SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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DELANO EVELYN,

Plaintiff,

- v -

560 ASSOCIATES DELAWARE LLC,SHAWMUT WOODWORKING & SUPPLY, INC.,TRANSEL ELEVATOR & ELECTRIC INC.,

Defendant.

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INDEX NO. 158890/2017

MOTION DATE 03/01/2023, 03/30/2023, 03/30/2023, 04/14/2023

MOTION SEQ. NO. 006 007 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 177, 178, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 250, 251, 252, 281

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 253, 257, 259, 260, 261, 262, 263, 264, 265, 266, 267, 280, 282, 285, 286, 287, 288

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 244, 245, 246, 247, 248, 249, 254, 258, 269, 270, 271, 272, 273, 274, 275, 276, 277, 289, 290

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 255, 256, 268, 278, 279, 283, 284, 291, 292, 293, 294, 295, 296, 297

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

Motion sequence numbers 006, 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a sheet metal mechanic on October 3, 2016, when, while working at a construction site located at 560 Broadway, New York, New York (the Premises), the ladder he was working from collapsed, causing him to fall.

In motion sequence number 006, plaintiff Delano Evelyn moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against

defendant 560 Associates Delaware LLC (560 Associates), defendant/third-party plaintiff/second third-party plaintiff Shawmut Woodworking & Supply, Inc. d/b/a Shawmut Design and Construction (Shawmut) and defendant/second third-party defendant Transel Elevator & Electric, Inc. (TEI).

In motion sequence number 007, Shawmut moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims asserted against it, as well as for summary judgment in its favor on its third-party claims against third-party defendant Cool Breeze A/C/, Inc., d/b/a Cool Breeze AC a/k/a Cool Breeze Air Conditioning, Inc. (Cool Breeze) and for summary judgment in its favor on its second third-party claims against TEI.

In motion sequence number 008, 560 Associates moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims against it, and (though not included in the notice of motion) for summary judgment in its favor on its contractual indemnification claims against Shawmut, Cool Breeze and TEI.

In motion sequence number 009, TEI moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and second third-party complaint as against it.

In relation to motion sequence number 009, Cool Breeze cross-moves, pursuant to CPLR 3126, to strike TEI's second third-party answer and for the grant of a negative inference charge on the ground of spoliation of evidence.

BACKGROUND

On the day of the accident, the Premises was owned by 560 Associates. 560 Associates hired Shawmut as a general contractor for a project at the Premises that entailed a significant renovation of the Premises (the Project). 560 Associates also hired TEI to perform elevator installation work at the Premises. Shawmut, subcontracted HVAC work to Cool Breeze. Plaintiff was employed by Cool Breeze.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Cool Breeze as an HVAC installer at the Project. Cool Breeze was tasked with "adding additional ductwork to the elevator shafts" at the Premises (plaintiff's tr at 30). He had two coworkers, his son Dwayne Isaac and Abad Suazo (*id.* at 31). Both worked for Cool Breeze. He also had a superior, Robert Tavares, another Cool Breeze employee (*id.* at 37). Tavares was not present on the day of the accident.

Aside from Cool Breeze, Shawmut and TEI workers were present on the day of the accident (*id.* at 33). Plaintiff was unaware of any safety supervisors on site.

As a part of his work, plaintiff often used extension ladders of various sized. He was taught "to lean the ladder and pull on the rope to slide the second part of the extension ladder up and to make sure that the lock that's holding it is in place" (*id.* at 46).

Cool Breeze provided him with his equipment, including 6-foot ladders (*id.* at 58). He was not provided with a safety harness (*id.* at 78). Sometimes he would use ladders provided by the building where he was working. If he had to use another company's ladders, he would talk "to [his supervisor] and they would make the arrangement" (*id.* at 50).

Part of plaintiff's work area in the basement of the Premises was accessible by the 6-foot ladders. Other parts were too high for the 6-foot ladders to reach, and had scaffolding installed (*id.* at 59). He did not need to use an extension ladder for any work in the basement.

On the day of the accident, Tavares tasked plaintiff and his two coworkers with measuring and installing duct work in the Premises' subbasement (*id.* at 62). The subbasement's ceiling was approximately 20 feet high. Unlike the basement, the subbasement did not have any scaffolding installed. Plaintiff testified that to reach his work area, he needed to use an extension ladder (*id.* at 77).

Cool Breeze did not provide any extension ladders, but there were extension ladders in the subbasement. He did not know who owned those ladders (*id.* at 81). He called Cool Breeze's office and informed them that he needed an extension ladder, or "preferably scaffolding" (*id.* at 83). "Ronnie" of Cool Breeze (later identified as Ronnie Ali) directed plaintiff to use one of the extension ladders in the subbasement (*id.*at 83 and 211). Ali also indicated that he would "square it with the super of the building" (*id.* at 83 and 212).

There were three ladders resting against the wall in the subbasement. Plaintiff and Suazo selected a ladder from a nearby area and Suazo brought it over to their work area (*id.* at 214). The ladder was a yellow extension ladder with initials on it (the Ladder) (*id.* at 84-85). Plaintiff confirmed that "[i]t had rubber antiskid pad[s]" on "[b]oth sides" (*id.* at 101). Plaintiff and Suazo maneuvered the Ladder to the work area and "stood it straight and pulled the rope to extend it" up to the ceiling (*id.* at 88). The top of the Ladder was "wedged between the ceiling and the beam" (*id.* at 98).

