

**Garcia v CM & Assoc. Constr. Mgt., LLC**

2023 NY Slip Op 34258(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 151158/2017

Judge: Francis A. Kahn III

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS A. KAHN, III**

**PART 32**

*Justice*

-----X

INDEX NO. 151158/2017

CESAR GARCIA,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 004

- v -

CM & ASSOCIATES CONSTRUCTION MANAGEMENT,  
LLC, 122-130 EAST 23RD STREET LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

CM & ASSOCIATES CONSTRUCTION MANAGEMENT, LLC,  
122-130 EAST 23RD STREET LLC

Third-Party  
Index No. 595785/2020

Plaintiff,

-against-

R.C. STRUCTURES, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff, Cesar Garcia, seeks to recover for injuries sustained on January 10, 2017, when he allegedly fell from an elevated work area while working on a concrete form in a building located at 122 East 23rd Street, New York, New York. At the time of his accident, Plaintiff was employed by Third-Party Defendant RC Structures Inc. ("RC"). Defendant 122-130 East 23<sup>RD</sup> Street LLC ("122 East") was the owner of the premises where the accident occurred, and it retained Defendant CM & Associates Construction Management ("CM") to perform the work at issue. CM subcontracted with RC to provide concrete superstructure services at the project.

Plaintiff commenced this action and pled, *inter alia*, causes of action under Labor Law §§ 200, 240[1] and 241[6]. Plaintiff also pled a common law negligence cause of action. Defendants CM and 122 East answered jointly and pled sixteen affirmative defenses. Subsequently, CM and 122 East commenced a third-party action against RC seeking contractual indemnification and damages for breach of contract for failure to procure insurance. RC answered the third-party action.

Now, Defendants CM and 122 East move for summary judgment dismissing Plaintiff's Labor Law §241[6], §200 and common law negligence causes of action. Also sought by Defendants is summary judgment, or, in the alternative, conditionally so, against RC on its contractual indemnification claim. Plaintiff partially opposes the motion and cross-moves for partial summary judgment against Defendants on the Labor Law §240[1] and §241[6] causes of action. Defendant RC partially opposes CM and 122 East's motion. Defendants oppose Plaintiff's cross-motion.

Plaintiff testified that just prior to the accident he was ten feet above the ground on a scaffold tasked with erecting "columns". When the accident occurred, Plaintiff averred that he was standing on a scaffold when it "broke" "fell downwards" and that he landed on top of the scaffold debris. Plaintiff also averred that the accident occurred when the wood planks he was standing on and the metal braces thereunder "got loose" and caused him to fall. Plaintiff stated that although he was wearing a harness designed to prevent falls, there was no place for him to tie-off a safety line. He also claimed that his supervisor at RC, Mauricio Veira ("Viera"), would get angry if workers complained to him about an absence of tie-off points. Plaintiff denied ever seeing a "Employee's Report of Injury Form" that admittedly contained his signature. The report contained the following description of the accident: "Was tied off when stepped on a Peri table brace that was not fully connected. As the brace fell I dropped a few feet onto Fermin Cuevas and swung into the column clamps".

Viera's testimony concerning the structure Plaintiff was working on and the task being performed was more comprehensive. Viera averred that Plaintiff and other RC workers were erecting a "PERI table brace", which he described as a hollow rectangular structure called a "form" into which concrete would be poured to create concrete columns. The PERI table was constructed of orange vertical posts connected by silver horizontal cross-bracing. Viera explained that the form was constructed within and connected to the PERI structure with an amalgam of rebar, scissor clamps and plywood. Viera testified that the plywood was nailed together to create the column form and that an exoskeleton of rebar and scissor clamps would hold the form in place within the "PERI" posts. Viera stated that "MRKs" could be clipped to the vertical orange posts. When attached, wooden OSHA planks could be horizontally laid on and wired to the MRKs to create an elevated work surface to, among other things, facilitate the workers' installation of scissor clamps.

Viera contradicted Plaintiff's testimony that he tasked Plaintiff with installing clamps on the columns by utilizing the OSHA planks on the MRKs. Indeed, Viera stated that Plaintiff was not authorized to perform that task and that he instructed Plaintiff only to carry scissor clamps from outside the worksite to the professionals inside. Viera confirmed that he was the only person authorized to direct the nature and method of Plaintiff's activities at the site. Viera did not witness the incident but arrived at the location not long thereafter. He averred he saw Plaintiff sitting conscious on the floor under the PERI system. Viera did not know whether there was either OSHA planks or an MRK on the ground nearby. He was also unaware if Plaintiff was wearing a harness after the accident. However, he did claim there were safety line tie-off points nearby the incident site.

