SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RENE JARA-SALAZAR,

Plaintiff,

- v -

250 PARK, L.L.C., UNISPACE, INC.,

Defendant.

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INDEX NO. 152788/2019

MOTION DATE 06/21/2023, 06/21/2023, 06/21/2023

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

250 PARK, L.L.C.

Plaintiff,

-against-

TEXT 100 LLC

Defendant.

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Third-Party
Index No. 595822/2019

UNISPACE, INC.

Plaintiff,

-against-

PRECISE SERVICES CORP.

Defendant.

----------X

Second Third-Party
Index No. 596157/2019

TEXT 100 LLC

Plaintiff,

-against-

UNISPACE, INC., PRECISE SERVICES CORP.

Defendant.

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Third Third-Party
Index No. 595128/2021

250 PARK, L.L.C.

Fourth Third-Party
Index No. 595566/2021

Plaintiff,

-against-

PRECISE SERVICES CORP.

Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 004) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 224, 227, 228, 229, 230, 231, 241, 242, 243, 247, 248, 249, 250, 251, 252, 253

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 225, 232, 233, 234, 235, 236, 237, 245

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 226, 238, 239, 240, 244, 246

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

BACKGROUND

Plaintiff commenced this action against defendants 250 Park LLC ("Park") and Unispace, Inc. ("Unispace", and collectively "defendants") for injuries he sustained on while on the job when he was struck by a fallen pipe, causing him to fall off a ladder. He asserts causes of action for negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

Park commenced a third-party action against third-party defendant Text 100 LLC ("Text") asserting causes of action for contractual and common law indemnification, contribution, and breach of contract. Unispace commenced a second third-party action against second third-party defendant Precise Services Corp. ("Precise") asserting causes of action for contractual and common law indemnity, contribution and for failure to procure insurance. Text commenced a third third-party action against Unispace and Precise, asserting causes of action for contractual and common law indemnity, contribution and for failure to procure insurance. Park

commenced a fourth third-party action against Precise, asserting causes of action for contractual and common law indemnification and contribution.

PENDING MOTIONS

On April 6, 2023, Plaintiff moved for an order pursuant to CPLR § 3212 granting him summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) claims (mot. seq. 4).

On April 7, 2023, Park moved for an order pursuant to CPLR § 3212 dismissing the complaint and all cross claims asserted against it and granting it summary judgment on its contractual indemnification claims as against Text and for a finding that Text acted as the owner's statutory agent. (mot. seq. 5).

On April 7, 2023, Text moved for an order pursuant to CPLR § 3212 granting it summary judgment on its third-party complaint against Unispace and Precise (mot. seq. 6).[1]

The motions are consolidated herein for determination as set forth below.[2]

ALLEGED FACTS

Park owns the entire building located at 250 Park Avenue in Manhattan ("premises"). Park entered into a lease agreement with Text to lease Suite 600 on the 6th floor of the premises, for a term from October 2017 to July, 2028. Text hired Unispace as general contractor for a construction project on the 6th floor of the premises ("project"). Unispace subcontracted with Precise to provide demolition work in preparation for construction, including the removal of existing sprinkler pipe. Plaintiff was employed by Precise and assigned to work on the project.

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[1] While Text argues for dismissal of plaintiff's complaint in its motion papers, it clarifies in reply that it is not moving for summary judgment on the claims in plaintiff's complaint as plaintiff asserts no direct claims against it.
[2] The court notes that multiple parties in this action filed oversized briefs pursuant to 22 NYCRR § 202-b, without receiving prior permission by the court. The court will accept these submissions in this instance despite the aforementioned defects but instructs counsel to obtain the court's permission to do so in the future.

Plaintiff's Testimony

Plaintiff testified that the accident occurred on February 21, 2018, which was his first day working at the project. His foreman, Manny Paguay from Precise, assigned him and five other workers to cut and remove sprinkler pipe, and instructed them on how the work was to be performed. While they were initially removing the sprinkler heads from the pipe, Paguay eventually told them to hurry up and cut the pipe with everything on it. Plaintiff was provided with an 8-foot-tall A-frame ladder and a Sawzall to accomplish this task. The pipe was suspended by hangers akin to hooks.

To cut the pipe, plaintiff would climb the ladder to the point where the top step of the ladder would be at his waist level and, using both hands, hold the Sawzall above his head and in front of him and cut one end of the pipe, then he would move the ladder and cut the other end and repeat the process.[3] He would position the ladder on the side of the pipe so that no portion was directly under it. He testified that Mr. Paguay instructed him to cut vertically, not horizontally.

At the time of the accident plaintiff was in the process of cutting through the pipe but had not cut through the entirety of the pipe, and had cut some, but not all, of the hangers that were holding up the pipe. After Paguay gave the instruction to start cutting the main pipe, plaintiff "climbed the ladder to begin to cut the pipe, the pipe broke, struck [his] ladder, and [he] fell to the ground." The pipe was approximately nine feet long, but he could not recall if the pipe fell straight down or if it swung out and came back, or something else. He did not see the pipe fall,

[3] Plaintiff initially testified that he would cut the hangers before the pipe, but later testified that he would cut the pipe first. Additionally, at one point he testified that the pipe would fall to the floor after he cut it, and at another testified that a second worker would be positioned on the ladder to secure the pipe on the second cut so that it would not fall to the ground.

but felt the impact when it hit the ladder, and was not sure if the feet of the ladder moved, or merely vibrated without the feet of the ladder moving.

Other Deposition Testimony

Paguay testified that he had worked with plaintiff in the past and that he had a history of not following instructions. He stated that he and he alone would instruct Precise's workers on a jobsite, including site safety. At the jobsite, he was never told by anyone that time was of the essence or to get the job done quickly. On the day of the accident, he instructed the workers, including plaintiff, how to cut the pipe and where to place the ladder so that the pipe would not fall on it, but that plaintiff would not listen to him. He claims he corrected him about the proper placement of the ladder "about two or three times" but that "a minute after I correct him, he would go do the same thing." He also told him "he shouldn't be right underneath the pipe… Because if you are right on the pipe, it could fall on top of you but if you are on the side of the pipe, it would just fall down and nothing happened." He instructed the workers, including plaintiff, to cut eight-to-ten-foot sections of pipe depending on how comfortable they felt lowering it down, and to cut the hanger before cutting the pipe. He did not witness the accident but saw plaintiff on the floor after complaining that he hurt his knee. However, he was told by two workers who witnessed the accident that plaintiff "placed the ladder incorrectly and when they cut the pipe down and it fell down on the ladder" and that plaintiff was standing six feet up on the ladder using the Sawzall to cut the pipe when the accident occurred.

Kevin Sanderson, the site supervisor for Unispace, testified that at the jobsite, his duties and responsibilities included scheduling coordinating with the subcontractors, and for keeping the project on schedule and for site safety. Unispace, as general contractor, hired all of the subcontractors to perform the work at this site. Unispace and Precise Services did not meet to

discuss the method and manner of the sprinkler pipe removal. He would generally walk the job in the mornings to make sure everyone was wearing their personal protective equipment and stated that if he witnessed a subcontractor not using proper equipment complete its work, he would stop work and make corrections, but that he never did at this jobsite. He testified that generally workers would cut the hangers before cutting the pipe, with someone holding the pipe so that it did not fall, and that a "safe length" of pipe would be 10-15 feet. He claims he witnessed the accident as it was about to happen and was getting up from his desk because he thought plaintiff was cutting an unsafe length of pipe when the pipe fell, which he estimated to be around 30 feet long. He claimed he would have removed plaintiff from the area and instructed workers to cut the pipe in smaller lengths if he had been able to intercede in time. He did not observe where plaintiff positioned the ladder in relation to the pipe but had witnessed him prior to the accident positioned "relatively close to the underneath [of] the sprinkler pipe." that he was pos but that the proper procedure would be parallel to the side so that the pipe would not strike the ladder. He opined that "the situation I witnessed was very unsafe to where a child would know that that was unsafe" and that the accident was plaintiff's fault.

Vincent Palaguachi, an employee of Precise, testified that was hired by Paguay for the job, but had no experience beforehand. He witnessed plaintiff's accident while on a ladder cutting pipe next to plaintiff. He claimed plaintiff was on the seventh or eighth step of the ladder and observed the pipe "kick" him when he cut the last hook, although he could not see whether the pipe struck plaintiff or the ladder. He estimated that the piece of pipe cut by plaintiff was around 50 feet long. He could not recall whether Paguay instructed the workers on how to position the ladders and testified that he did not tell the workers to speed up, although he "had a time frame that we had to finish taking down all the pipes."

Expert Affidavit

Park submits the affidavit of Professional engineer Raymond Capeci, who opined that the equipment provided to plaintiff with appropriate equipment to perform his job and to protect him, and that given that plaintiff was working at an elevation of six feet, *i.e.,* the sixth step on an eight foot ladder, that there was no need for the ladder to be secured or for plaintiff to wear a harness. He further opines that the cited industrial code sections are inapplicable, including Industrial Code §23-1.21 which applies when work is being performed from a step of a stepladder 10 feet or more above footing.

DISCUSSION

SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

PLAINTIFF'S LABOR LAW §§ 240(1) AND 241(6) CLAIMS

Contentions

Plaintiff contends that he is entitled to summary judgment on his Labor Law § 240(1) claim under either a falling object or failure to provide adequate safety devices theory. He argues that his testimony and that of two independent eyewitnesses establish that neither the ladder that plaintiff was standing on, nor the pipe that fell on him, were properly secured. He also seeks summary judgment on his Labor Law § 241(6) claim, arguing that defendants violated Industrial Code §23-1.21(b)(4)(iv) by failing to provide him with a leaning ladder held in place by a person stationed at the foot of ladder or otherwise secured.

Park contends that plaintiff fails to meet his burden in support of summary judgment. It contends that the § 240(1) claim should be dismissed, because plaintiff was the sole proximate cause of his accident as he was a "recalcitrant worker" by disregarding specific safety instructions as to the placement of the ladder and the length of pipe that should have been cut. Park argues that it would not have made sense to secure the pipe as it would have defeated the purpose of the work of demolishing the sprinkler system. Park additionally seeks dismissal of plaintiff's § 241(6) claim, arguing that that Industrial Code §23-1.21(b)(4)(iv) is inapplicable, as the statute does not cover A-frame ladders and as plaintiff was performing work from a step less than 10 feet above the footing of the ladder.

Unispace adopts Park's arguments in separate opposition. Precise asserts similar arguments in separate opposition and adds that the cited Industrial Code provision is additionally inapplicable as the ladder used was an A-frame as opposed to a leaning ladder.

In reply, Plaintiff contends that he was not the sole proximate cause of his injuries. He argues that the "recalcitrant worker" defense is inapplicable as he did not disregard an "immediate" instruction. Plaintiff argues that the pipe should have been secured, and that it was not an intentional part of the construction process that the pipe fall the way it did.

Labor Law § 240(1)

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

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

"A Labor Law § 240 (1) claim will be dismissed where the plaintiff employee disobeyed an 'immediate and active direction' not to use a particular unsafe piece of equipment, and refused to use adequate safety devices when such were provided." *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96 (1st Dept 2000); *see Phillips v Powercraft Corp.*, 126 AD3d 590 (1st Dept 2015). Such actions by a "recalcitrant worker" abrogate what is normally strict liability under the statute only where plaintiff's own actions are the sole proximate cause of the accident. *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35 (2004).

Here, plaintiff makes a *prima facie* case for a violation of Labor Law § 240(1), as plaintiff's accident, in which the ladder he was on was struck by a pipe causes him to fall, clearly involved elevation differentials sufficient to trigger liability under the statute. *See Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287 (1st Dept 2008). However, Paguay's testimony that he instructed the workers, including plaintiff, to cut the pipe in 8-10 foot segments, and that he instructed them not to place the ladder directly under the pipe and had had to correct plaintiff multiple times, as well as the conflicting testimony as to the length of the pipe, and where plaintiff positioned the ladder raise triable issues of fact as to whether plaintiff disregarded specific safety instructions. Additionally, as the alleged instructions occurred on the same day as the accident, they were sufficiently immediate. *See Cahill*, 4 NY3d at 39 ("[plaintiff] was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them"); *Miraglia v H&L Holding Corp.*, 306 AD2d 58 (finding factual issue as to recalcitrant worker defense where plaintiff's employer allegedly gave him disregarded instruction day prior to accident).

Thus, as triable issues of fact remain as to whether plaintiff was a recalcitrant worker, both Plaintiff and Park's motions are denied as to plaintiff's Labor Law § 240(1) claim.

Labor Law § 241(6)

Labor Law §241 sets forth in relevant part that:

> All contractors and owners and their agents… when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements… [subsection] (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

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

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

Industrial Code §23-1.21(b)(4)(iv), which plaintiff clarifies is the sole provision relied upon, sets forth:

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

It is uncontroverted that plaintiff was using an A-frame ladder, as opposed to a leaning ladder. This provision of the Industrial Code has been found not to cover A-frame ladders. *See Morato-Rodirguez v Riva Construction Group, Inc.*, 2012 WL 9514734 (Supreme Ct, Bronx

County, 2012) *aff'd as modified* 115 AD3d 401 (1st Dept 2014); *Balleste v Forest City Ratner Companies, LLC*, 2019 WL 3342905 (Supreme Court, NY County 2019); *cf. Rivera v Suydam 379 LLC*, 216 AD3d 495 (1st Dept 2023) (finding triable issue as to whether industrial code provision violated where testimony ambiguous as to whether A-Frame ladder was closed and leaning or open and locked).

To the extent plaintiff's argument is premised on the fact that defendants failed to provide him with a leaning ladder, plaintiff fails to articulate or present evidence as to why a leaning ladder would have been more appropriate than an A-frame ladder to accomplish his task.

Thus, absent an applicable Industrial Code provision, Park's motion is granted as to Plaintiff's Labor Law 241(6) claim, and the claim is dismissed.

LABOR LAW § 200 AND COMMON LAW NEGLIGENCE

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

Labor Law § 200 applies where workers are injured as a result of dangerous or defective premises conditions at a worksite or where a worker is injured due to the way the work is

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

Park's sole argument in support of dismissal of plaintiff's Labor Law § 200 and common law negligence claims is that plaintiff was the sole proximate cause of his accident. As set forth above, there remain triable issues of fact as to the cause of plaintiff's accident given the conflicting testimony regarding the size of the pipe and where plaintiff positioned the ladder. Thus, Park's motion to dismiss these claims is denied.

PARK'S CLAIMS AGAINST TEXT

Park contends that it is entitled to summary judgment on its claims for contractual and common law indemnity against Text, arguing that its lease with Text clearly requires Text to indemnify it damages caused by it or its representatives. It argues that Text effectively stood in the shoes of the owner, as it was the party that hired and controlled the general contractor and directed the project for its own benefit.

In opposition, Text argues that Park is not entitled to contractual indemnification absent evidence of negligence, or wrongful acts, omissions or breach of lease. It argues that it cannot be

found to stand in the shoes of the owner as it is not a direct defendant, and had no authority to control plaintiff's work.

As Park advances no arguments in support of his request for summary judgment on his common law indemnity claim, that portion of the motion is denied.

Additionally, as Park cites no authority for the proposition that the court can determine a third-party defendant, who has no direct claims asserted against it by plaintiff, to be a direct defendant for purposes of the Labor Law, that portion of the motion is denied.

Paragraph 67 of the lease between Park and Text states:

> The Tenant shall, to the fullest extent permitted by law, at their own cost and expense, defend, indemnify and hold the Owner and the managing agent, its directors, officers, employees, agents and representatives harmless from any and all claims, loss (including reasonable, outside attorney fees, witness fees and all court costs), damages, direct, verifiable expenses and any liability (including statutory liability) resulting from injury and/or death of any person, or damage to or loss of any property arising out of and to the extent caused in whole or in part directly or indirectly, by any negligent or wrongful act, error, omission or breach of this Lease in connection with the Demised Premises and operations of the Tenant, its employees, agents and representatives other than arising from Owner's gross negligence or willful misconduct. The foregoing indemnity shall include injury or death of any employee of the Tenant and shall not be limited in any way by the amount or type of damages, compensation or benefits payable under any applicable Workers Compensation, Disability Benefits or other similar employee benefits acts. This provision shall survive the expiration or termination of this Agreement.

Based on the clear text of the lease, Text is required to indemnify Park for any negligence or wrongful act of it or its agents or representatives. Here, there remain questions of fact as to whether plaintiff was the sole proximate cause of his accident, but if any liability is found against defendants, it will be stemming from the actions or omissions of Unispace and Precise, who were agents of Text. Thus, Park is entitled only to a conditional order of contractual indemnification against Text. *See Quiroz v New York Presbyterian/Columbia University Medical Center*, 202 AD3d 555 (1st Dept 2022).

TEXT'S THIRD-PARTY CLAIMS

Text contends that it is entitled to contractual defense and indemnity from Unispace and Precise, arguing that any finding of liability against it would be purely vicarious, and Unispace agreed to indemnify Text from any damages that were caused by it or its subcontractors.

In opposition, Precise argues that Text's motion is premature, absent a determination of which party bears responsibility for plaintiff's accident, and that it would not be obligated to indemnify Text for its own negligence. It argues that if Text's motion is granted, it should be subject to anti-subrogation principles because Text is being defended under Precise's general liability policy.

In reply, Text argues that there can be no finding of fact that it is negligent as it is not a direct defendant, and in any event the indemnification provision is triggered even without a finding of negligence. It argues that anti-subrogation should not bar indemnification to the extent that plaintiff recovers damages in excess of the policy.

The indemnification provision of the subcontract between Unispace and Precise sets forth that:

> "Subcontractor agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contract and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work and cause in whole or in part by any act or omission of Subcontractor, or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder.

Based on a plain reading of the contract, this provision does not require negligence to be triggered. Additionally, as Text is not a direct defendant, as is not alleged to have committed any affirmative acts causing plaintiff's injury, there is no issue of fact as to Text's negligence.

As stated above, there remain questions of fact as to whether plaintiff was the sole proximate cause of his accident, but if any liability is found against defendants, it will be

stemming from the actions or omissions of Unispace and Precise. Thus, Text is entitled only to a conditional order of contractual defense and indemnification against Precise. Additionally, while it is undisputed that the anti-subrogation rule would bar recovery in excess of the policy amount, "the rule applies to bar indemnification up to the policy limits of the… policy at issue." *Blanco v CVS Corp.*, 18 AD3d 685 (2d Dept 2005). Thus, a conditional order is appropriate, in the event Text is found to be liable in excess of the policy amount.

As Unispace does not oppose Text's motion, Text is also entitled to a conditional order of defense and indemnification against Unispace.

CONCLUSION

Accordingly, it is hereby:

ORDERED that Plaintiff's motion for partial summary judgment (mot. seq. 4) is denied; and it is further

ORDERED that defendant 250 Park, LLC's motion for summary judgment (mot. seq. 5) is granted, to the extent that plaintiff's Labor Law §241(6) claim is severed and dismissed, and it is granted a conditional order of indemnification against Text 100 LLC, and is otherwise denied; and it is further

ORDERED that Text 100 LLC's motion for summary judgment (mot. seq. 6) is granted, to the extent that Text is granted a conditional order of defense and indemnification against Unispace, Inc. and Precise Services Corp., and is otherwise denied; and it is further

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

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

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

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

10/19/2023
DATE

SABRINA KRAUS, J.S.C.

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