

**Perez v Port Auth. of N.Y. & N.J.**

2023 NY Slip Op 33619(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 154910/2018

Judge: Richard Latin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN PART 46M

Justice

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ALAIN PEREZ,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, GEORGE WASHINGTON BRIDGE BUS STATION DEVELOPMENT VENTURE LLC, SJM PARTNERS, INC., THE GAP, INC., TUTOR PERINI BUILDING CORP., REBCOR CONSTRUCTION INC.,

Defendant.

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REBCOR CONSTRUCTION INC.

Plaintiff,

-against-

PRO CONTRACTORS, INC.,

Defendant.

-----X

INDEX NO. 154910/2018
MOTION DATE 03/06/2023, 03/06/2023, 03/06/2023
MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

Third-Party Index No. 595700/2018

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 220, 221, 222, 228, 231, 234, 235, 236, 244, 245, 246, 249, 250

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 223, 225, 226, 227, 229, 232, 237, 238, 239, 248

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 224, 230, 233, 240, 241, 242, 243, 247

were read on this motion to/for JUDGMENT - SUMMARY

Motion sequence numbers 005, 006 and 007 are hereby consolidated for disposition and are determined as follows:

### ***PROCEDURAL BACKGROUND***

In this action, plaintiff Alain Perez seeks damages for personal injuries he allegedly sustained on August 28, 2017. Plaintiff alleges that he fell from an A-frame ladder while working at a construction site in a retail space located in the George Washington Bridge Terminal Station, 4211 Broadway, New York, NY (the “Premises”). He alleges that the ladder shifted due an uneven concrete floor, causing him to fall and injure his hand.

At the time of the accident, the Premises was owned by the Port Authority of New York and New Jersey (the “Port Authority”), who leased it to the George Washington Bridge Bus Station Development Venture LLC (“GWB”). GWB leased the retail space to The Gap, Inc. (“Gap”), and Gap commenced a construction project (the “Project”) in the retail space. Gap hired Rebcor Construction, Inc. (“Rebcor Construction”) as the general contractor over the Project. Rebcor Construction hired third-party defendant Pro Contractors, Inc. (“Pro”) as a subcontractor to perform drywall work on the Project. Plaintiff was an employee of Pro.

In motion sequence 005, Gap, GWB, and Port Authority (the “Moving Defendants”) move for summary judgment in their favor, pursuant to CPLR 3212, on their third-party common law and contractual indemnification claims against Rebcor Construction. Moving Defendants also move for summary judgment on their third-party contractual indemnification claims against Pro.

In motion sequence 006, plaintiff moves for summary judgment pursuant to CPLR as to liability on his Labor Law §240 (1) claims as against Port Authority, GWB, Gap and Rebcor Construction.<sup>1</sup>

In motion sequence 007, Rebcor Construction moves for summary judgment pursuant to CPLR 3212 on its third-party contractual indemnification claims against Pro.

### ***Plaintiff’s Deposition Testimony***

Plaintiff appeared for deposition on June 22, 2021 (NYSCEF Doc. No. 210). At the time of the accident, he was working for Pro, a construction company doing sheetrock work on the Project (Plaintiff tr. at 15, 115). The Project was a build-out of a Gap department store (*id* at 115-116). Plaintiff testified that Port Authority owned the Premises, but he was not aware of GWB’s involvement with the Premises (*id* at 117). He did not know who hired Pro to work on the Project (*id* at 115).

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<sup>1</sup> Plaintiff’s action was discontinued with prejudice as against Tutor Perini Buildings Corp. (NYSCEF Doc. No. 107).

On the date of the accident, plaintiff's foreman, "Pat," was the only other Pro employee at the jobsite (*id* at 47). At the time of the accident, plaintiff was standing on an A-frame ladder, approximately eight feet from the ground, doing sheetrock work under Pat's direction (*id* at 20, 30, 33, 38-39, 139). Plaintiff testified that only Pro directed his work on the jobsite (*id* at 39).

Plaintiff testified that he inspected the ladder prior to using it, and that it was not defective or broken (*id* at 20). Prior to the accident, plaintiff had opened the ladder and moved it to the area where the accident occurred (*id.* at 128-130).

Immediately prior to the accident, plaintiff was standing on the third rung from the top of the ladder (*id* at 69). He was standing on the ladder for approximately five minutes when he felt it "wobble left" (*id* at 136). The ladder fell while plaintiff was standing on it (*id* at 17). Plaintiff attempted to get off of the ladder, but it fell while he was still on it (*id* at 33, 136).

***Deposition Testimony of Miguel Ray, GWB property manager***

Miguel Ray appeared for deposition on November 23, 2021 (NYSCEF Doc. No. 211). At the time of the accident, he was working for GWB as the property manager of the Premises (Ray tr. at 8-9, 15). At the time of the accident, Port Authority owned the Premises and GWB had a lease with Port Authority. Ray testified that Rebcor Construction was the construction company working on the Project for Gap (*id* at 28).

There were no contracts between GWB and Gap as to the Project (*id* at 2). Further GWB did not provide supervision over the work being done on the Project (*id* at 22-23, 35). GWB was not involved in the hiring or approval of any contractors, nor did GWB have any control over site safety (*id* at 35, 102). GWB did not provide any safety equipment for the Project (*id* at 102).

Ray's only responsibility was to make sure that all of the workers on the Project had the required identifications and credentials while on the worksite (*id* at 23). He did not conduct walkthroughs or inspections of the worksite and did not have the authority to stop work (*id.* at 25-26, 41-42).

Ray did not witness the accident (*id* at 66). He was informed of the accident after it happened and did not speak with anyone as to how it occurred (*id* at 48, 60).

***Deposition Testimony of Louis Anselmi, Gap's director of construction, North America, Eastern region***

Louis Anselmi appeared for deposition on December 13, 2021 (NYSCEF Doc. No. 214). At the time of the accident, he worked for Gap as the director of construction for North America, Eastern Region (*id.* at 7-11). Gap leased a space in the Premises from GWB and was building out a Gap Factory store there (*id.* at 18). Anselmi did not directly communicate with GWB or Port Authority (*id.* at 23).

Rebcor Construction was the general contractor on the Project (*id.* at 20, 26-27). Anselmi testified that there were two contracts between Gap and Rebcor Construction relating to the Project, the Master Services Agreement (NYSCEF Doc. No. 176) and a second contract “attachment” (the “Purchase Order”) (NYSCEF Doc. No. 177) that referenced the Master Services Agreement (*id.* at 22-23). Anselmi testified that these attachments are “created for every project that references the Master Service Agreement” (*id.* at 22-23). Anselmi testified that he was not involved in the creation of the Master Services Agreement, but he was involved in drafting the Purchase Order specific to the Project (*id.* at 21-23).

Anselmi further testified that Rebcor Construction worked for Gap on other construction jobs prior to the Project (*id.* at 29). Specifically, Rebcor Construction had worked for Gap under Rebcor Construction’s previous owner, before John Files purchased Rebcor Construction from the prior owner (*id.* at 29).

Bill Miller was Rebcor Construction’s superintendent on the Project and John Ciuzio was Gap’s project manager (*id.* at 11, 36). Ciuzio was involved on the Project on a daily basis and was responsible for the work on the Project (*id.* at 11-12). Anselmi’s job was to supervise Ciuzio (*id.* at 11-12). Anselmi further testified that he had no contact with Pro (*id.* at 55).

Gap did not have a daily presence on the jobsite, nor did it provide any of the equipment for the Project (*id.* at 42). Gap was not involved in the hiring of subcontractors (*id.* at 29).

Anselmi did not witness the accident and was informed of it by Ciuzio (*id.* at 45-46).

***Deposition Testimony of John Files, owner of Rebcor Construction***

John Files appeared for deposition on January 12, 2022 (NYSCEF Doc. No. 171). At the time of the accident, he was the owner of Rebcor Construction, a general contracting company that does “interior finales” (Files tr. at 10-11). Files distinguished Rebcor Construction from Rebcor Inc. as two separate companies (*id.* at 17, 102). Specifically, Files purchased Rebcor Inc. from Eric Miller on June 11, 2015 and retained the name “Rebcor” (*id.* at 17).

Files testified that when he purchased Rebcor Inc. from Eric Miller, Rebcor Construction did not continue any of the ongoing contracts that Rebcor Inc. held with any prior clients (*id.* at 118). He further testified that Rebcor Construction did not assume any responsibility nor take any revenue from any existing work done by Rebcor Inc. (*id.* at 118). Rebcor Construction only took on Rebcor Inc.'s "un-started work" (*id.* at 118).

He further testified that he had never seen the Master Service Agreement and that he did not know the circumstances of how Eric Miller signed the Master Service Agreement (*id.* at 103).

Files testified that Rebcor Construction was hired by Gap as the general contractor on the Project (*id.* at 16-17, 23). He testified that he signed the Purchase Order and that it was the only written agreement between Rebcor Construction and Gap as to the Project (*id.* at 21-22, 115).

Files distinguished the Purchase Order from the Master Service Agreement (*id.* at 20-21, 103). At his deposition, Files was shown the Master Service Agreement and testified that he had never seen it before (*id.* at 102). He further indicated that the Master Service Agreement was signed by Eric Miller and referred to Rebcor Inc., which was not Files' company (*id.* at 102-103).

Files testified that Rebcor Construction's responsibilities as general contractor included preparing a safety plan and hiring subcontractors for the Project, such as Pro (*id.* at 25, 33, 54). Rebcor Construction also had a full-time superintendent, "Bill Miller," who was at the worksite on a daily basis (*id.* at 36). Files testified that Bill Miller's responsibilities included the safety of the worksite and overseeing the subcontractor "from a means and methods standpoint" (*id.* at 39, 41-42). This included oversight over the subcontractors as they were working and using equipment such as ladders and lifts (*id.* at 48-49). Bill Miller also had the authority to stop work if he saw an unsafe condition (*id.* at 48).

Files also testified that Miller was not responsible for telling the subcontractors the specifics of the work. He testified that "each sub and... each foreman or general foreman for the sub is directing [the work] ... [Rebcor Construction] give[s] them the blessing or we don't, you know. So, it's a means and methods thing but it's also a safety thing as well" (*id.* at 41-42).

Files testified that Rebcor Construction did not provide any ladders on the worksite and that the subcontractors provided all of the equipment (*id.* at 49-52).

Files testified that Rebcor Construction did not have any contracts with Port Authority or GWB (*id.* at 34). Further, neither Port Authority nor GWB approved Rebcor Construction's subcontractors (*id.* at 34).

Files testified that Port Authority had a “strong presence” on the worksite (*id* at 43-45). He testified that Port Authority did not have control over how the work was being done, but that Rebcor Construction had to get approval from Port Authority for certain work done on the Project (*id* at 44-45).

Files was not onsite on the date of the accident (*id* at 76). He learned about the accident from Bill Miller (*id* at 75). Files did not know the work plaintiff was performing at the time of the accident (*id* at 88).

### ***DISCUSSION***

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

“[F]acts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

#### ***Plaintiff’s Labor Law § 240 (1) claims as against NYCHA and AAA (motion sequence 006)***

Plaintiff moves for summary judgment as to liability on his Labor Law § 240 (1) claims against Port Authority, GWB, Gap and Rebcor Construction.

Labor Law § 240 (1), also known as the Scaffold Law reads as follows:

“Scaffolding and other devices for use of employees

“1. 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, altering, painting, cleaning or pointing 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.”

“[T]he Labor Law imposes absolute liability on owners and general contractors for injuries that are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks” (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]). To prevail on a Labor Law § 240 (1) claim, plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries (*See Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). “[T]he single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Initially, Port Authority, GWB, Gap and Rebcor Construction do not contest that they are proper Labor Law defendants.

Here, plaintiff has met his prima facie burden on his Labor Law § 240 (1) claims. Plaintiff testified that he was working on an unsecured A-Frame ladder, approximately 8 feet off of the ground, when the ladder shifted causing him to fall (Plaintiff tr. at 17, 20, 30, 33, 38-39, 136 139). As such, plaintiff has established prima facie that the accident occurred while he was working at an elevated height and that defendants’ failure to provide him with appropriate safety devices was the proximate cause of the accident (*See Pinzon v Royal Charter Props., Inc.*, 211 AD3d 442, 443 [1st Dept 2022] [plaintiff established prima facie violation of Labor Law § 240 (1) as the A-frame ladder on which he was standing suddenly moved to the left, causing him to lose his balance and fall]).

Further, defendants have failed to create an issue of fact in opposition to plaintiff’s motion for summary judgment.

Port Authority, GWB, and Gap argue that there is an issue of fact as to how the accident occurred. They refer to an accident report dated August 28, 2017 (the “Accident Report”) (NYSCEF Doc. No. 226), which indicates that the accident occurred when the plaintiff lost his

balance while working on a ladder. Rebcor Construction also argues in opposition to the motion that plaintiff has failed to establish prima facie that the ladder failed, thereby causing the accident.

The Accident Report is unsworn and uncertified. It does not indicate that the person who prepared it witnessed the accident, was present at the worksite, or had any firsthand knowledge of the circumstances of the accident. Even assuming arguendo that the Accident Report was properly sworn, certified, and prepared by someone with firsthand knowledge of the accident, the information therein is insufficient to create an issue of fact as to how the accident occurred. Specifically, the indication in the Accident Report that plaintiff “lost his balance and fell” from the ladder is not inconsistent with plaintiff’s more detailed testimony as to how the accident occurred nor does it present an alternative cause for the accident (*See Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650, 652 [1st Dept 2021] [“[p]laintiff’s statement to his supervisor that he fell because he lost his balance is consistent with his more detailed testimony regarding how he lost his balance and fell from the ladder after it moved.”]). There is nothing from the record to suggest that the accident occurred due to plaintiff simply losing his balance while working on a properly secured ladder (*See Ping Lin*, 193 AD3d at 652).

Finally, “plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law § 240(1) claim” (*Pinzon*, 211 AD3d at 443, citing *Ping Lin*, 193 AD3d at 651).

As such, plaintiff is entitled to summary judgment in his favor on liability against Port Authority, GWB, Gap and Rebcor Construction as to his Labor Law § 240 (1) claims.

**Gap, GWB and Port Authority contractual indemnification claims against Rebcor Construction (motion sequence 005)**

Moving Defendants move for summary judgment in their favor on their contractual indemnification claims against Rebcor Construction. They argue that prior to retaining Rebcor Construction as the general contractor on the Project, Gap entered into the Master Service Contract with Rebcor Inc. As per the terms of the Master Service Agreement, Rebcor Inc. would be authorized to commence any work for Gap by submitting an “Authorization to Execute Construction”.

Moving Defendants present two arguments for holding Rebcor Construction subject to the indemnification provision in the Master Service Agreement. Firstly, they

argue that Rebcor Construction signed the Purchase Order, which incorporated the terms of the Master Service Agreement. They argue that after Rebcor Construction purchased Rebcor Inc., Rebcor Construction's owner, Files, signed and submitted the Purchase Order to Gap. The Purchase Order was in the form of an Authorization to Execute Construction, which incorporated the terms and conditions of the Master Service Agreement.

Secondly, Moving Defendants argue that although Rebcor Construction was not a party to the Master Service Agreement, there is objective evidence that Rebcor Construction and Gap both intended to be bound by the agreement.

Rebcor Construction argues in opposition that it never entered into a written agreement with Gap that included an indemnification clause. Specifically, Rebcor Construction did not enter into the Master Service Agreement with Gap, and further, the Purchase Order did not include any indemnification language. Rebcor Construction further argues that its purchase of Rebcor Inc. was solely a purchase of assets. As such, Rebcor Construction did not assume any of Rebcor Inc.'s duties or liabilities as to any ongoing construction projects.

Here, Moving Defendants have failed to establish prima facie that Rebcor Construction is subject to any indemnification provisions in the Master Service Agreement presented to the court. Specifically, they have failed to establish that the Purchase Order incorporates any of the terms of the Master Service Agreement.

"Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole" (*Fort v Haar*, 209 AD3d 466, 467 [1st Dept 2022] [internal quotation marks and citations omitted]).

The Purchase Order specifically indicates that it "incorporates the terms and conditions of that certain Master Agreement For Contractor Services dated as of the 30<sup>th</sup> day of November 2000 (the "Agreement") by and between Gap, Inc ("Owner") and Contractor" (Purchase Order at p 1). However, there is nothing in the Master Service Agreement to indicate that it was dated as of November 30, 2000. Moving Defendants' submitted Master Service Agreement includes an effective date of April 20, 2009 (Master Service Agreement at p 1). Further, the signature page does not include a date of signature (Master Service Agreement at p 49). In addition, there is

nothing in the submitted Master Service Agreement to indicate that it is a restatement of any prior contract.

As such, Moving Defendants have failed to establish prima facie that the Purchase Order incorporates the terms of the submitted Master Service Agreement. Further, Moving Defendants' argument that there is objective evidence that Rebcor Construction intended to be bound by the Master Service Agreement is without merit. Specifically, Moving Defendants cite to *Flores v Lower E. Side Serv. Ctr., Inc.* (4 NY3d 363, 653 [2005]) and *Ajche v Park Ave. Plaza Owner, LLC* (171 AD3d 411, 411 [1st Dept 2019]) which stand for the principle that "[a]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores*, 4 NY3d at 369). However, the instant action differs significantly from the cases cited by Moving Defendants.

Specifically, the instant action does not involve an unsigned contract. There is no dispute that the Master Service Agreement was signed by Gap and Eric Miller, the former owner of Rebcor Inc. Further, there is no dispute that Rebcor Inc., and Rebcor Construction are two separate entities.<sup>2</sup>

As such, the Master Services Agreement is not an "unsigned contract", but simply a contract to which Rebcor Construction was not a party. "One cannot be held liable under a contract to which he or she is not a party" (*See Collyer v LaVigne*, 202 AD3d 1335, 1341 [3rd Dept 2022], quoting *Arroyo v Central Islip UFSD*, 173 AD3d 814, 816 [2nd Dept 2019]).

As Moving Defendants have failed to establish prima facie that the Purchase Order incorporates the terms of the submitted Master Service Agreement and/or that the Master Service Agreement is an "unsigned contract," they are not entitled to summary judgment on their contractual indemnification claims against Rebcor Construction.

**Gap, GWB and Port Authority's common law indemnification claims against Rebcor Construction (motion sequence 005)**

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<sup>2</sup> The Court notes that Moving Defendants do not raise any issues as to the scope of any purchase agreements that may exist between Rebcor Inc. and Rebcor Construction. None of the motions before the Court request relief based upon the contents of any purchase agreements between Rebcor Inc. and Rebcor Construction. As such, the instant decision in no way speaks to the scope of any purchase agreements that may exist between Rebcor Inc. and Rebcor Construction.

Moving Defendants move for summary judgment in their favor on their common law indemnification claims against Rebcor Construction. They argue that Rebcor Construction asserted supervision and control over the worksite. Specifically, Rebcor Construction actively insured that its subcontractors were working as directed by the subcontractors' foreman and Rebcor Construction's onsite superintendent. Moving Defendants further argue that they did not direct, supervise, nor control any of the work at the jobsite.

Rebcor Construction argues in opposition that it did not supply any equipment on the jobsite nor did it supervise or control plaintiff's work. It argues that the subcontractors' foremen supervised their employees' work and that the specific terms of the subcontract between Rebcor Construction and Pro (the "Rebcor Construction/Pro Agreement") (NYSCEF Doc. No. 178) made Pro responsible for the means and methods of their employees' work.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012], citing *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Reilly v Digiacommo & Son*, 261 AD2d 318 [1st Dept 1999]). "Thus, a party moving for summary judgment dismissing a common-law indemnification claim can meet its prima facie burden by establishing that the plaintiff's accident was not due to its own negligence" (*Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 752 [2nd Dept 2021] [citations omitted])

As such, it must be determined whether Moving Defendants and/or Rebcor Construction were negligent as a matter of law.

"It is well-settled that to establish a claim of negligence, a plaintiff must prove: a duty owed to the plaintiff by the defendant, a breach of that duty, and injury proximately resulting therefrom" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023] [citations omitted]).

A general contractor's common law duty of care to provide construction site workers with a safe place to work has been codified by Labor Law § 200 (*See Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022]). As such, determinations of whether a general contractor has violated Labor Law § 200 and/or common law negligence are based upon the same criteria (*See Valencia v Glinski*, 219 AD3d 541, 545 [2nd Dept 2023] [where "plaintiff's injuries arise from the manner in which the work is performed, there is no liability under the common law or Labor Law § 200

unless the owner or general contractor exercised supervision or control over the work performed”] [internal quotation marks and citation omitted]; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 497 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

“Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means [means and methods] of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.”

(*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [citations omitted])

Further, “the mere fact that [a party] had the authority to stop unsafe work does not show that it had the requisite degree of control and actually exercised that control” (*See Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531-532 [1st Dept 2018], citing *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

Plaintiff’s accident resulted from the means and methods of the work. Specifically, the accident resulted from how the A-frame ladder was being used on the worksite (*see Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 556 [1st Dept 2022] [means and methods analysis applied where plaintiff fell from an A-frame ladder that tilted after a leg of the ladder broke through a temporary masonite covering]; *Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059 [2nd Dept 2015] [means and methods analysis applied where plaintiff was injured when the foot of an unsecured A-frame ladder twisted out from under him]).

Here, Moving Defendants have failed to establish prima facie that they are entitled to common law indemnification from Rebcor Construction. Specifically, Rebcor Construction did not supervise or control the injury producing work and as such was not negligent as to plaintiff’s accident. Plaintiff testified that at the time of the accident he was employed by Pro (Plaintiff tr at 15, 115). He further testified that only his foreman, a Pro employee, directed plaintiff as he was performing the sheetrock work immediately prior to the accident (*id* at 117).

The Court recognizes that Files, the owner of Rebcor Construction, testified that Rebcor Construction’s supervisor, Bill Miller had control over the safety of the worksite “from a means

and methods standpoint” (Files tr. at 39, 41-42). However, Files’ deposition testimony establishes that he was not using the phrase “means and method” as a legal term of art. Files specifically testified that Bill Miller was not responsible for the specifics of the sub-contractors’ work and that the subcontractor’s foremen directed their respective employees’ work (*id* at 41-42). Files’ testimony is consistent with plaintiff’s testimony that plaintiff’s foreman directed his work and establishes that Rebcor Construction only had general authority over the safety of the worksite. Plaintiff and Files’ respective testimonies do not establish that Rebcor Construction exercised control and/or supervision over the means and methods of the sheetrock work that lead to the accident.

As such, Moving Defendants are not entitled to summary judgment on their common law indemnification claims against Rebcor Construction.

**GWB and Port Authority’s contractual indemnification claims against Pro (motion sequence 005)**

GWB and Port Authority move for summary judgment in their favor on their contractual indemnification claims against Pro. GWB and Port Authority argue that they are third-party beneficiaries to the Rebcor Construction/Pro Agreement. Specifically, they argue that the Rebcor Construction/Pro Agreement requires Pro to indemnify the “Owner” for bodily injury claims arising from the work. They further argue that the Rebcor Construction/Pro Agreement does not define the term “Owner” as the agreement does not include a definition section.<sup>3</sup> GWB and Port Authority argue that in the context of a New York construction project, the term owner is expansive and includes entities such as Gap, GWB and Port Authority.

Pro argues in opposition that the Rebcor Construction/Pro Agreement specifically identifies Gap as the “Owner” and makes no reference to GWB and/or Port Authority.

The Rebcor Construction/Pro Agreement requires that Pro shall indemnify and hold harmless “Owner... and Contractor from all damages, losses, or expenses... resulting from performance of [Pro] and shall apply only to the extent that the claim or loss is caused whole or in

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<sup>3</sup> The Court notes that the defendants’ argument in its reply papers that “[o]wner is not specifically defined within the [Rebcor Construction/Pro Agreement], as the agreement contains no definition section” (Defendant’s affirmation in reply at p. 3, para 7)(NYSCEF Doc. No. 249) directly contradicts their argument in their moving papers that the Rebcor Construction/Pro Agreement “specifically defines the term ‘owner’ as being the Gap” (Defendants’ memorandum of law at p. 14, para 31)(NYSCEF Doc. No. 167).

part by any negligent act or omission of Subcontractor or any of its... employees” (Rebcor Construction/Pro Agreement at 3).

“One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006], citing *State of Cal. Pub. Employees’ Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]).

“Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole” (see *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]).

Here, the term “Owner” as used in the Rebcor Construction/Pro Agreement is unambiguously defined as Gap. The first page of the agreement reads in relevant part:

The Owner: Gap Inc.  
40 First Plaza  
Albuquerque, NM 87102

(Rebcor Construction/Pro Agreement at 1)

This language clearly and unambiguously defines the “Owner” as Gap. There is nothing in the Rebcor Construction/Pro Agreement that extends the “Owner” to include any entities other than Gap.

As GWB and Port Authority have failed to establish that they are third-party beneficiaries to the Rebcor Construction/Pro Agreement, they are not entitled to summary judgment on their contractual indemnification claims against Pro.

**Gap’s contractual indemnification claims against Pro (motion sequence 005)**

Gap also moves for summary judgment in its favor on its contractual indemnification claim against Pro.<sup>4</sup> Should contractual indemnification require a finding of negligence as against Pro, Gap seeks a conditional order of contractual indemnification against Pro.

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). “A contractual provision imposing a duty to indemnify ‘must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed’” (*Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2nd Dept 2015], quoting *Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Summary judgment on a contractual indemnification claim is warranted where the intent to indemnify is clear and there is no basis to conclude that the indemnified party was negligent as to the underlying accident. “[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” (*De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2nd Dept 2017] [internal quotation marks and citation omitted]; see e.g. *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 494 [1st Dept 2018]).

Gap argues that it is entitled to contractual indemnification from Pro based upon the Rebcor Construction/Pro Agreement and because Gap was not negligent as to plaintiff’s accident.

Pro acknowledges that the Rebcor Construction/Pro Agreement defines Gap as the Owner but argues that the indemnification provision was not triggered. Pro argues that its obligation to indemnify Gap is contingent on Pro’s negligence and that Pro was not negligent as to plaintiff’s accident. Pro further argues that there are issues of fact as to how the accident occurred, that plaintiff was the sole proximate cause of the accident, and that there are issues of fact as to whether Gap was negligence as to plaintiff’s accident.

Here, Gap has established prima facie that it is entitled to a conditional order of contractual indemnification against Pro. Specifically, the Rebcor Construction/Pro Agreement makes contractual indemnification contingent upon Pro’s negligence and Gap was not negligent as to plaintiff’s accident.

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<sup>4</sup> Gap, GWB and Port Authority share representation and collectively moved for summary judgment.

Initially, as Gap is specifically identified as the Owner in the Rebcor Construction/Pro Agreement, Gap has established that it is a third-party beneficiary of the agreement.

The Rebcor Construction/Pro Agreement requires Pro to indemnify Gap for damages and losses “only to the extent that the claim or loss is caused whole or in part by any negligent act or omission of Subcontractor or any of its... employees” (Rebcor Construction/Pro Agreement at 3). As such, Pro’s obligation to indemnify Gap depends upon the extent to which Pro’s “negligence is determined to have contributed to [plaintiff’s] accident” (*See Winkler v Halmar Intl., LLC*, 206 AD3d 458, 462 [1st Dept 2022]).

In addition, plaintiff testified that only Pro directed his work on the jobsite (Plaintiff tr at 39). Anselmi, Gap’s director of construction, also testified that Gap did not have a daily presence on the jobsite, nor did it provide any of the equipment for the Project (Anselmi tr at 42). Said testimonies are sufficient to establish prima facie that Gap was not negligent as to plaintiff’s accident.

Further, Pro has failed to create an issue of fact in opposition to the motion. As there was a violation of Labor Law § 240 (1), there is no basis to find that plaintiff was the sole proximate cause of the accident (*See Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290 [“Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.”]). In addition and as previously stated, there are no issues of fact as to how the accident occurred.