Viera attested that he spoke to Plaintiff about the occurrence who allegedly recounted his version of events. Initially, Viera related that Plaintiff stated, "he tried to set up some clamps with Pedro, installation of some clamps on the column". As to the occurrence, Viera testified Plaintiff said he was standing on a scissor clamp, perhaps eight feet off the ground, when "he tried to do some clamps, and when he tried to do some clamps he fell on top of Pedro". Later in his deposition, Viera acknowledged signing, as a witness, a "Supervisor's Accident Investigation Form" prepared by Robert Miller ("Miller") which contained the following description of the accident: "Was tied off when stepped on a

Peri table brace that was not fully connected. As the brace fell I dropped a few feet onto Fermin Cuevas and swung into the column clamps". He admitted the description was "consistent" with what Plaintiff told him, that he read the report before signing it and that he could read English. Viera could not remember why he failed to inform Miller of Plaintiff's contradictory statements.

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

### **Labor Law §240[1]**

Labor Law § 240[1] imposes "upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide workers proper protection from elevation-related hazards" (*see Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635 [2d Dept 2020] quoting *Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] quoting *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). "The purpose of the statute is to protect workers... 'from the pronounced risks arising from construction work site elevation differentials'" (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] quoting *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]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]).

"[T]he fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1)" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). "To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1<sup>st</sup> Dept 2017]). Thus, on a motion for summary judgment, a plaintiff must proffer evidence which demonstrates, in the first instance, that necessary protection from the gravity-related risk of his construction work was not provided and/or that the safety device in use failed to provide proper protection (*see eg Badzio v East 68th St. Tenants Corp.*, 200 AD3d 591 [1<sup>st</sup> Dept 2021]; *Carpentieri v 309 Fifth Ave., LLC*, 180 AD3d 571 [1<sup>st</sup> Dept 2020]; *Camacho v Ironclad Artists Inc.*, 174 AD3d 426 [1<sup>st</sup> Dept 2019]).

Scaffolds or other similar devices that "collapse or malfunction", absent reason, give rise to a presumption that the device did not afford a worker proper protection and a *prima facie* basis for an award of summary judgment to a moving plaintiff (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 289, n 8 [2003]; *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]). Plaintiff's deposition testimony established that while participating in the installation a "PERI" system, an elevated unsecured wooden plank on which he was standing shifted and fell, which caused him to fall and, therefore, failed to provide him with proper protection under the circumstances (*see Da Silva v Toll First Ave., LCC*, \_\_\_ Misc3d \_\_\_, 2020 NY Slip Op 31797[U][Sup Ct NY Cty 2020]; *see also Mora v Wythe & Kent Realty LLC*, 171 AD3d 426 [1<sup>st</sup> Dept 2019]; *Kristo v Board of Educ. of the City of N.Y.*, 134 AD3d 550 [1<sup>st</sup> Dept 2015]; *Norwood v Whiting-Turner Contr. Co.*, 40 AD3d 718 [2d Dept 2007]).

In opposition, Defendants posit that Viera's testimony, and the incident reports, raise an issue of fact as to how the accident occurred. Where, "credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1<sup>st</sup> Dept 2012]). Admissions by a plaintiff recounted via deposition testimony and/or post-incident reports can be utilized to demonstrate a disparate version of an accident (*see Lewis v. 96 Wythe Acquisition LLC*, 204 AD3d 470 [1<sup>st</sup> Dept 2022]; *Cain v Ameresco, Inc.*, 195 AD3d 677 [2d Dept 2021]). Viewing this evidence most favorably to Defendants, as this Court must on Plaintiff's motion, the opposing evidence sufficiently establishes that issue of fact exists as to whether Plaintiff fell because he was standing on a scissor clamp or an OSHA board (*see Crawford v 14 E. 11th St., LLC*, 191 AD3d 461 [1<sup>st</sup> Dept 2021]). Viera's testimony also supports that fact issues exist concerning whether Plaintiff was a recalcitrant worker by disregarding instructions not to engage in the activity which resulted in his accident (*see Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676 [2d Dept 2021]) and whether allegedly standing on the scissor clamp, as opposed to an available ladder or the OSHA planks, was the sole proximate cause of his accident (*see Crawford v 14 E. 11th St., LLC*, supra).

Plaintiff's assertion that Viera's testimony should be disregarded as its is incredible as a matter of law is without merit. Determining the credibility of a witness on a motion for summary judgment is a "rare" occurrence where the questioned testimony is "demonstrably false", "completely implausible" or "belied by 'common sense'" (*see Castro v Hatim*, 174 AD3d 464, 465-466 [1<sup>st</sup> Dept 2019]; *Carthen v Sherman*, 169 AD3d 416, 417 [1<sup>st</sup> Dept 2019]). Applied to Viera's testimony, these stringent standards are nowhere near met. At best, the inconsistencies in Viera's testimony raise common place, not "rare" credibility issues which are grist for the mill, so to speak.

Accordingly, considering the evidence supporting incongruent versions of the accident, the branch of Plaintiff's motion for summary judgment on his Labor Law §240[1], and §241[6] claim for that matter, must be denied.

### **Labor Law §241[6]**

To establish liability on a Labor Law §241[6], a claimant must demonstrate that their injuries were proximately caused by a violation of the Industrial Code applicable to the situation (*see Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872 [2d Dept 2021]; *Ortega v Roman Catholic Diocese of Brooklyn, N.Y.*, 178 AD3d 940 [2d Dept 2019]; *Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *see also Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Each section of the Industrial Code relied upon by a claimant must be a "concrete specification" "mandating a distinct standard of conduct" and "not merely a restatement of common-law principles" (*see Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 558 [1st Dept 2015], *quoting Misicki v Caradonna, supra and Ross v Curtis-Palmer Hydro-Elec. Co.*, supra; *see also Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]).

To be entitled to summary judgment, Defendants were required to show that any of the sections pled by Plaintiff were not concrete, inapplicable or did not cause his injuries (*see generally Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1<sup>st</sup> Dept 2020]). As cited in the bill of particulars, Plaintiff relies on alleged violations of Industrial Code §§23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-5.1, 23-5.3, 23-5.4 and 23-5.5. However, Defendants only offer arguments in support of dismissal of §§23-1.5, 23-1.7, 23-1.15 and 23-1.17.

Defendants established that §23-1.5 “is a general safety standard and, thus, is an insufficient predicate for liability under Labor Law § 241 (6)” (*Erickson v Cross Ready Mix*, 75 AD3d 524, 526 [2d Dept 2010]; *see also Sparkes v Berger*, 11 AD3d 601 [2d Dept 2004]). Also demonstrated was that §§23-1.7 and 23-1.15 are inapplicable under the circumstances (*see eg Bazdaric v. Almah Partners LLC*, 203 AD3d 643 [1<sup>st</sup> Dept 2022]; *Morgan v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 50 AD3d 866 [2d Dept 2008]). In opposition, Plaintiff offers no argument in support of these sections, thus Plaintiff abandoned reliance on same (*see Murphy v Schimenti Constr. Co., LLC*, 204 AD3d 573 [1<sup>st</sup> Dept 2022]; *Digirolomo v 160 Madison Ave LLC*, 294 AD3d 640 [1<sup>st</sup> Dept 2021]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1<sup>st</sup> Dept 2012]). However, as to §23-1.15, Defendants posit a single sentence to support dismissal, as follows: “Similarly, §23-1.15 concerns the specifications for safety railings, but does not actually indicate when they are required”. This conclusory argument is patently insufficient to explain a basis for dismissal of same (*see generally Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1<sup>st</sup> Dept 2010]). Moreover, Defendants did not address how application of this section fails as a matter of law when read in conjunction with §23-5.3[3].

Accordingly, Plaintiff’s reliance on Industrial Code sections §23-1.5, 23-1.7 and 23-1.15 as a predicate for liability under Labor Law §241[6] fails as a matter of law.

### **Labor Law §200 and Common Law Negligence**

Defendants also seek to dismiss Plaintiff’s Labor Law §200 and common-law negligence claims. Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 352). “A claim for common-law negligence may lie even though there is no Labor Law § 200 liability” (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1<sup>st</sup> Dept 2021]). “Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed” (*Cappabianca v Skanska USA Bldg. Inc.*, *supra* at 143-144 [1<sup>st</sup> Dept 2012]). Although “[t]hese two categories should be viewed in the disjunctive” (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute as overlapping conditions frequently arise (*see eg Cackett v Gladden Props., LLC*, 183 AD3d 419, 420-421 [1<sup>st</sup> Dept 2020]; *Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018]). Here, the condition at issue seemingly presents a combination of the above categories (*see Cackett v Gladden Props., LLC, supra*).

Where the accident is a consequence of a defective condition on a premises “a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1<sup>st</sup> Dept 2011], *citing Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). “A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition ‘only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it’” (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], *citing Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1<sup>st</sup> Dept 2009]). “Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca v Skanska USA Bldg. Inc.*, *supra* at 144; *see also Prevost v One City Block LLC, supra* [1<sup>st</sup> Dept 2017]). “[A] subcontractor . . .

may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area” (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2d Dept 2011], citing *Tabickman v Batchelder St. Cond. by the Bay, LLC*, 52 AD3d 593, 594).

To be entitled to summary judgment dismissing a Labor Law §200 and/or a common-law negligence claim, a defendant is required to demonstrate, *prima facie*, that one or more of the essential elements of these claims are negated as a matter of law (see *Poon v Nisanov*, 162 AD3d 804 [2<sup>nd</sup> Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2<sup>nd</sup> Dept 2017]). A common-law negligence claim may also fail where it is shown a defendant owed no duty to the plaintiff (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). It is unchallenged that 122 East exercised absolutely no supervisory authority over the work being performed by RC at the premises. CM also demonstrated with the depositions of Viera and Plaintiff that it lacked the necessary control over Plaintiff's work based upon the testimony that Plaintiff only took his instructions from Viera. At most, CM had oversight responsibility for work performed by RC's employees which is insufficient to impose Labor Law §200 liability (see *Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48-49 [1st Dept 2012]).

Accordingly, Plaintiff's Labor Law §200 and common-law negligence claims fail as against Defendants CM and 122 East.

### **Contractual Indemnification**

Concerning the branch of the motion by CM and 122 East on its contractual indemnification claim against RC, this claim is dependent upon the specific language of the contract (see *Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]; *Anderson v United Parcel Service*, 194 AD3d 675, 678 [2d Dept 2021]). “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], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Wai Cheung v 48 Tenants' Corp.*, 192 AD3d 503 [1st Dept 2021]). Where there is no legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (see *eg Tonking v Port Auth.*, *supra*).

Generally, “[t]o obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability” (see *Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020][internal quotation marks and citations omitted]). This is because “to the extent [a party's] negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc., v Gealtec Remodeling Corp.*, 58 A.D3d 660, 662 [2d Dept 2009]; see General Obligations Law § 5-322.1).<sup>1</sup>

Additionally, the proof necessary to establish a *prima facie* case on a claim for contractual indemnification depends on scope of the provision at issue. Broad indemnity clauses which are triggered when an accident arose out of or was related to a contractor's work are “triggered solely by

<sup>1</sup> However, if contemplated by the indemnity provision, partial indemnification may be available (see *Frank v 1100 Avenue of Americas Associates*, 159 AD3d 537, 538 [1st Dept 2018]).

virtue of an accident occurring in the course of the employee's work" (*see Pimentel v DE Frgt. LLC*, 205 AD3d 591, 594 [1st Dept 2022]). Narrowly drawn indemnification provisions, for instance where negligence or some other act or omission by a contractor is compulsory, will require proof in the first instance of the indemnitor's neglect or causal connection to the accident (*see Quiroz v. New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Francescon v Gucci Am., Inc.*, 71 AD3d 528, 529 [1st Dept 2010]).

The terms and conditions of the indemnification provision in contract between CM and RC reads as follows:

To the fullest extent permitted by law, Subcontractor shall indemnify, defend, save and hold Owner, Contractor, and Architect (excluding with respect to the Architect, claims arising out of (i) the preparation or approval of maps, drawings, opinions, reports, survey, Change Orders, designs or specifications, or (ii) the giving of or the failure to give directions or instructions by the Architect, his agent or employees, provided such giving or failure to give is the primary cause of the injury or damage), their respective partners, officers, subsidiaries, affiliates, parent and holding companies and related partnerships, corporations and limited liability corporations and employees, agents representatives, licenses and invitees of any of them, and anyone else acting for or on behalf of any of them (each an "Indemnitee" and collectively "Indemnitees") harmless from and against all liability, damages, losses, claims, demands and actions of any nature whatsoever (each an "Indemnity Claim" and collectively "Indemnity Claims") which arise out of, relate to or are connected with, or are claimed to arise out of, relate to or be connected with any of the following:

1. This Subcontract;
2. The performance or non-performance of the Work by Subcontractor, or any act or omission of Subcontractor, including without limitation, any breach of the Subcontract or any of the Contract Document;

The above contract language broadly obligated RC to indemnify CM and 122 East for injuries to persons "arising out of or resulting from any work" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1<sup>st</sup> Dept 2018]). CM established with the deposition testimony of Plaintiff that the incident arose out of the work RC was engaged to perform. Likewise, based upon the dismissal of Plaintiff's Labor Law §200 and common-law negligence claims supra, CM and 122 East were absent negligence.

Accordingly, it is

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's Labor Law §200 and common-law negligence claims against CM and 122 East is granted, and it is

ORDERED that the branch of Defendants' motion for summary judgment dismissing a portion of Plaintiff's Labor Law §241[6] claims is granted to the extent that Industrial Code sections §23-1.5, 23-1.7 and 23-1.15 are dismissed, otherwise this branch is denied, and it is

ORDERED that the branch of Defendants' motion for summary judgment contractual indemnification claim against CM and 122 East is granted, and it is

ORDERED that Plaintiff's cross-motion for summary judgment against Defendants is denied in its entirety.

12/8/2023

DATE

*J.C. W. III*

FRANCIS A. KAHN, III, A.J.S.C.

**NON** JUDICIAL DISPOSITION  
**FRANCIS A. KAHN III**  
J.S.C.

CHECK ONE:

CASE DISPOSED

JUDICIAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE