, and that the allegedly inconsistent prior accounts of the accident were due to inaccurate and incomplete translations, and because Kingdom was attempting to conceal the cause of the accident. Additionally, he contends that the drill rig was a structure as defined by the Labor Law.

Analysis

In relevant part, Labor Law § 240(1) provides that contractors and owners, and their agents who erect a building or structure shall furnish or erect "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." It is well settled that "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity'" *Nieves v Five Boro Air Conditioning & Refrig. Corp.*, 93 NY2d 914, 915-916 (1999), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see Misseritti v Mark IV Constr. Co. Inc.*, 86 NY2d 487, 491 (1995).

"Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 (2001). Moreover, Labor Law § 240(1) only applies to "exceptionally dangerous conditions posed by elevation differentials at work site" rather than the usual and ordinary hazards of construction. *See Misseritti*, 86 NY2d at 491.

CNY Defendants' Individual Responsibility

It is undisputed that the owners of a project are responsible parties under Labor Law § 240(1). While CNY defendants dispute that BRP and CJ were the owners of the Premises, it is

uncontroverted that they refer to themselves as owner in their contract with CNY, and CNY defendants fail to present evidence that they did not own the Premises. Thus, BRP and CJ are responsible parties under the Labor Law.

While it is undisputed that a general contractor is a responsible party under Labor Law § 240(1), a construction manager generally is not responsible "unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury." *Lamar v Hill Intern. Inc.*, 153 AD3d 685 (2d Dept 2017); *see Giannas v 100 3rd Avenue Corp.*, 166 AD3d 853 (2d Dept 2018). A defendant's title is not determinative, but the "degree of control or supervision exercised"; a role of general supervision "is insufficient to impose liability under the Labor Law." *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 (2d Dept 2011).

Here, it is uncontroverted that plaintiff's work was exclusively directed and controlled by Kingdom or its subsidiary, not CNY. However, CNY's witness testified that the site superintendent, who would be a CNY employee, had the authority to shut down the jobsite if there was an unsafe condition, and it hired a safety company to oversee site safety. Such stop work authority is sufficient to, at minimum, raise a triable issue of fact as to whether a CNY was a statutory agent for the purposes of the Labor Law. *Santos v Condo 124 LLC*, 161 AD3d 650 (1st Dept 2018).

Labor Law 240(1) is Applicable to Plaintiff's Activities

"Labor Law § 240(1) does not apply to routine maintenance that is not done in the context of construction or renovation work." *Jehle v Adams Hotel Associates*, 264 AD2d 354 (1st Dept 1999). However, routine maintenance is covered by the statute where plaintiff's employer is engaged in construction and renovation work, and the maintenance work is "integral and

necessary" to the performance of that work." *Covey v Iroquois Gas Transmission Sys., L.P.*, 218 AD2d 197 (3d Dept 1996).

Here, it is undisputed that plaintiff's employer was engaged in construction and was repairing heavy machinery that was integral to that construction activity.

Additionally, the Court of Appeals has defined a "structure" under the Labor Law as "any production or piece of work artificially built up or composed of parts joined together in some definite manner." *Joblon v Solow*, 91 NY2d 457 (1998), quoting *Lewis-Moors v Contel of N.Y.*, 78 NY2d 942 (1991). The drill rig that plaintiff was working on was clearly a "structure" within the meaning of the Labor Law. *See Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 (2d Dept 2005).

There Remain Triable Issues of Fact as to whether Plaintiff's Elevation Related Risks were De Minimis

Where a plaintiff's elevation off the ground is *de minimis*, Labor Law § 240(1) does not apply. *See Toefer v Long Island R.R.*, 4 NY3d 399 (2005) (4-5 foot descent from flatbed did not give rise to liability); *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 2012 (1st Dept 2012) (plaintiff's elevation of at most 12 inches off the floor could not give rise to liability); *cf. Myiow v City of New York*, 143 AD3d 433 (1st Dept 2016) (elevation of 13-14 feet was contemplated by the statute); *Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491 (1st Dept 2017) (elevation of dock 3-4 feet off the ground was not *de minimis*). Additionally, in determining whether an elevation differential of a falling object is "physically significant" versus "*de minimis*," the court must consider "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent." *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31 (3d Dept 2012), quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d at 605 (2009).

Here, as there are significantly differing accounts about whether plaintiff fell at the jobsite, and as to the weight and manner of how the drill part fell, there remain triable issues of fact that preclude summary judgment for either party. Such conflicting versions of events, including plaintiff's prior inconsistent statements, are questions of credibility best left to the trier of fact. Thus, both plaintiff and CNY defendants' motions are denied as to plaintiff's Labor Law 240(1) claim.

PLAINTIFF'S LABOR LAW §§ 241(6), 200, AND NEGLIGENCE CLAIMS

Contentions

CNY defendants contend that as there is no evidence that any of them created the condition that caused plaintiff's accident, had actual or constructive notice of the condition, and as plaintiff testified that Kingdom exclusively directed and supervised his work, plaintiff's negligence and Labor Law § 200 claims must be dismissed against them. They argue that none of the OSHA and industrial code provisions cited by plaintiff support a Labor Law § 241(6) claim.

In opposition, plaintiff contends that his Labor Law § 241(6) claim is supported by a violation of Industrial Code § 23-1.16(b), arguing that while he was supplied with a safety harness, he was unable to use it because there were no available attachment points. He argues that CNY defendants maintained supervisory control at the jobsite through CNY's superintendents and retained site safety manager, and thus material questions of fact exist as to their negligence.

Plaintiff's Labor Law § 241(6) Claim

Labor Law §241 sets forth in relevant part that:

> All contractors and owners and their agents... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the

> following requirements... [subsection] (6) 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting all areas in which construction, excavation or demolition work is being performed." *Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 348 (1998); *see also, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 (1978). The owners and contractors' duty under Labor Law § 241(6) is nondelegable, "regardless of their control or supervision of the jobsite." *Whalen v City of New York*, 270 AD2d 340, 342 (2d Dept 2000); *see also Allen*, 44 NY2d at 300.

To support a cause of action pursuant to Labor Law §241(6), plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v Skanska USA Building Inc.*, 99 AD3d 139 (1st Dept 2012); *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 (2d Dept 2006).

As plaintiff only argues the applicability of Industrial Code § 23-1.16(b) in opposition, its claim pursuant to all other provisions cited in its bill of particulars are deemed abandoned. Industrial Code § 23-1.16(b), entitled "safety belts, harnesses, tail lines and lifelines" states:

> Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

"That provision of the Industrial Code is sufficiently specific to warrant the imposition of liability." *Jerez v Tishman Const. Corp. of New York*, 118 AD3d 617, 618 (1st Dept 2014). Here, plaintiff testified that he was provided with a safety harness, but that he did not use it at the time of the accident because he did not need it and had no place to secure it even if he did. Where, as here, the equipment listed in the statute is not used, the provision has been found to not give rise to a Labor Law §241(6) claim. *See Venegas v Shymer*, 201 AD3d 1001 (2d Dept 2022); *D'Acunti v New York City School Const. Auth.*, 300 AD2d 107 (1st Dept 2002). Thus, absent an applicable underlying Industrial Code violation, plaintiff's Labor Law §241(6) claim must be dismissed.

Plaintiff's Labor Law § 200 and Common Law Negligence Claims

The duty to provide a safe worksite imposed upon owners, general contractor and their agents are based upon supervision and control. "The purpose of the [Labor Law] is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor instead of the workers themselves." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). Labor Law § 200 is the codification of the common-law duty of owners, general contractors and their agents to protect the health and safety "of all persons employed therein or lawfully frequenting such places." *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 299 (1978). An implicit precondition of this duty "is that the party charged with that responsibility has the authority to control the activity bringing about the injury." *Russin v Picciano & Son*, 54 NY2d 311, 317 (1981).

Labor Law § 200 applies where workers are injured because of dangerous or defective premises conditions at a worksite or where a worker is injured due to the way the work is performed. When a premises condition is at issue, the owner or general contractor may be held

liable for a violation of the statute if they created the condition that caused the accident or had actual or constructive notice of the dangerous condition. *See Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 AD3d 446 (1st Dept 2013); *Singh v Black Diamonds LLC*, 24 AD3d 138 (1st Dept 2005). When the means and manner of the work are at issue, "a plaintiff must show that the owner or agent have the authority to control the activity bringing about the injury to enable it to avoid or correct any unsafe condition." *Lemanche v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422 (1st Dept 2021); *see Rizzuto v L.A. Wegner Contr. Co.*, 91 NY2d 343 (1998).

Here, plaintiff is not alleging a premises defect, but that the means and manner of the work that was performed was unsafe. As stated within, CNY, through its onsite superintendents, had the authority to shut down the jobsite for safety reasons. This is sufficient to raise a triable issue of fact as to its supervision and control of the means and methods of plaintiff's work. *Lemanche*, 190 AD3d at 424. Thus, CNY defendants are not entitled to summary judgment on plaintiff's negligence and Labor Law § 200 claims.

CNY DEFENDANTS' DEFENSE AND INDEMNITY CLAIMS

Contentions

CNY defendants argue that they are entitled to common law indemnification from Kingdom, as they are free of negligence and Kingdom had exclusive supervision control over plaintiff's work. They contend that they are entitled to contractual defense and indemnity pursuant to the contract between CNY and Kingdom, as it is undisputed that plaintiff's alleged accident occurred in the course of his employment with Kingdom.

In partial opposition, Kingdom argues that, in the event the court find that plaintiff was a special employee of it, then all common law claims against it would be barred as plaintiff did not

sustain a grave injury within the meaning of Workers Compensation Law Section 11. It argues that as CNY defendants would not be entitled to summary judgment on their contractual indemnification claim unless it was found to be actively at fault, and there are factual issues as to whether plaintiff's injury arose out of KHC's work.[2]

In reply, CNY defendants argue that it is immaterial whether plaintiff was employed by Kingdom or KHC at the time of his accident, as it is contractually required to indemnify them for claims arising out of either it or its subcontractors' work. They otherwise reiterate their arguments.

Analysis

As it is uncontested that plaintiff was a special employee of Kingdom and did not suffer a "grave injury" within the meaning of Workers Compensation Law § 11, CNY defendants' common law indemnification claim against it is statutorily barred. *Keita v City of New York*, 129 AD3d 409 (1st Dept 2015).

Article 16 of the contract between CNY and Kingdom required Kingdom to defend and indemnify CNY from any claims "arising out of…the performance of the Work by [Kingdom] and/or Subcontractors including anyone directly or indirectly employed by them…" Such broad indemnification provisions have been interpreted to be triggered absent a finding of negligence. *See Ging v F.J. Sciame Construction Co., Inc.*, 193 AD3d 415 (1st Dept 2021).

While it is uncontroverted that plaintiff's claims arise out of his work for Kingdom and its subsidiary, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" *Mejia v Cohn*, 188 AD3d 1035, 1038 (2d Dept 2020), quoting *Reisman v*

[2] Kingdom in its affirmation refers to an entity called "KFC Equipment Corp." but given the context it is the court's understanding that they were referring to KHC.

Bay Shore Union Free School Dist. 74 AD3d 772 (2d Dept 2010). As there remain questions of fact as to CNY defendants' negligence, it is not entitled to summary judgment on its contractual defense and indemnification claims.

CONCLUSION

Accordingly, it is hereby:

ORDERED that defendant Kingdom Associates Inc.'s motion for summary judgment (mot. seq. 5) is granted, and all of plaintiff's direct claims against it are dismissed; and it is further

ORDERED that plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim (mot. seq. 6) is denied; and it is further

ORDERED that the motion for summary judgment of defendants CNY Construction CJS LLC, BRP Jamsta TC Owner LLC and CJ Plaza One LLC (mot. seq. 7) is granted, to the extent that plaintiff's Labor Law §241(6) claim is dismissed against them, and is otherwise denied; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

8/23/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE