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 7th day of December, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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DONALD FRANKS and LAURA FRANKS,

Plaintiffs,

-against-

NATIONAL GRID USA, NATIONAL GRID USA SERVICE COMPANY, INC., NATIONAL GRID CORPORATE SERVICES LLC and THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY,

Defendants.

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THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY,

Third-Party Plaintiff,

-against-

RESIDENTIAL FENCES CORP.,

Third-Party Defendant.

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DECISION / ORDER

Index No.: 509848/2020
Mot. Seq. # 3, 4 & 5

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	44-45, 57-58, 63, 66-67, 85
Opposing Affidavits (Affirmations)	90, 93, 94, 95, 97
Affidavits/ Affirmations in Reply	103, 104, 106

Upon the foregoing papers, plaintiffs Donald Franks and Laura Franks move for an order, pursuant to CPLR 3212, granting them partial summary judgment with respect to liability on their Labor Law § 240 (1) cause of action as against all four defendants (motion sequence number 3). Third-party defendant Residential Fences Corp. (Residential) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint (motion sequence number 4). Defendant and third-party plaintiff Brooklyn Union Gas Company d/b/a National Grid NY[1] (BUG) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiffs' complaint and any and all cross claims, or, if dismissal is not granted, granting it summary judgment on its third-party claims for breach of contract to procure insurance, contribution, common-law indemnification and contractual indemnification, against Residential (motion sequence number 5).

For the reasons which follows, plaintiffs' motion (motion sequence number 3) is granted solely as against defendant BUG.

Third-party defendant Residential's motion (motion sequence number 4) is granted solely to the extent that BUG's third-party contribution and common-law indemnification claims are dismissed. Residential's motion is otherwise denied.

[1] The court notes that BUG asserts that the other National Grid defendants identified as National Grid USA, National Grid USA Service Company, Inc., and National Grid Corporate Services LLC are incorrectly sued herein. They have failed to provide any factual basis for this assertion, nor have they moved for dismissal. However, the court takes judicial notice that the last recorded deed to the property on ACRIS was issued to BUG, which was the owner of the property at the time of the accident..

Further, The Brooklyn Union Gas Company is a New York Corporation formed in 1895, according to the public website of the New York State Department of State, Division of Corporations. It filed a certificate of assumed name for National Grid NY in 2007, according to the website. Therefore, the only proper Labor Law defendant is the owner, the Brooklyn Union Gas Company d/b/a National Grid NY.

BUG's motion (motion sequence number 5) is granted to the extent that plaintiffs' common-law negligence and Labor Law § 200 causes of action are dismissed, and the Labor Law § 241 (6) cause of action is dismissed to the extent that it is based upon violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21 (b) (4) (iii), (iv) and (v), 23-2.1, 23-2.2, 23-2.3, 23-4, 23-5, 23-6, 23-7, and 23-8. BUG's motion is otherwise denied.

BACKGROUND

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff Donald Franks alleges that on March 17, 2020, he sustained injuries while constructing a fence at defendants' facility at 287 Maspeth Avenue in Brooklyn, when the ladder he was standing on allegedly kicked-out and caused him to fall to the ground. Plaintiff Laura Franks' claims are derivative only. All singular references to plaintiff herein relate to plaintiff Donald Franks. In its answer, BUG admitted that it was the entity that hired Residential for the fence construction project at issue. Plaintiff was employed by Residential and had worked for it as a fence installation laborer for 29 years.

According to plaintiff's deposition testimony, the project involved the installation of an eight-foot-tall chain link fence, perma-hedge, barbed wire, and gates. Plaintiff had been working at the jobsite for a week or two before the accident. Residential's crew for the project consisted of five workers, including plaintiff, and all of the crew members had been involved in each stage of the fence construction. No one from BUG gave plaintiff

any instructions regarding the fence installation and plaintiff did not observe any BUG personnel instructing any of his coworkers.

By the morning of the accident, the work crew had completed the installation of the posts, rails and the chain link panels, and were beginning to install the perma-hedge. Perma-hedge consists of plastic strips, somewhat similar to branches of artificial Christmas trees, that plaintiff and his coworkers wove through the links of the chain link fence. Its purpose is to prevent people from seeing through the fence. The only equipment plaintiff had available to him for installing the perma-hedge were the ladders that the Residential work crew had brought to the project site on Residential's trucks. Plaintiff selected a six-foot tall A-frame ladder to perform the work. It appeared to be in good shape. The ground where they had installed the fence consisted of dirt and gravel, and, since it was raining lightly, the ground was wet and muddy. Each time the plaintiff moved the ladder, he testified, he would "shake it" to make sure it was stable, and then he stepped onto the bottom rung in order to "dig it in a little" [Doc 78 Page 59].

The accident occurred approximately an hour after plaintiff had started installing the perma-hedge. Plaintiff had last repositioned the ladder a minute or two before the accident and had not noticed any problems with the ladder. In order to perform this work, plaintiff stood on the third or fourth rung of the ladder, and after plaintiff had been working in this position for a minute or two, the bottom of the ladder suddenly "kicked out" and fell, causing plaintiff to fall away from the ladder to the ground [*id*. Page 68].

At his deposition, Keith Bellois, Residential's supervisor for the project, testified that the project at BUG's facility involved the installation of 1,000 feet of fencing, that

Residential's five-person work crew, which included plaintiff, had been working there for approximately two weeks before the accident, and that each member of the crew had been involved in each stage of the project. Although a BUG employee was sometimes present to observe Residential's work, no one from BUG told Residential's workers how to perform their work nor did they provide them with any assistance in performing the work.

Bellois had been a Residential supervisor for around 10 years, and during that time had been plaintiff's supervisor. On the day of the accident, Bellois was in a position to observe plaintiff during the course of his work and he said he did not observe him doing anything improper or unsafe. Although Bellois did not see the accident, he heard what sounded like a ladder striking the fence, turned toward the sound and saw that both plaintiff and the ladder had fallen to the ground. After the accident, Bellois noticed that the "hinges" of the ladder as well as the ladder, appeared to be bent. [Doc 84 Pages 64-65]. The ladder could no longer be used [*id.*]. It appears that what he meant by "hinges" was the cross-braces. Bellois also stated that these bent hinges were visible in photographs of the ladder taken after the accident which were shown to him at his deposition [Doc 83]. The ladder at issue belonged to Residential, but Bellois had no idea when Residential purchased the ladder or how long it had been in use prior to the accident.

Chris De Domenico, a BUG supervisor who was present on the day of the accident, testified at his deposition that his role was limited to observing the work for safety compliance and the quality of the work. On the date of the accident, De Domenico only arrived at the work area shortly before plaintiff fell, and he did not have an opportunity to speak with any Residential employees before the accident. De Domenico did not see the

accident from the beginning, but rather, he heard the ladder hitting the fence and glanced over in time to see the ladder hitting the ground. In his testimony, he initially stated that plaintiff told him that he had slipped off of the ladder, but later in his testimony De Domenico conceded that he could not recall if plaintiff told him that the ladder fell or that he fell off the ladder. Indeed, in his notes that he prepared on the date of the accident, De Domenico stated that plaintiff fell when the ladder gave out from under him. In addition, BUG's accident report relating to the incident, which was based on information provided by De Domenico, likewise states that accident happened when the ladder gave out from under plaintiff.

DISCUSSION

Labor Law § 240 (1)

Turning first to the parties' contentions relating to plaintiff's Labor Law § 240 (1) cause of action, that section imposes absolute liability on owners and contractors or their agents when it is demonstrated that their failure to protect workers employed on a construction site from the risks associated with elevation differentials proximately caused injury to a worker (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). With respect to falls from ladders, the Appellate Division, Second Department has emphasized that "[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *see Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038-1039 [2021]; *Orellana v 7 W. 34th*

St., LLC, 173 AD3d 886, 888 [2d Dept 2019]). In order to find the absence of proper protection, "[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Karanikolas*, 120 AD3d at 555 [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]).

Here, there is no dispute that BUG may be held liable under Labor Law § 240 (1) as it acted in the role of owner by contracting with Residential to install the fence (*see Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1190 [2d Dept 2020]; *Wicks v Leemilt's Petroleum, Inc.*, 103 AD3d 793, 795-796 [2d Dept 2013]; *see also Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]), and plaintiff was working at an elevation within the meaning of that section (s*ee Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]; *Barber v Kennedy Gen Contrs.*, 302 AD2d 718, 720 [3d Dept 2003]). Additionally, plaintiff's deposition testimony that the ladder kicked-out and fell and caused him to fall to the ground while he was installing the perma-hedge is sufficient to establish, prima facie, that the ladder failed to provide him with proper protection (*see Soczek v 8629 Bay Parkway, LLC*, 193 AD3d 1093, 1094 [2d Dept 2021]; *Cioffi v Target Corp.*, 188 AD3d 788, 791 [2d Dept 2020]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]; *see also Panek v County of Albany*, 99 NY2d 452, 458 [2003]). Contrary to Residential's contention in opposition, in view of plaintiff's deposition testimony regarding the movement and

collapse of the ladder, plaintiff has made out his prima facie burden (*see Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 538 [1st Dept 2021]; *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 730 [2d Dept 2020]; *Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008]; *Whalen v Exxon Mobile Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008], *lv denied* 53 AD3d 1124 [4th Dept 2008]). Plaintiff asserts in his papers that the ladder collapsed, and the photos demonstrate that the ladder virtually fell apart under him.

BUG's primary contention in opposition to plaintiff's motion is that plaintiff has failed to demonstrate, prima facie, that his work at the time of the accident was covered work within the meaning of Labor Law § 240 (1). In this regard, BUG asserts that plaintiff's work does not constitute alteration work because the installation of the perma-hedge was merely a cosmetic change that did not result in a significant physical change to the fence's configuration or composition (*see Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Munoz v DJZ Realty, LLC*, 5 NY3d 747, 748 [2005]; *McCarthy v City of New York*, 173 AD3d 1165, 1166 [2d Dept 2019], *lv denied* 36 NY3d 901 [2020]).

This court rejects BUG's argument in this respect, and finds that plaintiff's work was covered work. Whether or not the installation of perma-hedge on a fence would, in and of itself, constitute alteration work for purposes of Labor Law section 240 (1), (*compare Munoz*, 5 NY3d at 748 [affixing advertisement on billboard not alteration] *with Belding v Verizon N.Y., Inc.*, 14 NY3d 751, 752-753 [2010] [applying bomb blast film to windows was a significant alteration]), BUG's argument overlooks the fact that plaintiff was part of a five-person crew that had been working at the job site for a few weeks to install the fencing, which included installing posts, rails and chain link fencing and, after

they finished the installation of the perma-hedge, they next were going to install barbed wire on the fence and gates.

The installation of 1,000 feet of fencing constitutes the erection a structure within the meaning of Labor Law section 240 (1) (*see Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2d Dept 2009] [moving 12-foot fence bolted to floor]; *see also Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 886 [2d Dept 2021] [removal of side boards from an indoor soccer facility], *affirming* 2018 WL 11385949[U],*1 [Sup Ct, Kings County 2018]; *Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 955-956 [2d Dept 2014] [disassembly of indoor shelving]) and plaintiff's work in installing the perma-hedge was only a part of this larger project (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *Hensel*, 198 AD3d at 886; *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013]; *Rico-Castro*, 60 AD3d at 750). As the Court of Appeals stated in *Prats* (100 NY2d 878), "it is neither pragmatic nor consistent with the spirit of [Labor Law § 240 (1)] to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*id.* at 882).

Residential, in opposition, primarily argues that plaintiff's "self-serving" deposition testimony is insufficient to demonstrate his prima facie showing of entitlement to summary judgment. However, contrary to Residential's contentions, plaintiff's testimony is not the only evidence that supports his motion. The fact that the plaintiff may have been the sole witness to the accident does not preclude an award of summary judgment in his favor (*see e.g., Klein v City of New York*, 89 NY2d 833, 834-835 [1996]; *Cardenas v 111-127 Cabrini*

Apts. Corp., 145 AD3d 955, 957 [2d Dept 2016]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]). Denying summary judgment in such circumstances is only appropriate where the defendant raises a bona fide issue as to either how the accident happened or with respect to the plaintiff's credibility (*see Klein*, 89 NY2d at 835; *Alverez v 2455 8 Ave., LLC*, 202 AD3d 724, 725 [2d Dept 2022]; *King v Villette*, 155 AD3d 619, 622 [2d Dept 2017]).

Here, Residential has pointed to no evidence suggesting that the accident did not occur as testified to by plaintiff, and has failed to identify any material inconsistencies in plaintiff's testimony sufficient to raise an issue with respect to plaintiff's credibility. Indeed, while neither Bellois nor De Domenico witnessed what caused the ladder to fall, they heard it hit the fence and saw plaintiff and the ladder on the ground seconds later. While, as noted above, De Domenico initially testified at his deposition that plaintiff told him that he slipped off of the ladder, De Domenico later conceded that he could not recall whether plaintiff told him that the ladder fell or that he fell off of the ladder. Moreover, De Domenico's notes, written on the date of the accident [Doc 82], and the information he provided to the drafter of BUG's accident report, are consistent with plaintiff's deposition testimony. Specifically, his notes say, "Employee Donald Franks was on the 3rd rung of a 6' A-Frame ladder installing perma-hedge for fence when the ladder gave out from underneath him. . . Other employee said he saw the ladder buckle and bend from under him" [Doc 82].

The court disagrees with Residential's assertion that plaintiffs' bill of particulars suggests an inconsistent version of the accident. This assertion is based solely on Residential's misleading partial quotation of plaintiffs' allegations regarding the accident.

The plaintiff's complete allegation states, in relevant part, that, "[w]hile plaintiff was lawfully performing his duties on the aforesaid premises, he was caused to fall from a wet ladder that gave way and/or collapsed causing him to sustain serious and severe injuries" (Plaintiffs' Bill of Particulars at ¶¶ 4, 11, 18). This full statement in the plaintiff's bill of particulars is consistent with plaintiff's deposition testimony and in no way suggests the existence of a factual issue regarding either the plaintiff's credibility or the happening of the accident.

In addition, contrary to Residential's contentions, nothing in the record suggests the existence of a factual issue as to whether plaintiff was the sole proximate cause of the accident based on his alleged improper placement of the ladder. Residential points to no evidence suggesting that plaintiff misused the ladder (*see Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]; *Goodwin*, 144 AD3d at 747; *Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1106 [2d Dept 2016]; *Ruiz v WDF, Inc.*, 45 AD3d 758, 758 [2d Dept 2007]) and, contrary to Residential's contention, plaintiff, under these circumstances, was not required to submit expert testimony regarding his use of the ladder (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *see also Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]).

Similarly, Residential points to no evidence suggesting that other safety devices were readily available to plaintiff, or that plaintiff violated any of Bellois' instructions or any standing orders from Residential regarding the use of ladders at the worksite (*see Gallagher v New York* , 14 NY3d 83, 88-89 [2010]; *Mullins v Centerline Studios, Inc.*, 199 AD3d 526, 527 [1st Dept 2021]; *Silvas v Bridgeview Invs., LLC*, 79 AD3d 727, 731-

732 [2d Dept 2010]). As plaintiff had the tacit approval of his supervisor in the manner of his performance of the work, any negligence by plaintiff in his placement or use of the ladder cannot be deemed the sole proximate cause of the accident (*see Zholangi v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Von Hegel*, 180 AD3d at 730; *Orellana*, 173 AD3d at 888; *Rico-Castro*, 60 AD3d at 750) Notably, "when a plaintiff [is] provided only with an unsecured ladder and no safety devices, [he or she] cannot be held solely at fault for his injuries, even where the plaintiff has negligently placed the ladder" (*Von Hegel*, 180 AD3d at 730 [internal quotation marks omitted]). The court notes that there were five workers performing the same task along the fence, and that plaintiff's supervisor could have stopped the work because of the weather, but he did not do so.

Accordingly, plaintiffs have demonstrated their prima facie entitlement to partial summary judgment in their favor with respect to their Labor Law § 240 (1) cause of action as against BUG, and BUG and Residential have failed to demonstrate a triable factual issue warranting denial of plaintiffs' motion. Plaintiffs' motion, however, must be denied to the extent that they seek summary judgment as against the other National Grid defendants, as plaintiffs have failed to address whether any of the other National Grid defendants had any connection with the project or the project site. For these same reasons, the portion of BUG's motion seeking dismissal of plaintiffs' Labor Law section 240 (1) cause of action is denied.

Labor Law § 241 (6)

With respect to plaintiffs' Labor Law § 241 (6) cause of action, BUG has demonstrated, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, 23-

1.15, 23-1.16, 23-1.17, 23-2.1, 23-2.2, 23-2.3, 23-4, 23-5, 23-6, 23-7, and 23-8 fail to state specific standards or are inapplicable to the facts of this case (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). As plaintiffs have abandoned reliance on these regulations by failing to address them in their opposition papers, defendant BUG is entitled to dismissal of the plaintiff's Labor Law section 241 (6) claim to the extent that it is predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-2.1, 23-2.2, 23-2.3, 23-4, 23-5, 23-6, 23-7, and 23-8 (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Plaintiffs do address Industrial Code (12 NYCRR) § 23-1.21 (b) (4) (iii), (iv) and (v) in their opposition papers. BUG, however, is also entitled to dismissal of those subsections of § 23-1.21 (b). Section 23-1.21 (b) (4) (iii), which relates to leaning ladders, is inapplicable because plaintiff was using an A-frame ladder. Section 23-1.21 (b) (4) (iv), which relates to work performed on ladder rungs six feet from the ground and higher, is inapplicable because plaintiff was only standing on the third or fourth rung of a six foot ladder. Section 23-1.21 (b) (v), which addresses the leaning of ladders on slippery surfaces, is also inapplicable, because plaintiff was not leaning his ladder against a surface, let alone a slippery surface.

BUG's motion with respect to Labor Law § 241 (6) is denied to the extent that plaintiffs rely on Industrial Code (12 NYCRR) § 23-1.21 (b) (1), which addresses ladder strength, §23-1.21 (b) (3), which addresses ladder maintenance, and § 23-1.21 (b) (4) (ii),

which addresses ladder footings. BUG has failed to demonstrate, prima facie, that those sections are either inapplicable to the facts here or were not a proximate cause of plaintiff's injuries (*see Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [2d Dept 2016]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 654-655 [2d Dept 2014]).

Labor Law § 200 and Common Law Negligence

BUG is entitled to dismissal of plaintiffs' common-law negligence and Labor Law § 200 causes of action. As is relevant to plaintiffs' Labor Law section 200 and common-law negligence causes of action, plaintiffs, in their complaint and their bill of particulars, do not allege that the accident occurred as the result of a dangerous premises condition, but rather, allege that the accident was the result of defendants' failure to ensure that the ladders were properly placed, operated and/or secured, and/or their failure to provide other safety devices. These allegations all focus on Residential's means and methods of performing its work. BUG, in moving for summary judgment, has successfully addressed the proper analysis for such claims (*see Przyborowski*, 120 AD3d at 652-653; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2d Dept 2008]; *cf. Seem v Premier Camp Co., LLC*,, 200 AD3d 921, 924-925 [2d Dept 2021]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-130 [2d Dept 2008]).[2] Where the plaintiff's injuries arise from the manner in which the work is performed, "there is no liability under the common law or Labor Law § 200 unless the owner or general

[2] The deposition testimony and photographs of the worksite contained in the record demonstrate that any slope and unevenness of the gravel and dirt area near the fence was open and obvious and not inherently dangerous, and thus, it did not constitute a dangerous property condition (*see Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *see also Gasper v Ford Motor Co.*, 13 NY2d 104, 110-111 [1963]; *Ibragimov v Town of N. Hempstead*, 164 AD3d 1426, 1427 [2d Dept 2018]; *Seelig v Burger King Corp.*, 66 AD3d 986, 986 [2d Dept 2009]).

contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). Moreover, under a means and methods of work theory of liability, "no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Cody v State of New York*, 82 AD3d 925, 927 [2d Dept 2011]).

Plaintiffs', Bellois' and De Domenico's deposition testimony, that Residential provided the ladder at issue and that BUG did not provide Residential with any instructions relating to the fence installation, demonstrates, prima facie, that BUG did not supervise or control the work at issue (*see Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]; *Przyborowski*, 120 AD3d at 652-653; *Ortega*, 57 AD3d at 61-62; *cf. Chowdhury*, 57 AD3d at 129-130). The fact that BUG had a representative who was sometimes present to watch Residential's work, to ensure compliance with contract specifications and safety requirements, and the fact that he or she had the authority to stop Residential's work, are insufficient to demonstrate that BUG had more than general authority over the worksite for purposes of liability under either common-law negligence or Labor Law § 200 liability (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 496 [2d Dept 2022]; *Abelleira v City of New York*, 201 AD3d 679, 680 [2d

Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). As plaintiff has failed to raise an issue of fact with respect to BUG's supervision and control of the work, BUG is entitled to dismissal of plaintiffs' common-law negligence and Labor Law § 200 causes of action.

Third-Party Claims

Turning to BUG's claim for common-law indemnification and contribution against Residential, Residential has demonstrated its prima facie entitlement to dismissal of those claims. The evidence in the record shows that plaintiff was its employee, that he received Workers' Compensation benefits and that he did not sustain a grave injury within the meaning of Workers' Compensation Law § 11 (*see Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1190 [2d Dept 2018]; *see also Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 71-72 [2d Dept 2023]). Further, BUG has not addressed Residential's contentions relating to the Workers' Compensation bar to BUG's common-law indemnification and contribution claims in its opposition papers. Residential is thus entitled to summary judgment dismissing the common-law indemnification and contribution causes of action. For these reasons, the portion of BUG's motion seeking summary judgment on its contribution and common-law indemnification claims against Residential must be denied.

Residential, however, has failed to demonstrate, prima facie, that Residential and BUG had no contract containing an indemnification provision or requiring it to obtain liability insurance naming BUG as an additional insured. Residential's "proof" in this respect is its assertion that BUG, during discovery, failed to provide a contract requiring

Residential to indemnify it or to procure insurance on behalf of BUG. Such an assertion is insufficient, since a party moving for summary judgment must provide affirmative evidentiary proof supporting its entitlement to relief, and a party does not demonstrate its entitlement to summary judgment solely by pointing to gaps in its adversary's case (*see Hernandez-Martinez v Shiao S. Wang*, ___ AD3d ___, 2023 NY Slip Op 06127, *1 [2d Dept 2023]; *Yancha v 2 Herald Owner, LLC*, 196 AD3d 537, 539 [2d Dept 2021]; *cf. Barrett v Magnetic Constr. Group Corp.*, 149 AD3d 1022, 1024 [2d Dept 2017] [prima facie burden of no contract met by affidavit from subcontractor's representative]). In addition, Residential's assertion that BUG's insurance procurement claim is barred by waiver and/or estoppel is likewise insufficient to warrant dismissal of BUG's insurance procurement claim (*see Watters v R.S. Branch Assoc., LP*, 30 AD3d 408, 410 [2d Dept 2006]; *see also Howard v J.A.J. Realty Enters.*, 283 AD2d 854, 856 [3d Dept 2001]).

Similarly, BUG has failed to demonstrate, prima facie, that a contract requiring Residential to indemnify it and to procure insurance was in effect at the time of the plaintiff's accident. The email exchanges from February 2020, which include a purchase order relating to fencing at BUG's facility in Greenpoint, does not unequivocally show on its face that the purchase order related to the fence construction work at issue. BUG has not provided an affidavit from a person familiar with BUG's records or with knowledge of the contract process with Residential to address the purchase order's connection to this project (*see Bank of N.Y. Mellon Trust Co., N.A. v Anderson*, 209 AD3d 817, 820 [2d Dept 2022]). Most importantly, the purchase order in the email does not contain indemnification or insurance procurement provisions, but rather, contains an unclear provision which states

that, "[g]oods and or services related to this purchase order are subject to the terms and conditions stipulated in this document or as referenced. Copies of our standard terms and conditions can be found on the following website https://www.nationalgridus.com/Business-Partners/Suppliers-and-Vendors/Additional-Documents-and-Forms." This ambiguous language, in and of itself, does not unequivocally adopt the "standard terms and conditions" (Standard Terms) available on the website as part of the purchase order (*see Harrison v Revel Tr. Inc.*, 2022 NY Slip Op 30430[U], *17-18 [Sup Ct, Kings County 2022]). The court notes that, although BUG attaches a copy of the email with the purchase order, and a copy of the Standard Terms and conditions on its website, as "Exhibit H" to its motion papers, it has provided nothing to demonstrate that the Standard Terms were part of the email exchange containing the purchase order. Further, this court will not consider the "Master Service Agreement" dated August 1, 2016 as part of BUG's motion, as this document was submitted for the first time with BUG's reply papers (*see Lopresti v Alzoobaee*, 217 AD3d 759, 761 [2d Dept 2023]).[3]

Further, BUG has not established that it is the intended beneficiary of those provisions.[4] BUG has also failed to demonstrate, prima facie, that it would be entitled to

[3] In any event, it is unclear from the face of the Master Service Agreement that it was in effect at the time of the accident since Article 6 provides that its term was one year, with BUG having the option of extending the term by three one-year extensions. In addition, contrary to BUG's assertion, the purchase order contained in the email does not appear to make any reference to the Master Service Agreement. While the "certificate of insurance" submitted by BUG references a written contract, and indicates that National Grid USA and its subsidiaries and affiliates are additional insureds, may constitute some evidence of the existence of a written agreement to procure insurance coverage, the certificate fails to demonstrate such as a matter of law (*see Muhjaj v 77 Water St., Inc.*, 148 AD3d 1165, 1167 [2d Dept 2017]).

[4] In this respect, the purchase order identifies the party hiring Residential as "Brooklyn Union Gas-KEDNY," and there is nothing in the record addressing whether Brooklyn Union Gas-KEDNY is the same entity as BUG, or if it is an affiliate of National Grid USA Service Company, Inc., for purposes of

indemnification or a declaratory judgment with regard to its insurance procurement claims, even if the terms on the website were found applicable to this transaction, on the record before the court. Notably, the indemnification provision, as is relevant here, requires a showing of negligence on the part of Residential or its employees (Standard Terms § 3.1), and the record here fails to demonstrate, as a matter of law, that the accident resulted from Residential's negligence or the negligence of one of its employees (*see Palaguachi v Idlewild 228th St., LLC*, 197 AD3d 1321, 1323 [2d Dept 2021]; *see also Scavelli v Town of Carmel*, 131 AD3d 688, 690 [2d Dept 2015] [the mere happening of an accident is insufficient to establish liability in negligence]). Similarly, the conclusory assertions of BUG's counsel are insufficient to demonstrate, prima facie, that the insurance obtained by Residential did not comply with the contract's insurance procurement requirements (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Karnikolas*, 120 AD3d at 556).

The court notes that "[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*

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the indemnification and insurance sections of the Standard Terms (*see* Standard Terms §§ 1.1.1, 1.1.2, 3.1, 13.1.2) (*see Muhjaj*, 148 AD3d at 1168).

v Duke/Fluor Daniel, 221 AD2d 938, 939 [1995]; cf. *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [promise to indemnify must be clearly implied in agreement]).

Here, BUG has not established, as a matter of law, that the alleged agreement was in effect at all applicable times. There is nothing that was signed by anyone. BUG has submitted two different alleged contracts, one in the motion and a different one it its reply, further confusing the issue. None of the deposition witnesses was aware of the terms of any contract, nor did any of them authenticate a contract. Mr. Bellois said he had never seen a contract [Doc 84 Pages 13, 18] and he did not know who would have negotiated a contract on Residential's part [Page 81]. Mr. De Domenico said he did not know which company had hired Residential [Doc 80 Page 33], and that he had never seen a written contract for the fence. He was shown the purchase order, and said he had never seen it before. He was not familiar with such documents [Page 40].

Accordingly, the branches of the motions by BUG and Residential which address BUG's contractual indemnification and insurance procurement claims are all denied.

This constitutes the decision and order of the court.

E N T E R :

Hon. Debra Silber, J.S.C.