Once the Ladder was properly placed at the correct height, plaintiff "made sure the lock was on" by "[v]isually" inspecting and pushing on it (*id.* at 90-91 [confirming that he "[t]ouched" the lock]). He also explained that the Ladder "clicks" at every "step the ladder goes" up (*id.* at 154-155) and that the ladder "locks itself" every time it clicks (*id.* at 155). He further explained that "[o]nce the hook locks, there is a little clip on the back that's supposed to keep the extended ladder part in place" (the Clip) (*id.*at 91-92). He then checked to make sure that the Clip's spring was working, and that the extension portion of the Ladder was securely fastened to prevent it from retracting (*id.* at 93). Suazo then tied the rope used to raise the Ladder to a rung as "an extra safety precaution" to prevent the Ladder from retracting (*id.* at 94). Plaintiff did not inspect the rope prior to climbing the Ladder (*id.* at 97).

Plaintiff then began climbing up the Ladder. Suazo was "standing at the foot of the ladder . . . to try and keep [the Ladder] from sliding or moving" (*id.* at 101). As he climbed the Ladder, plaintiff passed the Clip and "visually looked at it" (*id.* at 99). He then climbed past it and "heard a snap and in that same instant, the ladder came down" (*id.* at 99). Specifically, "the extended part collapsed and then the ladder went forward" falling to the ground (*id.* at 100). Plaintiff fell along with the ladder (*id.* at 102). While he did not know what the snap sound meant, he believed that the Clip failed or broke (*id.* at 239).

Plaintiff testified that at the time of the accident, Isaac was in the bathroom and Suazo was standing at the base of the ladder. Plaintiff also testified he believed Suazo was "trying to keep [the Ladder] from coming off the beam" (*id.* at 103).

Several days after the accident, he was interviewed at his home by a man. He did not recall who the interviewer worked for. The interviewer "took a statement and [plaintiff] signed it" after he "skimmed through it" (*id.* at 124). At his deposition, plaintiff reviewed the statement and confirmed that he did not write it, but he did sign it.

Plaintiff was shown several photographs of ladders at his deposition. He reviewed them and, while he could not confirm that any of the ladders were the ladder that he used, he testified that in one specific photograph the letters TEI were written on the ladder, which plaintiff confirmed "resemble[d] the writing that [he] saw on the ladder" he used at the time of the accident (*id.* at 137).

Deposition Testimony of Art D'Estrada (560 Broadway's Property Manager)

Art D'Estrada testified that, at the time of the accident, he was employed as a managing director by non-party GFP Real Estate, Inc. (GFP), the agent for 560 Broadway (D'Estrada tr at 12). GFP was the property management company for the Premises. His duties as a managing director included managing the Premises, including supervising the building staff.

D'Estrada testified that the Project was a large-scale remodel of the Premises, including removing and relocating the elevators, major structural redesign and full HVAC renovation and installation. While he was present at the Premises three or four times a week, he "did not walk the job site while work was going on" (*id.* at 59).

At his deposition, D'Estrada reviewed two contracts and confirmed that 560 Broadway hired Shawmut as the general contractor for the Project, and separately hired TEI to construct and install two elevators (*id.* at 35). According to D'Estrada, Shawmut was generally responsible for safety at the Project.

D'Estrada also testified that 560 Broadway did not schedule or coordinate trades (*id.* at 56) or direct the method of a trade's work performance (*id.* at 57). According to D'Estrada, typically most tools and equipment "would be put away and locked up at the end of the day" (*id.* at 85).

D'Estrada testified that he did not know what trades were working at the Premises on the day of the accident (*id.* at 107), and he was not sure whether he was present at the Premises that day (*id.* at 110). D'Estrada also testified that 560 Broadway did not "ever lend out tools or equipment," including ladders, to contractors (*id.* at 90).

Deposition Testimony of Ketan Karkare (Shawmut's Project Executive)

Ketan Karkare testified that at the time of the accident, he was Shawmut's project executive for the Project. Shawmut is a general contractor. As project executive, Karkare oversaw "multiple projects" and "coordinate[s] with the project managers on those sites" (Karkare tr at 14). His duties include high-level overcite of projects, making sure they are on schedule and running within budget. He did not typically walk around the job site; that was the responsibility of Shawmut's project manager (*id.* at 31).

Karkare confirmed that Shawmut hired most of the subcontractors at the Project (*id.* at 18). He did not directly supervise anyone at the Project (*id.* at 15). Shawmut did not hire TEI (*id.* at 22), and it did not supervise any of TEI's work (*id.* at 24-25). Shawmut would coordinate with TEI, to make sure that their work did not overlap and they did not interfere with each other.

Shawmut was responsible for "general safety" while each subcontractor was responsible for their own work safety (*id.* at 23). Shawmut had a "safety manager" on site (*id.* at 33). Karkare was shown a copy of a Shawmut accident report and confirmed that it was prepared by Shawmut's safety manager (*id.* at 55).

According to Karkare, Shawmut "usually" did not have any ladders on site (*id.* at 40). He was also shown several photographs depicting ladders (*id.* at 92-93). He testified that he was unaware of whether the ladders in the photograph depicted the subject Ladder involved in the accident (*id.* at 93-95). He was also unaware of whether the photographs depicted the Project or the Premises (*id.* at 108).

Karkare testified that he did not know specifically where or how equipment was stored at the Project. He was aware that subcontractors were provided with areas to stage their own equipment (*id.* at 62-63). Typically, subcontractors would lock their ladders (*id.* at 64), but he did not know where or how any entity would store their equipment at the end of the day (*id.* at 131).

Deposition Testimony of Christopher Brock (TEI's Construction Foreman)

Christopher Brock testified that at the time of the accident he was a construction foreman for TEI (Brock tr at 9). His duties included running "the day-to-day tasks" for TEI at the Project (*id.* at 10). TEI was hired to install three elevators at the Project. Shawmut was hired by the owner to construct the elevator shaft. By the time TEI began work on the Project, the shaft had been completed.

To do its work, TEI would provide its workers with rigging equipment and ladders, amongst other tools (*id.* at 13). TEI supplied both a-frame and extension ladders (*id.* at 17). TEI workers did not use any other ladders at the Project (*id.* at 69).

At his deposition, Brock was shown several photographs. He identified one photograph as depicting "[TEI's] shanty . . . the room that we lock all our stuff up in" (*id.* at 26). He also identified a yellow ladder depicted in the photograph as "one of [TEI's] extension ladders" (*id.* at 26).

TEI did not perform formal inspections of their ladders, though they would "do a hazard scan . . . before we use it to make sure it's in working order" (*id.* at 39-40). This included a visual inspection to confirm that "the locking mechanisms are working [and] that there's no cracks in the ladder from wear" (*id.* at 40). He was unaware of any TEI ladder breaking or malfunctioning (*id.* at 49-50).

Brock testified that TEI's shanty was "a room with a door to it" (*id.* at 27) and that door was regularly locked with a "[c]ombo lock" (*id.* at 45). Only TEI workers had the combination for the lock (*id.* at 45). Brock also testified that he only allowed TEI workers to use TEI equipment, though he never explicitly told this to anyone (*id.* at 49).

Several days before the accident, TEI completed a portion of its work and was not present at the Premises for approximately one week (*id.* at 63). When TEI returned to the Premises, Brock "found [the] lock [to TEI's shanty] cut . . . and removed" (*id.* at 63). He asked Shawmut why the lock had been removed and was informed that "one of the contractors had to get in there and do work" (*id.* at 64). Brock then learned that at some point after the lock had been removed, "somebody had fallen off one of our ladders" (*id.* at 64).

Finally, Brock testified that TEI continued to use the yellow Ladder after the accident, until, several years later, when he accidentally "ran [an] elevator down on" it "and broke it" (*id.* at 82). Until the Ladder was crushed, TEI continued to use it, and there were no problems with the rope, pulley or locks (*id.* at 84).

Deposition Testimony of Niki Flowers (Cool Breeze's Comptroller)

Niki Flowers testified that on the day of the accident, she was Cool Breeze's comptroller. Her duties included "all of the business operations" including billing, financing, and the preparation of accident reports (Flowers tr at 9). Flowers confirmed that, pursuant to contract, Shawmut hired Cool Breeze to install ductwork at the Premises.

Flowers testified that she did not visit the worksite at any time that Cool Breeze workers were working (*id.* at 27). She also did not know what work Cool Breeze was performing or whether that work required the use of ladders (*id.* at 28). She did not know what type of equipment Cool Breeze provided to its workers at the Project.

Flowers testified that Ronnie Ali was the foreman for the Project (*id.* at 23). She did not know if he was regularly present at the Premises. When she visited the Premises, Ali would go with her.

She was not present at the Premises on the day of the accident and did not witness it (*id.* at 49). She learned of the accident some time afterwards from Tavares. Within a month of the accident, Flowers participated in an investigation of the accident site along with an insurance investigator (*id.* at 59). There, she spoke with Suazo, Tavares and Ali, as well as the investigator.

During the investigation, she spoke with Abad who informed her that the Ladder was "upside down" when plaintiff climbed it (*id.* at 58). Abad also showed the investigator how the Ladder was set up (*id.* at 59) and indicated that the Ladder was not properly secured (*id.* at 63). Abad also told Flowers that he was not holding the Ladder at the time of the accident (*id.* at 99). She did not know who owned the Ladder (*id.* at 76).

Flowers testified that she prepared Cool Breeze's accident report (the Cool Breeze Report) based on information from Tavares (*id* at 83). She confirmed that Tavares informed her that "the ladder was not properly secured" and so she included that information in the Cool Breeze Report (*id.* at 83).

The Cool Breeze Report

The Cool Breeze Report, annexed to a Workers' Compensation accident report form (NYSCEF Doc. No. 170), indicates that it was prepared the day after the accident by Flowers. It states that plaintiff was injured on October 3, 2016 and the cause of his injury was a "[f]all, slip trip from ladder" (*id.* at 6). It also indicated that "the ladder was not properly secured by [plaintiff]" (*id.* at 6). Finally, the Cool Breeze Report indicates that plaintiff's supervisor, Ronnie Ali, did not witness the accident and that it was "unknown" whether anyone witnessed the accident (*id.*at 7).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claims Against 560 Associates, Shawmut and TEI (Motion Sequence Numbers 006, 007, 008 and 009)

Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim. 560 Associates, Shawmut and TEI each move for summary judgment dismissing the same claim.

Labor Law § 240 (1), known as the Scaffold Law, provides as relevant:

> "All contractors and owners and their agents . . . 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."

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "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" (*O'Brien v. Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

That said, not every worker who is injured at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, 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 Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, 560 Associates and Shawmut, as owner and general contractor, do not dispute that they are proper Labor Law defendants. TEI, however, argues that it is not a proper Labor Law defendant as it was not an owner or general contractor responsible for plaintiff's work, nor an agent of either for the purposes of the Labor Law.

> "When the work giving rise to these [Labor Law] duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241."

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Nascimento v Bridgehampton Constr. Corp,* 86 AD3d 189, 193 [1st Dept 2011] [an entity becomes a statutory agent under the Labor Law when it has been "delegated the supervision and control either over the specific work area involved or the work which [gave rise] to the injury"] [internal quotation marks and citation omitted]).

TEI argues that, as a contractor working on a separate project at the Premises, it did not have any supervisory control or authority over any work being done at the time of plaintiff's accident (*see Walls v Turner Constr. Co.,* 4 NY3d 861, 864 [2005] ["[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

Here, there is no evidence in the record before the court establishing that TEI had any control or supervisory responsibility over Shawmut's or Cool Breeze's (and therefore, plaintiff's) work at the Project. In addition, the record establishes that TEI was not present at the Premises for four days prior to the date of the accident, and for two days after the accident (Brock tr at 63; TEI work records [annexed to TEI's notice of motion, exhibit W; NYCEF Doc. No. 239] [indicating that TEI worked on September 30, 2016 and then not again until October 5, 2016, two

days after the accident]). Further, plaintiff points to no terms in the contract between 560 Associates and TEI that would establish such control or responsibility.

Given the foregoing, TEI has established, prima facie, that it was not a statutory agent under the Labor Law.

In opposition, plaintiff argues that TEI became a statutory agent because Plaintiff used its ladder. This argument is unpersuasive.

Plaintiff principally relies on two cases, *Vohra v Mount Sinai Hosp*., 180 AD3d 503 (1st Dept 2020) and *Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750 (2d Dept 2021). Neither case is applicable to the instant matter. *Vohra* is inapposite to the facts presented here. In *Vohra*, the court found that a scaffolding company was a statutory agent where it was hired to (and did) supervise and control scaffold dismantling, which was the injury producing work (*Vohra,* 180 AD3d at 503). Cando is also unavailing. In *Cando*, the court found that a subcontract between the general contractor and the subcontractor expressly "gave [the subcontractor] many of the powers of a general contractor" (*Cando,* 200 AD3d at 754). Here, as noted above, plaintiff points to no such contractual authority on the part of TEI.

Accordingly, plaintiff has not raised a question of fact with respect to whether TEI is a proper Labor Law defendant in this action. Thus, as TEI has met its prima facie burden establishing that it is not a proper Labor Law defendant, TEI is entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against it.

Turning now to the substance of the claim, plaintiff's accident arises from a ladder collapse. "'It is well settled that [the] failure to properly secure a ladder, to insure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)]'" (*Cuentas v Sephora USA, Inc.* 102 AD3d 504, 504 [1st Dept, 2013], quoting *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]).

In addition, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions for no apparent reason" (*Quattrocchi v F.J. Sciame Constr. Corp*., 44 AD3d 377, 381 [1st Dept 2007] [internal quotation marks and citation omitted]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, and that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]; *Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] ["Whether

the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials"]).

Here, plaintiff has established that, while climbing the extension Ladder, it retracted, causing it to fall out from under plaintiff before falling to the ground along with plaintiff (plaintiff's tr at 99 [plaintiff "heard a snap and in that same instant, the ladder came down"], and 100 ["the extended part collapsed and then the ladder went forward," falling to the ground and taking plaintiff with it]). Accordingly, plaintiff has established his prima facie entitlement to summary judgment in his favor on this claim (*see Daly v Metropolitan Transp. Auth.*, 206 AD3d 467, 468 [1st Dept 2022] ["Plaintiff made a prima facie showing that his injuries were proximately caused by violations of Labor Law § 240 (1) through his testimony that he was climbing up an A-frame ladder which suddenly shifted, causing him to fall to the ground along with the ladder"]).

In opposition, the defendants make several arguments regarding plaintiff's failure to establish that the ladder was defective. Importantly, a plaintiff is "not required to show that the ladder on which he was standing was defective" (*Montalvo v. J. Petrocelli Const., Inc*., 8 AD3d 173, 174 [1st Dept. 2004]). Rather, "[i]t is sufficient for [the] purposes of liability under Section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Cutaia v Board of Mgrs. of the Varick St. Condominium,* 172 AD3d 424, 425 [1st Dept 2019], *quoting Orellano v 29 E. 37th St. Realty Corp.,* 292 AD2d 289, 290-291 [1st Dept 2002]). Accordingly, whether the Ladder was defective is of no moment with respect to plaintiff's prima facie case.

Specifically, the focus is whether a device – the Ladder – provided proper protection to plaintiff to protect him from a gravity-related harm (*see Garcia v Church of St. Joseph of the Holy Family of City of N.Y.*, 146 AD3d 524, 525 [1st Dept 2017] ["Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1)"]; *accord Lizama v 1801 Univ. Assoc., LLC*, 100 AD3d 497, 498 [1st Dept 2012]; *Nelson*, 268 AD2d at 572).

Here, plaintiff testified that the Ladder collapsed while he was using it, causing him to fall. Defendants do not contest this. Accordingly, the Ladder, by itself, was insufficient to protect plaintiff from the hazard created by his work. Therefore, as discussed above, the Ladder was an insufficient safety device, in violation of Labor Law § 240 (1).

To the extent that defendants argue that plaintiff was the sole proximate cause because he purportedly set the ladder up incorrectly, such argument is unpersuasive. A plaintiff cannot be the sole proximate cause of his accident where a defendant "failed to provide an adequate safety device in the first instance" (*Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]; *see also Nimirovski v Vornado Realty Trust Co.,* 29 AD3d 762 [2d Dept 2006]). Accordingly, plaintiff's purported negligence – of setting up the ladder incorrectly and/or failing to double-check that the Ladder was locked – goes to comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]). "[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]).

560's reliance on the facts of *Blake v Neighborhood Hous. Servs. Of N.Y. City* (1 NY3d 280 [2003]) is unpersuasive. While *Blake* involved the collapse of an extension ladder, there, the plaintiff testified that he "was not sure if he had locked the extension clips in place" (*id.* at 284).

In contrast, in the instant matter, plaintiff testified that he did check that the clips were locked in place (plaintiff's tr at 90-91 [plaintiff "made sure the lock was on" by "[v]isually" inspecting and pushing and touching it]; 91-93 [confirming that he checked "the hook locks" and confirmed that the springs were working]) (*see Hunt v Millennium Bldrs.,* 5 AD3d 633, 633 [2d Dept 2004] [affirming summary judgment in the plaintiff's favor where he "fell off an extension ladder that spontaneously retracted while he was working"]; *Manfredonia v 750 Astor LLC*, 2022 WL 1600752, *1 [Bronx County, 2022] *affd* 217 AD3d 573 [1st Dept 2023] [granting summary judgment in the plaintiff's favor where he was working from an extension ladder "when unexpectedly the top half of the ladder slid to the bottom causing it to collapse on itself, thereby causing Plaintiff to fall to the ground"]).

Given the foregoing, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against 560 Associates and Shawmut. 560 Associates and Shawmut are not entitled to summary judgment dismissing the same claim.

The Labor Law § 241 (6) Claims Against 560 Associates, Shawmut and TEI (Motion Sequence Numbers 006, 007, 008, 009)

Plaintiff moves for summary judgment in his favor on his Labor Law § 241 (6) claims against 560 Associates, Shawmut and TEI. Those defendants move for summary judgment dismissing the same.

As an initial matter, as discussed above, TEI is not a statutory agent under the Labor Law. Accordingly, it is entitled to summary judgment dismissing the Labor Law § 241 (6) claim as against it (*Russin*, 54 NY2d at 318).

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

> "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:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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 L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d at 501–502).

Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017] ["a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident").

Notably, "[w]hether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York,* 88 AD3d 951, 953 [2d Dept 2011]).

Plaintiff alleges violations of Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv) and 23-1.21 (d) (2).

12 NYCRR 23-1.21 (b) (4) (iv)

Industrial Code 12 NYCRR 23-1.21 governs ladders. Subsection 23-1.21 (b) (4) governs installation and use. It has been held sufficiently specific to support a Labor Law § 241 (6) claim (*Montalvo v J. Petrocelli Constr., Inc.,* 8 AD3d 173, 176 [1st Dept 2004]).

Section 23-1.21 (b) (4) (iv) provides, as relevant, the following:

> "When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used"

It is undisputed that plaintiff's work area was higher than 10 feet above the Ladder's footing. Therefore, this provision may be applicable to plaintiff's accident. That said, the accident was not caused by a violation of this statute, as plaintiff's accident was not produced by a "side slip" of the Ladder's upper end or by a failure to hold the lower end of the Ladder in place.

Here, plaintiff testified that the top of the Ladder was "wedged between the ceiling and the beam" (plaintiff's tr at 98) and that at the time of the accident, Suazo was "standing at the foot of the ladder . . . to try and keep [the Ladder] from sliding or moving" (*id.* at 101) and "trying to keep [the Ladder] from coming off the beam" (*id.* at 103). These statements, alongside plaintiff's clear and consistent testimony that the Ladder retracted (and did not slip sideways), removes the accident from the ambit of this provision.

While the Cool Breeze Accident Report indicates that Suazo stated that he was not holding the Ladder at the time of the accident, such statement is immaterial given that plaintiff does not allege that the Ladder fell because it was not being held in place.

Accordingly, as a violation of section 23-1.21 (b) (4) (iv) was not the cause of plaintiff's accident, 560 Associates and Shawmut are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on a violation thereof, and plaintiff is not entitled to summary judgment in his favor on the same claim.

12 NYCRR 23-1.21 (d) (2)

Industrial Code 12 NYCRR 23-1.21 (d) governs "Extension ladders and sectional ladders." Subsection 23-1.21 (d) (2) is sufficiently specific to support a Labor Law § 241 (6) claim (*see*

Deshields v Carey, 69 AD3d 1191, 1194 [3d Dept 2010]). It provides the following, in pertinent part:

> "Each upper section of any extension ladder when extended shall be locked in place by two automatic positive active locks"

Here, the record establishes that the Ladder was equipped with locks. That said, there is no testimony, expert or otherwise, supporting whether those locks were "automatic positive active locks" as required by the statute. Therefore, a question of fact remains regarding whether the Ladder was properly equipped, pursuant to section 23-1.21 (d) (2), and whether that alleged violation was a proximate cause of the accident.

Accordingly, plaintiff is not entitled to summary judgment in his favor as to this section, and 560 Associates and Shawmut are not entitled to summary judgment dismissing the same.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 007, 008 and 009)

560 Associates, Shawmut and TEI each move for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them.

In his opposition to 560 Associates, Shawmut and TEI's motions, plaintiff's counsel "concede[s] that the facts in this case do not state a cognizable claim under Labor Law § 200 or common law negligence" (plaintiff's memorandum of law in opposition to 560 Associates and Shawmut, p 1, fn 1; NYSCEF Doc. No. 257; plaintiff's memorandum of law in opposition to TEI, p 1, fn 1; NYSCEF Doc. No. 256).

Accordingly, 560 Associates, Shawmut and TEI are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Shawmut's Contractual Indemnification Third-Party Claim Against Cool Breeze (Motion Sequence Number 007)

Shawmut moves for summary judgment in its favor on its third-party contractual indemnification claim against Cool Breeze.

"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]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Additional facts relevant to this claim

Shawmut and Cool Breeze entered into a subcontractor agreement for the Project dated May 17, 2016 (the Shawmut/Cool Breeze Agreement) (Shawmut's notice of motion, exhibit O; NYSCEF Doc. No. 195). It identifies the "Owner" as "Newmark Grubb Knight Frank" (*id.*).

The Shawmut/Cool Breeze Agreement contains an indemnification provision that states, as relevant, the following:

> "To the fullest extent permitted by applicable law, [Cool Breeze] agrees to defend, indemnify and hold harmless Owner . . . [Shawmut] and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of [Cool Breeze] or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder"

(*id.*, section 5[P]).

Here, plaintiff was injured while he was performing work on behalf of Cool Breeze on the Project. Accordingly, the accident arose from Cool Breeze's work on the Project. Further, plaintiff's accident was caused at least in part by an "act" of Cool Breeze, as plaintiff's work was directed by Cool Breeze and done on behalf of and for the benefit of Cool Breeze (*see e.g. Matter of New York City Asbestos Litig.,* 41 AD3d 299, 303 [1st Dept 2007] [finding that an indemnification provision applied where "[the indemnitor] was [the plaintiff's] employer and sole supervisor . . . with a duty to protect its employees" against hazards]).

Cool Breeze argues that the above indemnification provision requires a finding of negligence before indemnification attaches. It does not (*Correia,* 259 AD2d at 65).

As discussed above, Shawmut has only been found to be statutorily liable for plaintiff's accident. Further, Cool Breeze does not argue that Shawmut was actively negligent with respect to plaintiff's accident.

Given the foregoing, Shawmut is entitled to contractual indemnification from Cool Breeze (*id*.).

Shawmut's Contractual Indemnification Second Third-Party Claim Against TEI (Motion Sequence Number 007 and 009)

Shawmut moves for summary judgment in its favor on its second third-party contractual indemnification claim against TEI. TEI moves for summary judgment dismissing the same.

Additional facts relevant to this claim

TEI and 560 Associates (through its agent Newmark Family Properties, LLC) entered into an AIA Standard Form of Agreement Between Owner and Contractor on August 13, 2015 (the 560 Associates/TEI Agreement) (Shawmut's notice of motion, exhibit S; NYSCEF Doc. No. 199). Section 9.15 of this agreement contains an indemnification provision that provides the following, as relevant:

> "To the fullest extent permitted by law [TEI] shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims . . . arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [TEI], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder"

(*id.*, section 9.15.1 [the 560 Associates/TEI Indemnification Provision]).

Here, Shawmut fails to establish that it was contemplated by this indemnification provision. The 560 Associates/TEI Indemnification Provision establishes that TEI has to indemnify the Owner – 560 Associates – the architect, consultants and their agents and employees. Shawmut's primary argument is a conclusory statement that TEI "agreed to indemnify and hold harmless Shawmut" (Shawmut's memo of law, p. 12), without setting forth sufficient proof thereof. Essentially, Shawmut does not establish how the indemnification provision applies to it.

In its own motion, TEI establishes that Shawmut was not specifically named or identified in the 560 Associates/TEI Agreement and is not contemplated by the 560 Associates/TEI

Indemnification Provision. Further, TEI notes that there is a second indemnification provision in the Rider to the agreement (the 560 Associates/TEI Rider). That provision states, as relevant:

> "The Contractor hereby agrees to indemnify and hold harmless, Owner, its agent Newmark, the Architect and any of Owner's subsidiaries and designees from and against all liability . . . in connection with or arising from any injury . . . arising out of the performance of this Contract by the Contractor . . . ."

(*id.*, rider to the 560 Associates/TEI Agreement, § 17.2.12 [the 560 Associates/TEI Rider Indemnification Provision]). TEI correctly argues that this indemnification provision does not contemplate indemnification for Shawmut either.

Further, TEI has established that, while the 560 Associates/TEI Rider makes reference to a "general contractor" in an insurance procurement provision (Shawmut's notice of motion, exhibit S, rider § 17.2.2; NYSCEF Doc. No. 199), the 560 Associates/TEI Agreement and Rider do not define who such a general contractor would be. Further, the record is clear that TEI worked directly for 560 Associates on a project that was separate from Shawmut's project. The record is devoid of any evidence establishing that the 560 Associates/TEI Agreement (or the work it contemplated), intended to identify Shawmut as a "general contractor" for that work.

In other words, merely because Shawmut is a general contractor does not mean that it was the defined "general contractor" contemplated by the instant agreement. Further, as noted above, on its face, the rider's indemnification provision does not provide indemnification for general contractors.

Accordingly, TEI has established its entitlement to summary judgment dismissing Shawmut's claim for contractual indemnification against it. Shawmut is not entitled to summary judgment in its favor on the same claim.

560 Associates Contractual Indemnification Claims Against Shawmut (Motion Sequence Number 008)

560 Associates moves for summary judgment in its favor on its contractual indemnification claims against Shawmut.

Additional facts relevant to this issue

560 Associates and Shawmut entered into an AIA standard form agreement between owner and contractor regarding the Project on May 3, 2016 (the 560 Associates/Shawmut Agreement)

(560 Associates notice of motion, exhibit B; NYSCEF Doc. No. 249). It contains an indemnification that provides the following:

> "To the fullest extent permitted by law, [Shawmut] shall indemnify and hold harmless the Owner . . . and agents and employees of any of them from and against claims . . . arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [Shawmut], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ."

(*id.*, section 9.15.1).

Here, 560 Associates argues only that Shawmut owes it indemnification under this provision because the accident arose from Shawmut's work. 560 Associates, however, fails to identify any specific "negligent acts or omissions" on behalf of Shawmut or any of its subcontractors that would, as a matter of law, trigger the indemnification provision.

Accordingly, 560 Associates has not established its prima facie entitlement to summary judgment on its claim for contractual indemnification against Shawmut.

560 Associates Contractual Indemnification Claims Against TEI (Motion Sequence Number 008)

560 Associates moves for summary judgment in its favor on its contractual indemnification claims against TEI.

As discussed above, the 560 Associates/TEI Agreement contains an indemnification provision that contains a negligence trigger (Shawmut's notice of motion, exhibit S, section 9.15.1; NYSCEF Doc. No. 199 [requiring TEI to indemnify "the Owner . . . from and against claims . . . arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [TEI], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable"]).

As with Shawmut, 560 Associates fails to address the negligence prong of the contractual indemnification provision and, therefore, has failed to meet its prima facie burden. To the extent that 560 Associates argues in its reply papers that TEI was negligent for purportedly leaving a defective Ladder at the Project, such an argument fails to establish, as a matter of law, that TEI was negligent. The case it relies on – *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223 (1st Dept 1999) – is inapposite. In Higgins, the entity that provided a ladder was found negligent for

providing a ladder. However, unlike here, there was testimony in *Higgins* that established "that principals of the [defendant] were aware of the defective condition of the ladder prior to the accident" (*id.* at 225). The record here does not contain such evidence or testimony.

Accordingly, 560 Associates is not entitled to summary judgment in its favor on its contractual indemnification claim against TEI.

560 Associates Contractual Indemnification Claims Against Cool Breeze (Motion Sequence Number 008)

560 Associates moves for summary judgment in its favor on its contractual indemnification claims against Cool Breeze.

Here, 560 Associates argues that, as the owner of the Premises, it is entitled to indemnification from Cool Breeze under the Shawmut/Cool Breeze Agreement.

As noted above, the Shawmut/Cool Breeze Agreement defines "Owner" as "Newmark Grubb Knight Frank" (Shawmut's notice of motion, exhibit O; NYSCEF Doc. No. 195). 560 Associates does not explain its relationship to Newmark Grubb Knight Frank or otherwise establish that it was the "Owner" contemplated by the Shawmut/Cool Breeze Agreement. Accordingly, 560 Associates has failed to establish its prima facie entitlement to summary judgment on its contractual indemnification claim against Cool Breeze.

The Contractual Indemnification Crossclaims Against 560 Associates (Motion Sequence Number 008)

560 Associates moves for summary judgment dismissing Shawmut, Cool Breeze and TEI's contractual indemnification crossclaims against it. Specifically, 560 Associates correctly argues that there are no contractual provisions requiring 560 Associates to indemnify any of those parties.

Accordingly, 560 Associates is entitled to summary judgment dismissing the contractual indemnification crossclaims against it.

The Common-Law Indemnification and Contribution Crossclaims Against 560 Associates (Motion Sequence Number 009)

560 Associates moves for summary judgment dismissing the common-law indemnification and contribution crossclaims against it.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation

of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia,* 259 AD2d at 65).

Similarly, a claim for contribution requires a finding that "two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citations omitted]).

Here, as discussed above, 560 Associates, as the owner of the Premises, was not guilty of any negligence that contributed to plaintiff's accident. Accordingly, 560 Associates is entitled to summary judgment dismissing the common-law indemnification and contribution claims against it.

Shawmut's Second Third-Party Claims for Common-Law Indemnification and Contribution Against TEI (Motion Sequence Number 009)

TEI moves for summary judgment dismissing Shawmut's third-party common-law indemnification and contribution claims against it.

TEI argues that it was not negligent with respect to plaintiff's accident because it did not owe plaintiff a duty of care, as it did not provide the Ladder to plaintiff. It also argues that it was unaware of any defects in the ladder such that it would have been aware of the need to remedy a deficiency prior to the accident.

Where a defendant provides "allegedly dangerous or defective equipment to a worker that causes injury during its use, in moving for summary judgment that defendant must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (*Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138–39 [2d Dept 2016]).

Here, TEI has established that it was free from negligence with respect to plaintiff's accident, notwithstanding that the Ladder was TEI's equipment. TEI establishes that it had no notice, actual or constructive, of any danger or defect in the Ladder. Initially, there is no evidence in the record of actual notice of any issues with the Ladder. As to constructive notice, "a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it" (*Barrerra v New York City Tr. Auth.*, 61 AD3d 425, 426 [1st Dept 2009]). Here, plaintiff testified that, immediately before the accident, he inspected the ladder and found it to be in good condition. In addition, Brock (TEI's foreman)

testified that he regularly inspected TEI's ladders before he used them, and he was unaware of any defects in the Ladder.

In opposition, Shawmut fails to raise a question of fact as to whether TEI had actual or constructive notice of any defect in the Ladder sufficient to establish negligence and overcome TEI's entitlement to dismissal of the same.

Accordingly, TEI is entitled to summary judgment dismissing Shawmut's common-law indemnification and contribution claims against it.

The Crossclaims and Counterclaims Against Shawmut (Motion Sequence Number 007)

Shawmut moves to dismiss all crossclaims and counterclaims against it. Shawmut, however, does not identify or address any specific crossclaims or counterclaims, nor raise any argument as to why such claims should be dismissed.

Accordingly, Shawmut is not entitled to summary judgment dismissing such claims.

Cool Breeze's Cross-Motion for Spoliation Sanctions Against TEI (Motion Sequence Number 009)

Cool Breeze moves for spoliation sanctions against TEI. Specifically, it seeks dismissal of TEI's third-party answer due to TEI's purported failure to preserve the Ladder after the accident or, in the alternative, an adverse inference at trial regarding an asserted defective condition in the Ladder.

> "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense"

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks and citations omitted]).

Here, Cool Breeze argues that the Ladder was a material piece of evidence and was relevant to, or would have supported, Cool Breeze's defense with respect to the claims against it. Notably, the only viable claims against Cool Breeze sound in contractual indemnification.[1] As discussed

[1] As Cool Breeze is plaintiff's employer, all other claims would be barred by Workers Compensation Law § 11 (*see e.g. Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

above, the indemnification provision at issue against Cool Breeze does not contemplate negligence.[2]

Importantly, Cool Breeze does not claim that the Ladder was intentionally or willfully destroyed (and no evidence exists in the record to support such an argument). As such, Cool Breeze "must establish" that the destroyed Ladder was relevant to its defense (*Pegasus Aviation I, Inc.*, 26 NY3d at 547-8). Cool Breeze fails to do so. It focuses primarily on an argument that all defendants' defenses would be "substantially stronger were we able to demonstrate with surety . . . that the ladder was not defective" (Cool Breeze's affirmation in support of its cross-motion, p. 8; NYSCEF Doc. No. 279).

To that end, while the Ladder is the instrument of plaintiff's accident, whether it was defective is immaterial under the Labor Law, as a plaintiff is "not required to show that the ladder on which he was standing was defective" (*Montalvo*, 8 AD3d at 174). Further, as discussed above, there is no evidence in the record establishing that TEI created a defect in the Ladder or that, prior to the accident, TEI had notice (actual or constructive) of any defect in the Ladder such that TEI could be found negligent for failing to remove or repair the Ladder.

Importantly, as discussed above, the contractual indemnification provision between Shawmut and Cool Breeze does not have a negligence trigger. In other words, Cool Breeze's indemnification obligations arise irrespective of any alleged negligence (*Correia,* 259 AD2d at 65 [unless negligence is explicitly included in the provision, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant"]). Accordingly, Cool Breeze has not established that the condition of the Ladder is relevant to or would help defeat any claim against it.

Further militating against spoliation sanctions is that the Ladder was, in fact, inspected by a Cool Breeze representative and Cool Breeze's insurance investigator after the accident (Flowers' tr at 59-60). That investigation indicated that the Ladder was in working order.

Given the foregoing, Cool Breeze has failed to establish entitlement to any spoliation sanctions against TEI.

The parties remaining arguments have been considered and were determined to be unavailing.

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[2] Cool Breeze does not have a contract with TEI, and there is no direct contractual indemnification provision between them. Similarly, as discussed above, TEI does not owe Shawmut contractual indemnification.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff, Delany Evelyn (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against defendant 560 Associates Delaware LLC (560 Associates), defendant/third-party plaintiff/second third-party plaintiff Shawmut Woodworking & Supply, Inc. d/b/a Shawmut Design and Construction (Shawmut) and defendant/second third-party defendant Transel Elevator & Electric, Inc. (TEI), is granted with respect to the Labor Law § 240 (1) claim against 560 Associates and Shawmut, and the motion is otherwise denied; and it is further

ORDERED that the portion of Shawmut's motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims against it, as well as all crossclaims and counterclaims against it is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claims, as well as that portion of the section 241 (6) claim predicated on a violation of Industrial Code 23-1.21 (b) (4) (iv), and that portion of the motion is otherwise denied; and it is further

ORDERED that the portion of Shawmut's motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment in its favor on its third-party claims contractual indemnification against third-party defendant Cool Breeze A/C/, Inc., d/b/a Cool Breeze AC a/k/a Cool Breeze Air Conditioning, Inc. (Cool Breeze) and its second third-party contractual indemnification claims against TEI is granted with respect to Cool Breeze only, and is otherwise denied; and it is further

ORDERED that the portion of 560 Associates' motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims and counterclaims against it is granted to the extent of dismissing the common-law negligence and Labor Law § 200 claims as well as that portion of the section 241 (6) claim predicated on a violation of Industrial Code 23-1.21 (b) (4) (iv), and all crossclaims and counterclaims interposed against it, and that portion of the motion is otherwise denied; and it is further

ORDERED that the portion of 560 Associates' motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment in its favor on its contractual indemnification claims against Shawmut, Cool Breeze and TEI is denied; and it is further

ORDERED that TEI's motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the complaint and second third-party complaint as against it is granted; and it is further

ORDERED that Cool Breeze's cross-motion (related to motion sequence number 009), pursuant to CPLR 3126, for spoliation sanctions against TEI is denied; and it is further

ORDERED that the remainder of this action will continue.

This constitutes the decision and order of the court.

10/12/2023
DATE

RICHARD LATIN, 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