In addition, Pro has failed to create an issue of fact as to whether Gap was negligent. For the previously stated reasons, Gap has established prima facie that it was not negligent as to plaintiff’s accident. Pro does not refer to any evidence nor testimony to create an issue of fact in opposition to Gap’s prima facie case.

Finally, Pro has failed to establish that it was not negligent as to plaintiff’s accident. The record establishes that there are at least issues of fact as to whether Pro was negligent as to plaintiff’s accident. Specifically, plaintiff testified that only Pro directed his work on the jobsite and that his foreman (a Pro employee) was directing plaintiff’s work at the time of the accident

(Plaintiff tr at 38 - 39). Pro does not refer to any specific evidence nor testimony in support of its argument that it was not negligent as to plaintiff's accident.<sup>5</sup>

As such, Gap is entitled to a conditional order of contractual indemnification against Pro (*See Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194, 195 [1st Dept 2006]; *Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2nd Dept 2022] ["A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and may be held liable solely by virtue of statutory. . . or vicarious liability"] [internal citations and quotations marks omitted]).

**Rebcor Construction's contractual law indemnification claims against Pro (motion sequence 007)**

Rebcor Construction moves for summary judgment on its contractual indemnification claim against Pro. Rebcor Construction argues that it is entitled to contractual indemnification from Pro based upon the terms of the indemnification provision in the Rebcor Construction/Pro Agreement. Rebcor Construction further argues that it was not negligent as to the plaintiff's accident and that Pro was negligent as to the accident.

In opposition to Rebcor Construction's motion, Pro reiterates its arguments that it was not negligent as to plaintiff's accident, that there issues of fact as to how the accident occurred, and that plaintiff was the sole proximate cause of the accident. Pro further argues that there are issues of fact as to whether Rebcor Construction was negligent as to plaintiff's accident.

Just as with Gap, Pro's obligation to indemnify Rebcor Construction (pursuant to the Rebcor Construction/Pro Agreement) depends upon the extent to which Pro's "negligence is determined to have contributed to [plaintiff's] accident" (*See Winkler*, 206 AD3d at 462). As previously stated, Rebcor Construction was not negligent as to plaintiff's accident, Pro has failed to establish that Pro was not negligent as to plaintiff's accident, there are no issues of fact as to

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<sup>5</sup> The Court makes no determination as to whether Pro was negligent as to plaintiff's accident. The Court only finds that Pro has failed to establish that it was not negligent in opposition to Gap's and Rebcor Construction's respective motions for contractual indemnification.

how the accident occurred, and plaintiff was not the sole proximate cause of the accident. Further, Pro has failed to create any issues of fact as to any of these points.

As such, Rebcor Construction is entitled to a conditional order of contractual indemnification against Pro (*See Quichimbo*, 30 AD3d at 195; *Winter*, 201 AD3d at 845).

The parties remaining arguments have been considered and were deemed unavailing.

**CONCLUSION AND ORDER**


For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Alain Perez’s motion for summary judgment pursuant to CPLR 3212 as to liability in his favor on his Labor Law §240 claims (motion sequence 006) as against Port Authority of New York and New Jersey (“Port Authority), the George Washington Bridge Bus Station Development Venture LLC. (“GWB”), The Gap Inc. (“Gap”), and Rebcor Construction, Inc. (“Rebcor Construction”) is granted; and it is further

**ORDERED** that Gap, GWB and Port Authority’s motion for summary judgment pursuant to CPLR 3212 in their favor on their third-party common law and contractual indemnification claims against Rebcor Construction, and on their third-party contractual indemnification claims against Pro (motion sequence 005) is granted to the extent that Gap is entitled to conditional contractual indemnification from Pro pending a determination on negligence as to Pro, and the motion is otherwise denied; and it is further

**ORDERED** that Rebcor Construction’s motion for summary judgment pursuant to CPLR 3212 in its favor on its third-party contractual indemnification claim against Pro (motion sequence 007) is granted to the extent that Rebcor Construction is entitled to conditional contractual indemnification from Pro pending a determination on negligence as to Pro; and it is further

The foregoing constitutes the Order and Decision of the Court.

<u>10/11/2023</u>					
DATE			RICHARD LATIN, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE