At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of October, 2023

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

RAMON RIJO,

Plaintiff,

- against -

63RD STREET REALTY II LLC, YALDEINU THE KADIMAH ORGANIZATION, INC. and YALDEINU CORP.,

Defendants.

- X

63RD STREET REALTY II LLC,

Third-Party Plaintiff,

- against –

COUNTYWIDE BUILDERS, INC.,

Third-Party Defendant.

- X

YALDEINU CORP.,

Second Third-Party Plaintiff,

- against –

COUNTYWIDE BUILDERS, INC.,

Second Third-Party Defendant.

- X

DECISION / ORDER

Index No. 521342/2016
Motion Sequence No. 14, 15, 16, 18 & 19

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and	

Affidavits (Affirmations) Annexed	254-282, 305-323 283-304, 344-349, 399-418
Opposing Affidavits (Affirmations)	369-377, 378-384, 385-392, 393-394, 395-396, 398 419-421, 422-424
Reply Affidavits (Affirmations)	362, 425, 426, 427, 428

Upon the foregoing papers, defendant 63rd Street Realty II LLC (63 Realty) moves (in motion sequence [mot. seq.] 14) for an order, pursuant to CPLR 3212, granting it summary judgment (1) dismissing the complaint of plaintiff Ramon Rijo as against it, or (2) on its cross claims against co-defendants Yaldeinu the Kadimah Organization, Inc. and Yaldeinu Corp. d/b/a The Yaldeinu School, declaring that said entities are obligated to defend, indemnify and reimburse it in connection with this action.[1] Plaintiff moves (in mot. seq. 15) for an order, pursuant to CPLR 3212, granting him partial summary judgment against all defendants on the issue of liability pursuant to Labor Law § 240 (1). Co-defendant Yaldeinu moves (in mot. seq. 16) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it. 63 Realty also moves (in mot. seq. 18) for an order, pursuant to CPLR 603 and 1010, dismissing or severing the second third-party action commenced by Yaldeinu against Countywide Builders, Inc. (Countywide) from the main action. Lastly, plaintiff cross- moves (in mot. seq. 19) for an order, pursuant to CPLR 3042 and 3212, granting him leave

[1] Defendant Yaldeinu the Kadimah Organization Inc. has never answered or appeared in this action. All references to Yaldeinu herein refer to Yaldeinu Corp. On October 12, 2017, Doc 51, this court granted plaintiff's motion (Seq. # 3) for a default judgment order and directed that the inquest abide the trial. To the extent that 63 Realty asserted cross-claims against this non-appearing entity, as 63 Realty's answer was not served upon it, jurisdiction was never obtained over it. Defendant's answer with cross claims was required to be served on the non-appearing defendant in the manner of a summons and complaint. (See CPLR 3012, Conners, Practice Commentaries, 7B C3012:7 - Serving Cross-Claim on Non-Appearing Defendant; *PVI Indus. LLC v 224 Wythe Ave., LLC*, 40 Misc. 3d 1219(A) [Sup Ct Kings Co 2013]).

to amend his bill of particulars to include additional alleged violations of the Industrial Code (12 NYCRR Ch 1, sub. A), and, after permitting said amendment, awarding him partial summary judgment against all defendants on the issue of liability pursuant to Labor Law § 241 (6).

Background

Plaintiff commenced the instant action by electronically filing a summons and complaint with this court on December 1, 2016. As relevant to the instant motions, the record indicates that on October 30, 2016, plaintiff was injured while removing debris from a partially-demolished wall in a building under renovation at 1600[2] 63rd Street in Brooklyn. 63 Realty owns the subject building, and Yaldeinu, its tenant, operates a school therein, a part of the building. With a view toward leasing more of the building to Yaldeinu, 63 Realty hired Countywide, plaintiff's employer, to renovate part of the interior of the subject building. Plaintiff's job duties primarily consisted of sweeping and removing debris from the floor.

According to plaintiff, prior to the accident, the wall was almost completely demolished except for a row of cinder blocks which were still attached to the ceiling. The wall had been between eight and ten feet high, and the cinder blocks were each about two feet long. While plaintiff was collecting the debris from the floor near the subject wall, a cinder block fell from the remaining part of the wall and struck him, knocking him to the ground. Plaintiff sustained injuries as a result.

[2]It appears that, the premises known as 1638 63rd Street shares the same block and lot as 1600 63rd Street (Block 5538 Lot 7).

The pleadings allege that defendants violated Labor Law §§ 240 (1) and 241 (6), as predicated on certain provisions of the Industrial Code by, essentially, failing to provide plaintiff with adequate protection against the risk of being struck by a falling object. More specifically, plaintiff argues that the nondelegable provisions of the Labor Law required defendants to shore the area of the wall directly above where he was working by using stays, blocks, braces, irons, ropes, and/or other devices, and to provide overhead protection to protect workers from falling objects. Plaintiff claims that defendants provided no such devices. In sum, plaintiff concludes that defendants' failure to adequately protect him from being struck by the falling cinder block violated Labor Law § 240 (1) and 241 (6) predicated on specified provisions of the Industrial Code.

Additionally, plaintiff asserts causes of action based on Labor Law § 200 and common-law negligence. Plaintiff claims that defendants are owners, contractors or agents thereof, and therefore, are vicariously liable for plaintiff's injuries without regard to fault or responsibility. Plaintiff argues that since his injuries were proximately caused by defendants' negligence and violations of the Labor Law, and since he was performing protected work at a construction site, defendants are liable for the damages resulting from his injuries.

Shortly after plaintiff commenced the main action, 63 Realty commenced a third-party action against Countywide for, among other things, indemnification. Subsequently, counsel for Countywide assumed the defense of 63 Realty in the main action, and the first third-party action was discontinued by stipulation. 63 Realty asserted cross claims against Yaldeinu in its answer, asserting the right to indemnification, both contractual and common-

law, contribution, and seeking damages for an alleged breach of the covenant to purchase and maintain insurance coverage.

On April 18, 2022, plaintiff filed a note of issue certifying that discovery is complete and that this matter is ready for trial. The three instant motions for summary judgment followed. On July 15, 2022, after plaintiff filed his note of issue, Yaldeinu commenced the second third-party action against Countywide. In response, 63 Realty filed the instant motion to dismiss or sever it. Lastly, by cross motion filed on November 23, 2022, plaintiff seeks both leave to amend the bill of particulars to include a claim of additional Industrial Code violations, and, after such leave is granted, partial summary judgment against defendants on the issue of liability pursuant to Labor Law 241 § (6).

Arguments in Support of the Motions

63 Realty's Motion for Summary Judgment

In support of its motion, 63 Realty first asserts that the record demonstrates that there are no disputed material facts in this action. Therefore, it continues, there is no genuine issue to be decided by a trier of fact. Accordingly, 63 Realty concludes, the instant dispute should be summarily resolved.

63 Realty notes that plaintiff characterizes his Labor Law § 240 (1) claim as one based on the allegation that an object fell, struck him and caused injuries. 63 Realty argues, however, that inconsistencies in plaintiff's deposition testimony suggest that plaintiff's recitation of events is inherently incredible. More specifically, 63 Realty asserts that plaintiff alternated referring to the object as a block or a column, and could not specify

whether it fell from an existing wall. In any event, counsel continues, so-called "falling object" cases under Labor Law § 240 (1) require the injured worker to demonstrate that the accident was the direct consequence of a failure to provide him with adequate protection against a risk arising from a significant elevation differential. It is insufficient, 63 Realty contends, for the injured worker to simply show that an object fell and consequently caused injury; instead, counsel continues, a plaintiff must show that, at the time of the alleged accident, the object that fell either was being hoisted or secured or required securing for the purposes of the undertaking. Moreover, 63 Realty adds, the record must demonstrate that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in § 240 (1) of the Labor Law.

Here, 63 Realty argues, the record lacks all of the above-mentioned prerequisites. 63 Realty notes that plaintiff's testimony, inconsistent as it is, does not even identify the object that allegedly caused the accident. Also, 63 Realty continues, plaintiff's testimony seems to suggest that he was struck by debris from an already demolished wall; if that is true, 63 Realty reasons, these materials were not being hoisted and did not require securing for any purpose. Indeed, 63 Realty claims, since the alleged accident occurred while plaintiff and his co-workers were picking up debris from the ground, their assigned work did not require the securing of any materials. Additionally, counsel continues, nothing in the record suggests that the alleged accident occurred because of the absence or inadequacy of a safety device of the type listed in the statute. Since the requisite facts to establish "falling object" liability are not present here, 63 Realty concludes that plaintiff has no viable Labor Law § 240 (1) claim.

Alternatively, 63 Realty argues that plaintiff's Labor Law § 240 (1) claim should be dismissed because plaintiff was not performing one of the activities enumerated in the statute. According to 63 Realty, the task assigned to plaintiff—sweeping debris on the ground just outside of the subject demolition zone—is not a protected activity, and, moreover, did not expose him to an elevation-related risk. Additionally, 63 Realty emphasizes that plaintiff was never directed to perform any protected work; indeed, counsel continues, the accident occurred in a cordoned-off area (referred to as the "demolition zone") which plaintiff had been previously instructed not to enter. For this additional reason, 63 Realty concludes, plaintiff's Labor Law § 240 (1) claim should be dismissed.

63 Realty next asserts that plaintiff has no viable Labor Law § 241 (6) claim. 63 Realty points out that for an owner, contractor or agent to be liable under Labor Law § 241 (6), a plaintiff is required to establish a violation of an applicable regulation in the Industrial Code that gives a specific, positive command. 63 Realty avers that the plaintiff must demonstrate that any such violation must have proximately caused the alleged injuries. Furthermore, it argues, even if the worker alleges the breach of such a specific Industrial Code rule or regulation, Labor Law § 241 (6) claims are unsustainable if the identified rule is not applicable to the facts of the case.

Here, 63 Realty notes, plaintiff's bill of particulars alleges violations of Industrial Code §§ 23-1.7, 23-1.33, 23-2.2, 23-3.2, 23-3.3, 23-4.4, 23-6.1 and 23-6.2. However, 63 Realty maintains, these specified provisions are either inapplicable to the instant facts, applicable but were not violated, and/or were not the proximate cause of plaintiff's injuries. 63 Realty claims that sections 1.7, 1.33 and 3.2 do not support plaintiff's Labor Law § 241

(6) cause of action for two reasons: first, the subject demolition zone was adequately cordoned off, and second, plaintiff's unauthorized entry into the obviously-barricaded area was the sole proximate cause of his injuries. 63 Realty further asserts that section 2.2 applies only when concrete work is underway, whereas sections 3.3 and 4.4 only apply to demolition and excavation, respectively; here, in contrast, there was no ongoing concrete work in plaintiff's work area at the time of the alleged accident and plaintiff testified that the subject wall/column was already demolished ("gone and already knocked down") at the time of his injury, and that no excavation was ongoing at relevant times. 63 Realty contends that sections 2.2, 3.3 and 4.4 are therefore not applicable Lastly, 63 Realty notes that sections 6.1 and 6.2 apply when materials are being hoisted, but the record establishes that nothing was being hoisted when plaintiff was allegedly injured. In sum, 63 Realty claims that the Industrial Code provisions cited by plaintiff are either inapplicable to the instant facts, or, if applicable, were not violated. 63 Realty concludes that since plaintiff cannot show that the violation of an applicable provision of the Industrial Code proximately caused his injuries, his Labor Law § 241 (6) claim lacks merit and must be dismissed. Alternatively, 63 Realty reiterates that despite any possible violation of an applicable provision of the Industrial Code, plaintiff is, nevertheless, barred from recovering damages pursuant to the Labor Law because his foolish and forbidden act of entering a dangerous demolition zone was the sole proximate cause of his injuries.

Next, 63 Realty asserts that plaintiff's Labor Law § 200 and common-law negligence claims are meritless. First, 63 Realty notes that Labor Law § 200 is merely a codification of the common-law duty of an owner or general contractor to provide workers with a safe

place to work. 63 Realty points out that in the construction worksite context, section 200 and common-law negligence claims are sustainable in only two situations: first, where the allegedly liable party supervised or controlled the work that produced the injury, and second, when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. 63 Realty contends that neither situation exists here.

In this regard, 63 Realty states that the record establishes that its agents did not supervise and/or control the work performed by plaintiff (or, for that matter, the work performed by any Countywide employee). 63 Realty claims that, to the extent the record shows that it had some authority to control the site with respect to work performed at the premises, such authority was limited to the ability of agents of 63 Realty to stop work if they saw workers doing something that was unsafe. 63 Realty asserts that such activity is consistent with general supervisory authority. Nevertheless, 63 Realty argues, courts hold that such general supervisory authority is insufficient for imposing common-law negligence and Labor Law § 200 liability. Thus, 63 Realty reasons, to the extent plaintiff's Labor Law § 200 and common-law negligence claims are based on a "supervised or controlled" theory against it, such claims must be dismissed.

Next, 63 Realty continues, if plaintiff is alleging that a dangerous or defective premises condition led to his injuries, sustainable Labor Law § 200 and common-law negligence claims against an owner require a showing that the owner or its agents either created the dangerous condition that caused the accident or had actual or constructive notice of same. The record, it continues, establishes that neither situation exists here. 63 Realty

reiterates that its agents were not present on the subject site; furthermore, 63 Realty adds that the record is devoid of any showing that its agents either created a dangerous premises condition or had notice of same. Also, 63 Realty maintains that plaintiff's claims do not include an allegation that a dangerous premises condition existed for any length of time. Indeed, 63 Realty continues, the record contains no indication that plaintiff complained about his work area being unsafe. Counsel concludes that for these reasons, plaintiff cannot show actual or constructive notice. Therefore, 63 Realty avers, any claim based on Labor Law § 200 or common-law negligence principles lacks merit and must be dismissed.

Lastly, and in the alternative, 63 Realty turns to its third-party claims. 63 Realty alleges that pursuant to "several" written lease agreements and riders, Yaldeinu Corp. agreed to defend and indemnify 63 Realty against claims of the type asserted by plaintiff herein. Also, 63 Realty asserts that these written agreements required Yaldeinu to maintain liability insurance for such occurrences that named 63 Realty as an additional insured. 63 Realty claims that written agreements that clearly imply an intention to indemnify must be enforced as written. Moreover, it argues that there is no serious dispute that the instant claims arose from work performed by Countywide pursuant to the subject written agreements with Yaldeinu. Accordingly, 63 Realty continues, any written indemnity provision was both in effect at all relevant times and was triggered by the instant action. 63 Realty also emphasizes that the applicable indemnity provisions require Yaldeinu to indemnify it irrespective of whether Yaldeinu was either actively negligent or had agents present on the site; all that is necessary to trigger Yaldeinu's obligation to defend and indemnify, 63 Realty continues, is the fact that the instant claim arose out of Countywide's

work. Moreover, 63 Realty claims that there is no question that its liability would be purely vicarious, as it was not involved in the project, had no agents in the work area and committed no negligent act or omission that could reasonably be understood as the proximate cause of the injuries alleged. Also, 63 Realty contends that it furnished no equipment to any worker, had no duty to provide equipment, and lacked notice of or ability to correct any allegedly dangerous condition. In short, 63 Realty argues that it bears no fault for this accident, and, therefore, is entitled to contractual indemnification from Yaldeinu. For these reasons, 63 Realty concludes that this court should grant its motion for summary judgment dismissing plaintiff's complaint, or, if that is not granted, for summary judgment on its cross claims against Yaldeinu.

Plaintiff's Motion for Partial Summary Judgment

In support of his motion for partial summary judgment against 63 Realty and Yaldeinu on the issue of liability pursuant to Labor Law § 240 (1), plaintiff first claims that 63 Realty and Yaldeinu (a commercial tenant) are, respectively, the owner of the subject premises and the owner's agent. Plaintiff claims Yaldeinu was the owner's agent with respect to the construction work. Plaintiff claims that he was, at all relevant times, lawfully on the subject premises and performing work related to the subject renovation project. Plaintiff reasons that, therefore, as the owner and the owner's agent, 63 Realty and Yaldeinu had, pursuant to Labor Law § 240 (1), a non-delegable duty to provide him with proper protection against elevation-related risks. Moreover, as a statutorily-defined "owner" and owner's "agent," plaintiff continues, 63 Realty and Yaldeinu are subject to absolute vicarious liability for a breach of this duty without regard to responsibility or fault.

Next, plaintiff argues that he was engaged in protected work, performing one of the activities enumerated in Labor Law § 240 (1). Specifically, plaintiff states he was involved in the demolition of the subject wall. While doing so, he adds, he was exposed to an elevation-related risk; namely, the risk of masonry falling from the ceiling above and striking him. Here, plaintiff contends, that risk was realized when he was struck by a cinder block that fell from approximately ten feet above and struck him.

Plaintiff maintains that the subject cinder block was not, but should have been, secured for the purposes of the undertaking. Specifically, plaintiff claims that his co-workers had removed the bottom portion, and thus the majority of the subject wall, causing the structural integrity of the remaining portion—the part still attached to the ceiling—to be weakened and unsupported. Given the risk, plaintiff continues, defendants' non-delegable duty required them to furnish or provide safety devices such as stays, blocks, braces, irons or ropes that would prevent or slow an object above him from falling. Alternatively, plaintiff adds, the presence of overhead protection, such as a planked scaffold covering the area where plaintiff worked, would have fulfilled the duty imposed by Labor Law § 240 (1). Plaintiff argues that the failure to furnish him with any "proper protection" against the risk of a falling object such as the subject cinder block establishes, prima facie, both that § 240 (1) was violated and that the violation was the proximate cause of his injuries. Lastly, plaintiff provides an affidavit and a supplemental affidavit [Docs 309 and 404] from an expert, who states that she is a certified site safety manager. The first is addressed to Labor Law 240 (1) and the second to § 241 (6). She supports plaintiff's contentions.

In sum, plaintiff claims that the record establishes that the foreseeable risk of falling

objects required defendants to provide proper protection against that risk, and that any safety devices provided to him were not adequate to protect him from the risk of falling objects. It is also undisputed, adds plaintiff, that the object fell, struck and injured him. Therefore, plaintiff reasons, the record establishes that, in the falling-object context, that defendants violated Labor Law § 240 (1) and the violation proximately caused his injuries. Plaintiff concludes that he is entitled to partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240 (1).

Yaldeinu's Motion for Summary Judgment

In support of its motion for summary judgment dismissing the complaint as well as all cross claims against it, Yaldeinu first argues that it is not subject to absolute vicarious liability pursuant to the Labor Law. More specifically, Yaldeinu acknowledges that provisions of the Labor Law impose absolute vicarious liability, but nevertheless asserts that these provisions apply, by their terms, only to "owners," "contractors" or "agents" thereof. Here, claims Yaldeinu, it is undisputed that it was neither the owner of the subject premises nor a contractor hired by the owner to perform construction work thereon. Therefore, it reasons, it is not subject to absolute vicarious liability pursuant to the Labor Law unless it was an "agent" of an owner or contractor, as courts of this state have interpreted that term. Indeed, Yaldeinu continues, the record establishes that it is 63 Realty's tenant, and tenants generally are not liable pursuant to the Labor Law unless the tenants were given the authority to supervise and control the injury-causing work. Yaldeinu maintains that in the construction site injury context, when the record establishes that a lessee neither hired plaintiff's employer nor exercised control over plaintiff's work,

the lessee is not subject to absolute vicarious liability pursuant to the Labor Law. This is especially true, it continues, where the tenant supplied no defective equipment, had no authority to supervise workers, did not actually oversee the work performed, did not hire contractors, and exercised no control over site safety. Yaldeinu asserts that such is the situation here, and cites appellate authority suggesting that, therefore, this court should award it summary judgment dismissing the Labor Law claims asserted against it.

In sum, Yaldeinu claims that the record unequivocally establishes that it neither had authority to direct plaintiff's work, nor supervised his work, or that of any Countywide employee. The record also indicates, Yaldeinu continues, that it had no authority to control site safety. Moreover, it adds, Countywide was the party exclusively in control of both site safety and the manner in which work at the site was performed. Furthermore, Yaldeinu points out that the only construction contract in the record is between 63 Realty and Countywide. For these reasons, Yaldeinu argues that it is neither an "owner," "contractor" nor "agent" thereof; accordingly, Yaldeinu concludes that it is entitled to summary judgment dismissing plaintiff's Labor Law claims asserted against it.

Yaldeinu also argues that plaintiff's Labor Law § 200 and common-law negligence claims against it are meritless. Yaldeinu points out that Labor Law § 200 codifies the common-law duty of an owner and contractor to provide the workers on a construction site with a safe place to work. Appellate courts, Yaldeinu continues, generally hold that, beyond owners and contractors, this duty to provide a safe workplace applies only to parties that had authority to control the activity bringing about the injury. Therefore, reasons Yaldeinu, for a Labor Law § 200 or common-law negligence claim to be viable against a

party not an owner or contractor, there must be evidence that such party supervised or controlled the plaintiff's work.

Here, continues Yaldeinu, only Countywide supervised plaintiff. Yaldeinu points out that plaintiff's testimony, along with the affidavits in the record, demonstrates that plaintiff was only supervised by his employer. Moreover, it continues, the record also indicates that all materials and safety devices plaintiff used on the date of the accident were supplied by Countywide. Indeed, Yaldeinu adds, its employees had no interactions with plaintiff. Yaldeinu emphasizes that based on the record, it thus neither owed a duty to plaintiff nor breached a duty. Yaldeinu further notes the absence of any indication that its agents either created or had notice, actual or constructive, of any hazardous condition on the premises. Yaldeinu concludes that the record thus proves that plaintiff's Labor Law section 200 and common-law negligence claims against it are not viable.

Lastly, Yaldeinu asserts that it is entitled to summary judgment dismissing all cross claims asserted against it by 63 Realty. Yaldeinu notes that 63 Realty's arguments are based on an alleged indemnity provision contained in a written lease agreement between the parties. Yaldeinu acknowledges that it operates a school on the subject premises, and is a party to at least two written lease agreements (referred to as the 2008 lease and 2013 amended lease) and associated riders with 63 Realty. Yaldeinu also acknowledges that these documents contain a provision whereby it agrees to indemnify 63 Realty for claims relating to the leasehold. However, Yaldeinu argues, the leased premises do not include the area of the building where the subject renovation work was being performed (referred to by Yaldeinu as the "additional 6,000 square feet" or "additional space").

Yaldeinu claims that the documents in the record, which were created with a view toward the school leasing additional space, does not constitute a written lease agreement (let alone one that contains a written indemnity provision). Indeed, it adds, the only such documentation that references the additional space and the rent for same were in printed emails between its principal and a representative from 63 Realty, all of which were sent after the plaintiff's accident had already occurred. Yaldeinu suggests that these emails, which discuss the size of the space that would be renovated and the rental cost per square foot, were at best a memorialization of negotiations between 63 Realty and Yaldeinu that were underway. These emails do not, Yaldeinu contends, constitute either a lease agreement, with an indemnity provision, concerning the new space or Yaldeinu's acquiescence that any previously agreed-upon indemnity provision would automatically apply to a future lease of additional space. Indeed, Yaldeinu adds, none of the witnesses or affiants aver that any lease agreement concerning the new space existed, or that the prior lease agreements covered the additional space under construction. In short, Yaldeinu states, none of the documents concerning the negotiations contain "a hint" of indemnification language or a covenant that requires Yaldeinu to procure and maintain commercial general liability insurance to cover 63 Realty as an additional insured for the work at the premises.

In conclusion, Yaldeinu contends that no language in the 2008 original lease agreement or the 2013 agreement amending the lease agreement (or the associated riders) applies to the future additional space under renovation when plaintiff's accident allegedly occurred. Yaldeinu emphasizes that none of the provisions of these written agreements

contain any references to a future agreement to lease additional space. Yaldeinu notes that it planned to eventually take possession of the renovated area,[3] but, as established by the record, only after the renovation work was complete. Yaldeinu asserts that, in contrast, it never occupied the area under renovation at relevant times. Next, Yaldeinu points out that it is undisputed that plaintiff claims to have been injured in 2016 while Countywide performed the subject renovation work. Since there was no written agreement or rider relevant to the renovation work that took place in 2016, continues Yaldeinu, there was no enforceable covenant to either indemnify or procure insurance relative to plaintiff's claims. Yaldeinu reasons that since a court will not order indemnification unless the intention to indemnify is clear and unambiguous, and no such clear and unambiguous indemnity provision (or insurance procurement provision) exists here, 63 Realty is thus not entitled to either indemnification or damages stemming from a breach of an alleged covenant to procure insurance. Therefore, concludes Yaldeinu, this court should grant summary judgment dismissing all of the cross claims asserted by 63 Realty. Coupled with its prior arguments, Yaldeinu maintains that its motion for summary judgment dismissing all claims asserted against it should be granted in its entirety.

63 Realty's Motion to Sever or Dismiss

In support of its motion to sever or dismiss the second third-party action, 63 Realty first asserts that Yaldeinu has recently commenced this action—after discovery was complete, the note of issue had been filed and the time to move for summary judgment had

[3] The record suggests that Yaldeinu eventually did take possession of the additional space.

long passed—simply to delay resolution of the main action. 63 Realty claims that Yaldeinu needlessly waited until late in the litigation to bring its second third-party action despite knowing for years that Countywide was plaintiff's employer. Here, 63 Realty continues, given the procedural posture of this case, Countywide will have no opportunity to take depositions, conduct physical examinations, obtain relevant discovery, or to move for summary judgment. 63 Realty argues that if the second third-party action is not severed or dismissed, Countywide will be "completely and prejudicially deprived of all of its rights under the CPLR." In other words, 63 Realty adds, Countywide would be severely prejudiced if the instant motion to sever or dismiss is denied.

63 Realty points out that the CPLR allows a court, as a matter of discretion, to sever a third-party action, where the third-party plaintiff deliberately delayed commencing its third-party claims, in order to avoid prejudice to the third-party defendant. 63 Realty claims that such is the case here. For these reasons, 63 Realty concludes that this court should exercise its discretion, grant the motion and sever or dismiss the second third-party action.

Plaintiff's Cross Motion for Leave to Amend Pleadings

In support of his cross motion for leave to amend his verified bill of particulars to include alleged violations of additional provisions of the Industrial Code, plaintiff first argues that since he already alleged a violation of Industrial Code § 23-3.3, he should be permitted to specify that he is claiming that defendants specifically violated subsections (b)(3) and (c) of that provision. Plaintiff characterizes these subsections as "plainly

applicable" to this matter and argues that he should be granted leave to add them to his bill of particulars, even after the note of issue was filed. Indeed, plaintiff points out, the CPLR expressly states that a motion for leave to amend pleadings shall be freely granted at any time by leave of court.

Specifically, plaintiff cites appellate authority that states that in the context of a Labor Law § 241 (6) cause of action, an amendment that cites a specific section of the Industrial Code is permitted absent unfair surprise or prejudice, even after a note of issue has been filed. Plaintiff also argues that since leave to amend "shall be freely given," a plaintiff seeking leave to amend his pleadings need not justify the timing of the motion. Here, plaintiff continues, the original bill of particulars alleges a violation of Industrial Code § 23-3.3, and there is thus no prejudice if plaintiff is granted leave to amend the bill of particulars to include subsections of that provision. Also, plaintiff adds, since the pleading already alleges that defendants failed to "properly maintain and secure the subject wall" and "properly inspect the workplace," the proposed amendment involves no new alleged facts and no new theories of liability; accordingly, defendants are not prejudiced. For these reasons, plaintiff concludes that his cross motion for leave to amend his verified bill of particulars should be granted.

Next, plaintiff asserts that he is entitled to summary judgment on his Labor Law § 241 (6) claim as predicated on the violations of these newly pleaded subsections and his resulting injuries which, plaintiff continues, is clearly demonstrated by the record. Plaintiff notes that subsection (b) (3) expressly states that "[w]alls . . . shall not be left unguarded in such condition that such parts may fall, collapse, or be weakened by wind pressure or

vibration." Also, plaintiff continues, subsection (c) requires that "shoring, bracing, or other effective means[]" be utilized to prevent similar accidents. Plaintiff reasons that, since it is undisputed that a cinder block fell from the top of an unsteady and partially demolished wall and struck him, the record establishes that Industrial Code § 23-3.3. (b) (2) and (c) were violated. Plaintiff alleges that there is no serious dispute that the structural integrity of the subject wall was compromised, yet the wall was unsupported and not braced or shored; consequently, vibrations generated by the demolition work caused a cinder block to fall from the top of the wall. Moreover, plaintiff submits the affidavit of a purported safety expert who reaches the same conclusions. Plaintiff posits that these Industrial Code violations were a proximate cause of his accident, and, as such, he is entitled to partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 241 (6) as premised upon Industrial Code §§ 23-3.3 (b) (2) and (c).

Opposition Arguments

In opposition to plaintiff's motion for partial summary judgment, 63 Realty first argues that plaintiff was not engaged in a protected activity for Labor Law § 240 (1) purposes when he was allegedly injured. It reiterates that, by its terms, section 240 (1) is applicable only to workers exposed to elevation-related risks. Here, in contrast, 63 Realty claims that plaintiff's assigned task did not present an elevation-related risk. Instead, counsel continues, he was instructed to clean a separate area of the work site, at ground level, which was away from the demolition zone. Since plaintiff's assigned task did not involve exposure to an elevation-related risk, 63 Realty reasons, Labor Law § 240 (1) is not applicable here. In any event, 63 Realty argues, plaintiff was provided with adequate safety

devices for the sweeping work—which, again, did not involve any elevation-related risk that he was directed to perform.

In the alternative, and assuming arguendo that Labor Law § 240 (1) does in fact apply to the instant matter, 63 Realty claims that plaintiff's sworn testimony indicates that his Labor Law § 240 (1) cause of action is meritless. Although plaintiff presently maintains that a cinder block fell from the top of a wall and struck him, 63 Realty notes that plaintiff's deposition testimony (which, according to 63 Realty, "changed multiple times after multiple conversations with and interruptions from his attorney during [the] deposition") indicated, however, that the subject wall was "completely gone" and "had been knocked down already[.]" Indeed, continues 63 Realty, other workers near that area were picking up debris at relevant times but were not engaged in demolition. 63 Realty states that plaintiff, during his deposition, was unable to specifically identify what struck him or what caused the object to fall. Therefore, 63 Realty reasons, plaintiff cannot establish that the object that allegedly struck him was, as required by appellate authority discussing "falling object" liability pursuant to Labor Law § 240 (1), something that required securing for the purposes of the undertaking. 63 Realty maintains that this court should hold plaintiff to his sworn deposition testimony, and, as such, a wall which is "completely gone" and "knocked down already" is not something that requires securing. Thus, maintains 63 Realty, plaintiff has no viable Labor Law § 240 (1) claim.

Again, in the alternative, 63 Realty argues that a viable Labor Law § 240 (1) claim requires the plaintiff to show that a foreseeable risk of injury from an elevation-related hazard led to the accident. Also, it continues, the plaintiff must show that an absent or a

defective protective device of the type enumerated in the statute was a proximate cause of the alleged injuries. 63 Realty argues that a partially-demolished wall does not need to be shored or braced. It emphasizes that plaintiff was not part of the crew involved in the demolition of the subject wall and was instead instructed to clean an entirely separate area at the jobsite. Moreover, 63 Realty adds, any accident related to the demolition of the subject wall does not implicate Labor Law § 240 (1). Indeed, counsel continues, appellate authority indicates that the collapse of a wall in the process of being demolished at a job site is not the type of elevation-related accident that section 240 (1) is intended to guard against, but a risk integral to the work. For this additional reason, 63 Realty concludes that plaintiff's Labor Law § 240 (1) claim lacks merit and must be dismissed.

63 Realty next argues that plaintiff was a recalcitrant worker. It notes that the record shows that plaintiff was directed numerous times to stay out of the marked and taped-off demolition zone. Indeed, counsel continues, plaintiff testified that he knew that the area was taped off to stop people from entering. He further stated that a sweeper (such as plaintiff himself) was not permitted to be in that area because of the danger that something could fall on him or her. 63 Realty points out that the record shows that both supervisors and co-workers directed plaintiff to stay out of the cordoned-off area for safety reasons. Despite this, plaintiff entered the restricted area. Therefore, 63 Realty avers, plaintiff was a recalcitrant worker. 63 Realty points out that according to appellate authority, a construction worker who is injured because he purposefully disregarded safety instructions is a recalcitrant worker who cannot recover damages pursuant to Labor Law § 240 (1).

Lastly, 63 Realty argues that this court should disregard the affidavit of plaintiff's

purported safety expert. First, it claims that plaintiff did not timely exchange the affidavit as required by the CPLR provisions governing discovery relating to experts. Alternatively, 63 Realty contends that the affidavit is merely a vehicle for legal conclusions. It notes that the affidavit is devoid of any facts, analysis, calculations, or data to support the conclusions contained therein. Indeed, 63 Realty continues, the affidavit contains no indication that the purported expert ever inspected the location of the alleged accident and no indication that she went to the subject building to observe, measure or inspect any of its rooms or walls. 63 Realty also points out that the affidavit does not take into consideration certain sworn testimony and statements in the record (specifically, testimony that undermines her conclusions). For these reasons, 63 Realty concludes that the affidavit was created solely to support legal conclusions; since a purported expert is not competent to make assertions concerning the meaning and applicability of law, 63 Realty argues, that the affidavit should be disregarded.

In opposition to Yaldeinu's motion for summary judgment, 63 Realty reiterates its position that it is entitled to a defense and indemnity from Yaldeinu, as well as damages for Yaldeinu's failure to procure and maintain specified commercial general liability insurance coverage, based on written lease agreements and riders. 63 Realty asserts that Yaldeinu entered into "several leases, agreements and riders with the Owner 63rd Street which require Yaldeinu to defend, indemnify, [and] provide additional insured status" for claims such as the one asserted by plaintiff here. 63 Realty argues that the defense, indemnity and insurance procurement provisions in these documents are unambiguous. Moreover, 63 Realty maintains that since the subject renovation work was performed for the benefit of

Yaldeinu's planned expansion in the subject building, any provisions contained in the lease documents apply to the subject renovation work done in the space Yaldeinu planned to occupy. Indeed, 63 Realty maintains that Countywide "performed its work and services solely for the benefit of Yaldeinu[.]" Lastly, 63 Realty reiterates its position that it did not commit a negligent act or omission relative to plaintiff's claims, and that the subject indemnity provisions apply to Yaldeinu irrespective of whether Yaldeinu's agents committed a negligent act or omission that led to the alleged accident.

Acknowledging Yaldeinu's arguments in support of its motion for summary judgment dismissing the indemnification and breach of the covenant to procure insurance claims, 63 Realty protests that "there is absolutely no basis for Yaldeinu's claim that the alleged accident did not occur within its leased space." 63 Realty contends that it is "clear" that the parties intended the terms of the previously-executed lease agreements "to be effective for the new renovated space as clearly indicated by the expansion requests of Yaldeinu." Indeed, 63 Realty labels Yaldeinu's claim that no written indemnity provision applies to a space in the subject building that Yaldeinu did not yet lease as "ludicrous." Also, 63 Realty suggests that since Yaldeinu's agents sought more leased space in the subject building and communicated to 63 Realty an interest to expand, and because 63 Realty hired Countywide to perform the subject renovation work pursuant to these communications, Yaldeinu should thus be equitably estopped from arguing that the indemnity provisions contained in the lease agreements do not apply here. Lastly, and in the alternative, 63 Realty asserts that since agents of Yaldeinu "coordinated" with Countywide about how the space under renovation would be used, Yaldeinu is thus subject

to liability without regard to fault pursuant to the Labor Law as an "agent" of 63 Realty, the owner of the premises.

In opposition to 63 Realty's motion to sever the second third-party complaint, Yaldeinu first notes that appellate authority indicates that severance is inappropriate where there are common factual and legal issues involved in the two actions and where the interests of judicial economy and consistency of verdicts will be served by having a single trial. Indeed, it adds, a trial court's discretion to sever a third-party action should be exercised sparingly, since it is a more efficient practice to have one trial and determination of all relevant issues instead of having multiple fragmented trials.

Here, Yaldeinu continues, there are common factual and legal issues at hand, and, as such, the motion to sever should be denied. Yaldeinu claims that certain issues, such as whether it is considered an "agent" of 63 Realty, the owner of the premises, are "completely intertwined" with other relevant facts, such as the contractual relationships among the parties. Indeed, Yaldeinu continues, 63 Realty does not even argue that the second third-party action does not contain common factual and legal issues with the main action. Instead, Yaldeinu notes, 63 Realty simply asserts that the second third-party action was not timely commenced and that there would be prejudice unless this court severs Yaldeinu's claims against Countywide.

Yaldeinu argues that the second third-party action was not untimely. Specifically, Yaldeinu notes that Mayer Weber, the owner of Countywide (who, according to a prior Countywide deposition witness, gave instructions to workers on the site) was not deposed

until May 9, 2022. Yaldeinu also points out that Weber testified at his deposition that Yaldeinu's agents made "final decisions about the space" and conveyed them to Countywide. Yaldeinu reiterates its position that it is not subject to liability in this action, because it had not yet leased the subject area under renovation, did not hire the contractor that performed the work at the site, was not plaintiff's employer and did not control site safety. Nevertheless, Yaldeinu acknowledges that Weber's testimony suggests that Yaldeinu is 63 Realty's agent and could thus impact Yaldeinu's potential liability.

As a result, Yaldeinu continues, it commenced the second third-party action on July 15, 2022. Yaldeinu claims that Weber's testimony establishes the common questions of law and fact between the main action and the second third-party action against Countywide. Yaldeinu argues that any delay in commencing this third-party action is not attributable to Yaldeinu, which acted promptly after Weber was deposed. In any event, Yaldeinu adds, Countywide, which was previously named as the defendant in 63 Realty's third-party action, was quite aware of its potential exposure in this litigation before the second third-party action was commenced.

Lastly, Yaldeinu rejects any claim of prejudice. Yaldeinu points out that 63 Realty and Countywide are now united in interest, since both have been represented by the same counsel since 2018. Yaldeinu reasons that counsel for both companies have reviewed all relevant documents and deposition transcripts necessary for defending this matter. Finally, Yaldeinu points out that depositions of all parties have been completed, and plaintiff has provided all medical evidence and appeared for independent physical examinations. Yaldeinu argues that, for these reasons, either discovery is complete or that Countywide

may obtain whatever limited discovery necessary before trial. For these reasons, Yaldeinu concludes that the motion to sever should be denied.

In opposition to plaintiff's motion for partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240 (1), Yaldeinu first reiterates that it is not subject to the absolute vicarious liability imposed by the Labor Law since it is not an owner, contractor or agent thereof as defined by courts of this State. Specifically, Yaldeinu notes that it undisputedly did not own the subject premises. Second, Yaldeinu points out that it performed no renovation work on the subject premises, but Countywide unquestionably did. Also, Yaldeinu adds, Countywide was hired by 63 Realty alone. Thus, reasons Yaldeinu, it could be subject to the absolute vicarious liability provisions of the Labor Law only if it was the agent of an owner or contractor.

Yaldeinu asserts that courts of this State hold that a party will be considered an agent of the owner or general contractor for Labor Law purposes only if that party had the authority to direct and supervise the work performed by plaintiff at the time of the injury. Here, it continues, the record establishes that plaintiff received instructions solely from Countywide foremen, and contains no indication that Countywide delegated its authority to supervise its workers to any other party. Indeed, Yaldeinu continues, any involvement of its principals in the renovation project was limited to discussing how the site would eventually look (e.g., wall paint colors, room sizes and doorknob styles). Yaldeinu maintains that its involvement in the project was thus very limited, and that it never had authority to supervise or direct plaintiff or his co-workers. In sum, Yaldeinu notes that the record establishes that it did not possess or use the area under renovation at relevant times,

was not a party to a lease agreement concerning the subject area at relevant times, did not hire any contractors, did not participate in contract discussions between 63 Realty and Countywide, did not have authority to direct Countywide workers, and did not control site safety—in fact, the record instead establishes that Countywide was the only party that directed, supervised and controlled plaintiff's work on the site. For these reasons, Yaldeinu concludes it was not an agent of an owner or contractor for Labor Law purposes, and is thus not subject to liability pursuant to the Labor Law in connection with plaintiff's alleged accident.

Alternatively, Yaldeinu asserts that plaintiff's Labor Law claims lack merit and must be dismissed because the record establishes that he was both a recalcitrant worker and the sole proximate cause of his injuries. Yaldeinu reiterates that the accident would not have occurred had plaintiff followed on-site safety instructions and not crossed the barrier into the forbidden demolition zone. Yaldeinu adopts all arguments advanced by 63 Realty to this end. For these reasons, Yaldeinu concludes that this court should deny plaintiff's motion for partial summary judgment.

In opposition to 63 Realty's motion for partial summary judgment on the issue of indemnification and related claims, Yaldeinu reiterates that at relevant times, no contract or agreement existed between it and 63 Realty that concerned the leasing, possession or occupancy of the area under renovation. Yaldeinu emphasizes that at relevant times, it had no interest (other than the plan to eventually lease and possess the newly renovated space) in the subject area. Since it was not party to such a lease agreement, reasons Yaldeinu, there is thus no written covenant to defend and indemnify 63 Realty for claims such as those

asserted by plaintiff. Indeed, continues Yaldeinu, the only documents in the record referring to Yaldeinu's eventual—after the accident occurred—possession of the area under renovation are an email between 63 Realty and Yaldeinu from May of 2016 that notes the proposed rental cost of space per foot and indicates a lease agreement would be subsequently drafted; a letter to Yaldeinu from 63 Realty dated after the date of the alleged accident; and a statement showing that Yaldeinu was first billed for the new space in November of 2016. No other documents, contend Yaldeinu, connect it to the work done at the site.

Yaldeinu concludes that the record shows, contrary to 63 Realty's contentions, that there is no written indemnification agreement—or a written agreement to maintain insurance coverage—between 63 Realty and Yaldeinu concerning the part of the property that was being renovated, where plaintiff's accident allegedly occurred. Yaldeinu acknowledges that it leased and possessed other parts of the subject building, but the areas described in the relevant lease documents and possessed by Yaldeinu excluded the renovation area; indeed, the record demonstrates that the earliest possible month in which Yaldeinu possessed the subject area was the month after plaintiff's accident allegedly occurred. For these reasons, Yaldeinu concludes that 63 Realty's cross claims for defense, indemnity, costs and breach of a covenant to procure insurance are unsupported by the record and should thus be dismissed.

In opposition to Yaldeinu's motion for summary judgment, plaintiff first asserts that Yaldeinu's contention that it is not an agent, within the definition of the Labor Law, for the owner or contractor is belied by the record. First, plaintiff notes that it is undisputed that

the renovation project was undertaken to expand the existing space of the school operated by Yaldeinu in the subject building. Next, plaintiff claims that some items in the record suggest that Yaldeinu's principal was involved with the selection of Countywide as the contractor. Moreover, plaintiff points out the testimony of Countywide's owner, who averred that all final decisions regarding the project rested with the representative from Yaldeinu and not with anyone from 63 Realty. Lastly, plaintiff argues that the record indicates that Yaldeinu's principal was present in the renovation area at least five days of every week. Plaintiff claims that these items in the record demonstrate that an issue of fact exists as to whether Yaldeinu had sufficient authority to control the work, subjecting it to absolute vicarious liability under the Labor Law as an "agent" of 63 Realty, the owner, or Countywide, the contractor.

Plaintiff continues, with regard to Labor Law § 200, that the record shows that an issue of fact exists regarding Yaldeinu's liability. Plaintiff notes that, under appellate authority, a party that did not direct or control work but, nevertheless, had notice of a hazardous condition on a construction site is subject to Labor Law § 200 liability. Here, plaintiff claims, the dangerous condition was the partially-demolished wall from which the cinder block fell and struck him. Plaintiff emphasizes that the hazardous condition existed prior to his starting to work underneath the wall on the date of the accident. Since Yaldeinu's agent had access to the subject area and would occasionally check work progress, plaintiff reasons, Yaldeinu was required to submit evidence showing when the wall and surrounding area had last been inspected. Plaintiff states that Yaldeinu has not presented such evidence, and maintains that, absent such a showing, an issue of fact exists

as to whether Yaldeinu had constructive notice of the claimed hazard. For this reason, plaintiff argues, Yaldeinu's motion for summary judgment dismissing plaintiff's Labor Law § 200 claims must be denied.

Plaintiff also opposes defendants' arguments with respect to Labor Law §§ 240 (1) and 241 (6). Plaintiff reiterates that an applicable provision of the Industrial Code, § 23-3.3 (b) (3), prohibits leaving "[w]alls, . . . unguarded in such condition that such parts may fall, collapse, or be weakened by wind pressure or vibration." Here, plaintiff continues, the record shows that the remaining part of the partially-demolished wall from which the subject cinder block fell had been left unguarded; thereafter, natural forces caused the subject block to loosen, fall and strike him. Plaintiff maintains, therefore, that he has established prima facie entitlement to judgment as a matter of law against defendants with respect to Labor Law § 241 (6) liability.

Also, plaintiff argues that the cinder block was an object that required securing for the undertaking (specifically, workers cleaning debris near and underneath the remains of the subject wall). Plaintiff points out that it is undisputed that there were no safety devices in place to prevent the cinder block from falling and striking a worker. Plaintiff notes that there is no real dispute that he was injured when a cinder block struck him from above. Plaintiff reasons that, based on these two undisputed facts, the only logical conclusion is that defendants violated Labor Law § 240 (1), and that such violation proximately caused his injuries. Plaintiff maintains, therefore, that he has established prima facie entitlement to judgment as a matter of law against defendants with respect to § 240 (1) liability.

Plaintiff acknowledges defendants' contention that he said the wall was "completely knocked down" when the accident occurred. Plaintiff characterizes this contention as contrary to facts in the record—namely, that the subject block fell from the top of where the wall once stood. In addressing defendants' contention that plaintiff could not consistently name or identify what struck him, plaintiff claims that, even if true, appellate authority states that the failure to identify a falling object or explain how it fell does not preclude an injured worker from recovering damages pursuant to the absolute vicarious liability provisions of the Labor Law. Moreover, in response to defendants' claim that plaintiff was both the sole proximate cause of his injuries and a recalcitrant worker, plaintiff maintains that defendants are required to show that an injured worker had been provided with safety devices and chose, for no good reason, not to use them. Here, in contrast, plaintiff continues, the record demonstrates that no safety devices against the risk of overhead falling objects were furnished. Furthermore, plaintiff reiterates that there was no shoring or securing devices present at the accident site to prevent blocks from the top of the partially-demolished wall from falling on workers below. Plaintiff argues that, where, as here, no safety devices are either provided to the injured worker or placed to prevent the worksite accident, defendants may not avail themselves of the sole proximate cause or recalcitrant worker defenses. This is true, adds plaintiff, even if he was instructed to stay out of an area demarcated by yellow caution tape but decided to enter the area and clean debris therein. For these reasons, plaintiff maintains that this court should reject these defenses as meritless.

Lastly, both 63 Realty and Yaldeinu oppose plaintiff's motion for leave to amend the bill of particulars to include additional Industrial Code sections to support his Labor Law §

241 (6) claim. They reiterate their previous arguments, including that since plaintiff was both a recalcitrant worker and the sole proximate cause of his injuries, his section 241 (6) claim should be dismissed irrespective of what Industrial Code violations he now claims were violated. They further claim that plaintiff was not performing any protected tasks and that there was no violation of any Industrial Code mandate. Moreover, they claim that since plaintiff did not move for leave to amend the bill of particulars until after the note of issue was filed, the proposed belated amendments cause prejudice; defendants also contend that this prejudice is exacerbated because plaintiff seeks partial summary judgment with respect to Labor Law section 241 (6) based on the newly-identified Industrial Code sub-sections. Similarly, they continue, since plaintiff also seeks summary judgment, plaintiff was required to demonstrate good cause for a motion made much later than the deadline for dispositive motions and failed to do so here. Defendants conclude that, if the court does not dismiss plaintiff's claims in their entirety, plaintiff's motion for leave to amend his pleadings should, nevertheless, be denied.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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" (*Manicone v City of*

New York, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman*, 3 NY2d at 404 [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not

resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2009]).

However, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). With these principles in mind, the court turns to the underlying merits of the motions.[4]

Labor Law § 200 and Common-Law Negligence

The court grants the portions of defendants 63 Realty and Yaldeinu's motions which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Labor Law § 200 states, in applicable part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

[4] The court's reasoning and determinations are based on the sworn testimony and documents in the record, other than the affidavit of the purported expert, which is conclusory in nature; accordingly, the affidavit was disregarded (see e.g., *Wass v County of Nassau*, 166 AD3d 1052 [2018]).

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

"Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those

involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Here, irrespective of whether the instant matter should be analyzed as a "manner of work" case or as a "hazardous condition" case, plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed.

Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" that either was performed by plaintiff or produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, the record establishes that neither 63 Realty nor Yaldeinu or their agents controlled or supervised plaintiff and his work. Plaintiff specifically testified that he did not interact with agents of 63 Realty or Yaldeinu and that he only received instructions from Countywide foremen and supervisors. Furthermore, his testimony contains no indication that he took any instructions from defendants' agents. Therefore, if plaintiff's injuries are considered a consequence of the manner of his work—sweeping and removing debris from the floor—defendants are not subject to liability for plaintiff's causes of action both sounding in common-law negligence and alleging violations of Labor Law § 200 (*id.*).

Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are sustainable against defendants only if the claims are viable according to ordinary (common law) premises liability principles (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2007] ["(w)here a plaintiff's injuries stem not from the manner in which the work was being

performed, but, rather, from a dangerous condition on the premises, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident"]). Here, assuming arguendo that the cinder block which was, prior to the accident, still attached to the ceiling constituted a hazardous condition, the fact that plaintiff swept and removed debris while working under the cinder block belie any suggestion that there was a visible defect at the premises for an appreciable length of time; for this reason, the record establishes that no defendant had constructive notice of the alleged hazard (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"]). Accordingly, and contrary to plaintiff's arguments, no constructive notice of a hazardous condition exists in this record. Furthermore, there is no indication that any agent of defendants had actual knowledge of these alleged hazards (i.e., the record contains no statement to defendants' agents that the subject block was loose, shaking etc.). Moreover, there is no evidence in the record that anyone, other than Countywide employees, performed the demolition work on the wall. Therefore, no agent of defendants caused or exacerbated the allegedly dangerous condition. Accordingly, since the record indicates that defendants' agents neither had notice (constructive or actual) of any defect, nor created or worsened a dangerous condition, no defendant is subject to Labor Law § 200 or common-law negligence liability with respect to the subject cinder block.

Plaintiff's arguments to the contrary lack merit. That defendants had a duty (contractual or otherwise) to inspect the site and actually did so (even if inspections were daily) is insufficient to demonstrate an issue of fact as to the requisite supervision and control required under the Labor Law (*see Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [1998]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Enos v Werlatone, Inc.*, 68 AD3d 712, 713 [2009]; *Loiacono v Lehrer, Mcgovern, Bovis, Inc.*, 270 AD2d 464 [2000]; *Richichi v Constr. Mgt. Tech.*, 244 AD2d 540, 542 [1997]). Also, the fact that defendants had some general authority over site safety and the right to stop work if a safety violation existed are immaterial, since the authority to enforce safety standards is insufficient to establish the control necessary to impose liability pursuant to Labor Law § 200 or common-law negligence (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [2004] ["(t)he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability"], citing *Shields v General Elec. Co.* , 3 AD3d 715, 716-717 [2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [2001]). More specifically, the right to generally supervise the work, stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2012]).

Plaintiff's position that an issue of fact exists as to constructive notice similarly lacks merit, as he fails to identify anything in the record that indicates the allegedly hazardous

condition was present for an appreciable length of time. It is insufficient for plaintiff to merely assert that defendants had constructive notice of hazards; general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*see e.g. Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]), as is vague testimony that does not establish the length of time an allegedly hazardous condition existed before the subject accident (*see e.g. Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2006]). Nor does it suffice for plaintiff to assert defendants were required to submit evidence of their most recent inspection. To the contrary, evidence of notice of a hazard must be precise in order to create an issue of fact (*see e.g., Kobiashvilli*, 34 AD3d at 747-748; *Piacquadio*, 84 NY2d at 969), and no such evidence exists herein. In sum, plaintiff has failed to demonstrate that defendants supervised or controlled his work specifically, or Countywide's work generally, that defendants had any notice of an allegedly hazardous condition, or that defendants either created or exacerbated one. Thus, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims (*see e.g., Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2007]).

Claims Against Yaldeinu

The court grants Yaldeinu's motion for summary judgment dismissing all claims against it. With respect to plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, the court notes that these statutes impose absolute vicarious liability on "[a]ll contractors and owners and their agents[.]" Here, it is undisputed that Yaldeinu neither owned the subject premises (63 Realty is indisputably the owner) nor was a construction contractor hired to perform the subject renovation work (Countywide is indisputably the contractor). Accordingly,

Yaldeinu is subject to the absolute vicarious liability provisions of Labor Law §§ 240 (1) and 241 (6) only if it is deemed an "agent" of the owner or the contractor.

It is undisputed that Yaldeinu was 63 Realty's tenant and that it occupied at least part of the subject premises. However, a tenant or lessee is not automatically considered an "agent" of the owner for purposes of the Labor Law. To the contrary, a party is deemed to be an agent of an owner or general contractor under the Labor Law only when it has the "ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 99 [1999]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] 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" (*Russin*, 54 NY2d at 318). A party that did not hire contractors and did not have authority to supervise the work that precipitated the injuries is not an "agent" for Labor Law purposes (*see e.g., Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2011]). Indeed, a lessee that shows that "it neither contracted for nor supervised and controlled the demolition [or renovation] work on the premises" establishes prima facie entitlement to judgment as a matter of law dismissing the Labor Law claims (*Garcia v Market Assoc.*, 123 AD3d 661, 665 [2014], *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Wendel v Pillsbury Corp.*, 205 AD2d 527 [1994]). Here, since Yaldeinu neither contracted for the renovation work nor supervised or controlled the work, Yaldeinu is thus not an "agent" for Labor Law purposes.

63 Realty and plaintiff argue otherwise, stating that Yaldeinu had "final" say over the renovations, had agents present, had a say in 63 Realty's selection of Countywide as the contractor and made aesthetic decisions (such as what color the walls would be painted and what doorknob styles would be used) regarding the renovated space. Assuming the truth of all these assertions, none of them constitute supervision and control of the subject work. Indeed, the court reiterates that plaintiff testified that he only received instructions from Countywide supervisors and foremen. The record contains no indication that agents of Yaldeinu directed how Countywide workers should demolish the subject wall or remove debris from the general area. "[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" (*Walls*, 4 NY3d at 864, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]). For these reasons, the court rejects the arguments of 63 Realty and plaintiff to the contrary, and, accordingly, plaintiff's claims are dismissed as against Yaldeinu.

Similarly, the court dismisses all cross claims asserted by 63 Realty against Yaldeinu. Specifically, the record establishes that 63 Realty's cross claims for defense, indemnity, contribution and breach of the covenant to maintain insurance are meritless. There is no viable common-law indemnity or contribution claim against Yaldeinu since the record contains no indication that agents of Yaldeinu committed a negligent act or omission that led to the accident. For a sustainable common-law indemnity and contribution claim, 63 Realty is required to show that Yaldeinu "was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1999];

see also Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 [2004]), or, "in the absence of any negligence[,]" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2003]). Here, neither prerequisite exists, and, therefore, the common-law indemnification and contribution claims against Yaldeinu are unsustainable.

63 Realty's contractual claim for defense and indemnity and related damages also must be dismissed. "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" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "'[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract'" (*Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005], quoting *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [1995]). Here, there is no demonstrated intention—written, "clearly implied" or otherwise—that Yaldeinu agreed to indemnify 63 Realty for claims related to the subject renovation work. To be sure, the record contains written agreements and riders that contain indemnification (and insurance procurement) provisions whereby Yaldeinu agrees to indemnify 63 Realty for claims *related to the space leased by Yaldeinu.* However, the record unequivocally establishes that, at the time of the accident, Yaldeinu did not have a leasehold interest in the area being renovated. Moreover, and contrary to 63 Realty's suggestions, none of the written agreements or other evidence in the record suggest that the provisions of existing leases would apply to any additional

space later leased by Yaldeinu. Also, 63 Realty focuses on the fact that the renovation work was undertaken for Yaldeinu's benefit, to expand its presence in the building; however, this is insufficient to imply an agreement to indemnify. Lastly, the court notes that 63 Realty, and not Yaldeinu, hired Countywide to perform the renovation work. For these reasons, 63 Realty's cross claims against Yaldeinu for defense, indemnity, contribution, costs and damages resulting from a failure to procure insurance are dismissed.

In sum, Yaldeinu's motion for summary judgment is granted in its entirety and all claims against it are dismissed. Since no claims against Yaldeinu survive, the second third-party action, in which Yaldeinu seeks contribution and indemnity from Countywide, is rendered moot and is dismissed. Similarly, 63 Realty's motion to dismiss or sever the second third-party action is denied as moot.

Labor Law §§ 240 (1) and 241 (6)

The court now considers 63 Realty's and plaintiff's motions insofar as they address Labor Law § 240 (1) and Labor Law § 241 (6). Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, 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 . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [holding that owner or contractor is liable under Labor Law § 240 (1) "without regard to . . . care or lack of it"]).

Although this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]), an accident alone does not establish a Labor Law § 240 (1) violation; rather the plaintiff is required to show that the

violation was a contributing cause of the falling object and consequent injury (*see e.g. Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]). Indeed, a successful cause of action under Labor Law § 240 (1) requires that the plaintiff establish both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall's Inc.*, 229 AD2d 569, 570 [1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Zimmer,* 65 NY2d at 524). A plaintiff alleging that the provided safety devices were inadequate must show that it was that inadequacy which proximately caused the alleged injuries (*Wilinski*, 18 NY3d 1 [2011]). Generally, the issue of whether a particular safety device provided proper protection is a question of fact for the jury (*see generally Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016]).

Next, Labor Law § 241 states, in applicable part, as follows:

> "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, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*,81 NY2d 5044, 501-502 [1993]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto*, 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated an Industrial Code provision that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 349). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [1995]).

Here, 63 Realty has not demonstrated entitlement to judgment as a matter of law dismissing either of plaintiff's causes of action. Viewing the totality of the evidence presented in the light most favorable to plaintiff, the party opposing summary judgment, and according plaintiff the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2019]), his testimony indicates that while he was cleaning debris that resulted from interior demolition work, a loose block fell from above and struck him, causing injuries. 63 Realty has not demonstrated that, as a matter of law, the subject block was not an object that "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see also Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008]). The fact that no devices were present to either prevent the block from falling or to arrest a falling block tends to suggest the existence of a Labor Law § 240 (1) violation (*see e.g. Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404, 408 [2007] [falling rods "should have been completely 'secured' or some safety device should have been used in the meantime to prevent the 'special hazard' of a gravity-related accident such as 'being struck by a falling object that was improperly hoisted or inadequately secured'"]).

Also, as plaintiff correctly points out, the facts suggest that Labor Law § 241 (6) was violated because 63 Realty did not comply with Industrial Code § 23-3.3 ("Demolition by hand"), which, in subsection (b) (3), provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." This provision of the Industrial Code has been held sufficient to support a Labor Law § 241 (6) claim (*Wilinski v*

334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1 [2011]). For these reasons, plaintiff's Labor Law § 240 (1) and Labor Law § 241 (6) claims should not be dismissed.

The arguments advanced by 63 Realty to the contrary lack merit. The contention that plaintiff allegedly contradicted himself about the facts of the accident during his deposition, if true, at best creates an issue of fact but does not entitle defendants to summary judgment. The court cannot properly deem plaintiff's testimony summarily incredible. "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *see also Scott v Long Is. Power Auth.*, 294 AD2d 348 [2002]). "The credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts" (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [1976]).

Next, and as plaintiff correctly points out, this court cannot summarily find that plaintiff was the sole proximate cause of his injuries or that he was a recalcitrant worker. To prevail on the sole proximate cause defense, defendants must show that the injured worker "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, this defense is unavailable where, as here, the injuries were "at least partially attributable to defendant's failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential" (*Nunez v Bertelsman Prop., Inc.*, 304 AD2d 487, 488 [2003]). Here, it is at

least arguable that the absence of any fall prevention or fall arresting devices constituted a Labor Law § 240 (1) violation, and, as such, plaintiff cannot be summarily deemed the sole proximate cause of his injuries (*Id.*). Lastly, 63 Realty has not shown that plaintiff was a recalcitrant worker; such a defense requires a showing that the plaintiff was provided with certain safety devices, that such devices were readily available for his use, and that the plaintiff was specifically instructed to use such devices but chose for no good reason to disregard those instructions (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *see also Zong Mou Zou v Hai Ming Constr. Corp.*, 74 AD3d 800, 801 [2010]; *Yax v Development Team, Inc.*, 67 AD3d 1003, 1004 [2009]). Here, there is no such showing. In sum, since 63 Realty has failed to show that no statutory violation existed or that a defense against Labor Law liability is applicable, it has failed to demonstrate prima facie entitlement to judgment as a matter of law with respect to Labor Law § 240 (1) and § 241 (6).

However, plaintiff is likewise not entitled to summary judgment on these claims. Viewing the record in favor of defendants, the opponents of plaintiff's motion for summary judgment, issues of fact exist. Specifically, the New York State Court of Appeals has "held that in order to invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents), a 'plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent'" (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990], citing *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]; *Allen v Cloutier Constr. Corp.*,

44 NY2d 290 [1978]; *Koenig v Patrick Constr. Corp.*, 298 NY 313 [1948]; *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Here, the record, including plaintiff's testimony, suggests that plaintiff was neither "permitted or suffered" (*Mordkofsky*, 76 NY2d at 576-577) to work in the demolition area; to the contrary, plaintiff apparently entered the cordoned-off area despite the clear instructions of his supervisors not to do so. A trier of fact could reasonably conclude that not only was plaintiff not "permitted or suffered" to enter the demolition area, but he was expressly forbidden from doing so. For this reason, an issue of fact exists as to whether 63 Realty is liable under plaintiff's Labor Law § 240 (1) and Labor Law § 241 (6) claims (*see e.g., I.P. v Bonilla*, 216 AD3d 805 [2023] [plaintiff not authorized to repair garage was not permitted to recover damages pursuant to Labor Law for accident that occurred while repairing garage]). Since plaintiff does not dispute that he entered the cordoned-off demolition zone despite clear instructions from his supervisors not to do so, he has failed to demonstrate prima facie entitlement to judgement as a matter of law with respect to his Labor Law §§ 240 (1) and 241 (6) claims.

Leave to Amend Plaintiff's Bill of Particulars

The court grants plaintiff's cross motion insofar as it seeks leave to amend the bill of particulars to include violations of Industrial Code § 23-3.3 (b) (3) and (c). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Citimortgage, Inc. v Rogers*, 203 AD3d 1125, 1126, quoting *U.S. Bank N.A. v Singer*, 192 AD3d 1182, 1185; *see also Onewest Bank, FSB v N & R Family Trust*, 200 AD3d 902; *Bridgehampton Ntl. Bank v D & G*

Partners, L.P., 186 AD3d 1310, 1311). The burden of establishing prejudice is on the party opposing the amendment (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411; *see also GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 49). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Shields v Darpoh*, 207 AD3d 586, 587 [internal quotation marks omitted]).

Here, there is no reasonable basis to for this court to find prejudice or surprise. The original bill of particulars included the allegation that defendants violated section 23-3.3 of the Industrial Code; it is hardly prejudicial or surprising that plaintiff might also allege violations of the subsections in the same provision. Also, and as stated above, the facts suggest it is at least arguable that subsections (b) (3) and (c) of § 23-3.3 were violated, since the subject wall was unguarded and ostensibly lost integrity. Since the proposed amendment is not "patently devoid of merit," (*cf. Bridgehampton Natl. Bank v D & G Partners*, L.P., 186 AD3d 1310, 1311 [2020]), the court exercises its "sound discretion" (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2019]; see also CPLR 3025 [b]; *Murray v City of New York*, 43 NY2d 400, 405 [1977]) and grants plaintiff leave to amend. The proposed amended bill of particulars (NYSCEF document 418) is deemed to have been properly served on all appearing parties.

Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendant 63rd Street Realty II LLC (mot. seq. 14)

for summary judgment is granted solely to the extent that plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against it, and is otherwise denied; and it is further

ORDERED that the motion of plaintiff Ramon Rijo (mot. seq. 15) for summary judgment is denied; and it is further

ORDERED that the motion of defendant/second third-party plaintiff Yaldeinu Corp. (mot. seq. 16) for summary judgment is granted and all claims against it are dismissed; and it is further

ORDERED that the motion of defendant 63rd Street Realty II LLC (mot. seq. 18) to dismiss or sever the second third-party action is denied as moot and the second third-party action is dismissed; and it is further

ORDERED that the cross motion of plaintiff Ramon Rijo (mot. seq. 19), for both leave to amend his bill of particulars and for summary judgment on the new claims, is granted to the extent that leave is granted and the proposed amended bill of particulars (Doc 418) is deemed to have been properly served, and is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.