

**Bobozaripov v 1635 52 St. LLC**

2023 NY Slip Op 34838(U)

January 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 522925/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 10<sup>th</sup> day of January 2023.

PRESENT:

HON. CARL J. LANDICINO,  
Justice.

-----X  
BOBIR BOBOZARIPOV,

*Plaintiff,*

-against-

1635 52 STREET LLC, JOSEPH-RAIZEL RIEGLER,  
THE RIEGLER GROUP INC., GREENFIELD CUSTOM  
BUILDINGS INC., SHOLEM GREENFIELD AND  
EXPERT GROUP ENTERPRISE, INC.,

*Defendants.*

-----X  
1635 52 STREET LLC, JOSEPH-RAIZEL RIEGLER,  
THE RIEGLER GROUP INC., GREENFIELD CUSTOM  
BUILDINGS INC.,

*Third Party Plaintiff,*

-against-

A & A MASONRY CORP.,

*Third Party Defendant.*

-----X  
1635 52 STREET LLC, JOSEPH-RAIZEL RIEGLER,  
THE RIEGLER GROUP INC., GREENFIELD CUSTOM  
BUILDINGS INC.,

*Second Third Party Plaintiff,*

-against-

EXPERT GROUP ENTERPRISE, INC.

*Second Third Party Defendant.*

-----X  
A & A MASONRY CORP.,

*Third Third Party Plaintiff,*

-against-

EXPERT GROUP ENTERPRISE, INC.

*Third Third Party Defendant.*

-----X

Index No.: 522925/2017

DECISION AND ORDER

Motions Sequence #6, #7

A & A MASONRY CORP.,

*Fourth Third Party Plaintiff,*

-against-

SKYRISE BUILDING SERVICES, INC.

*Fourth Third Party Defendant.*

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed .....	118-140, 142, 144-152, 154
Opposing Affidavits (Affirmations).....	156, 159, 161-163, 168-170,
Reply Affidavits (Affirmations) .....	172-173, 175-176,
Memorandum of Law.....	141, 153, 158, 171, 174

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Bobir Bobozaripov (the “Plaintiff”), commenced this action relating to injuries he allegedly sustained during his employ with Third Party Defendant and Third and Fourth Third Party Plaintiff, A & A Masonry Corp. (hereinafter “A&A”) when he purportedly fell from a scaffold at the property known as 1635 52<sup>nd</sup> Street Brooklyn, N.Y. (hereinafter the “Premises”, “Property” and/or “Project”).

Defendants, Third Party and Second Third Party Plaintiffs 1635 52 Street, LLC (“52 Street”), Joseph Raizel Riegler (“Riegler”), and Greenfield Custom Buildings, Inc. (“Greenfield”) (hereinafter referred to collectively as the “1635 Defendants”), now move (motion sequence #6) for the following relief pursuant to CPLR 3212: 1) dismissal of the Plaintiff’s common law negligence and Labor Law 200 claims; 2) conditional contractual indemnity from A&A; 3) summary judgment against A&A for breach of contract for failure to procure insurance; and 4) dismissal of all counterclaims asserted by A&A.<sup>1</sup> In addition, the body of the motion seeks

<sup>1</sup> Although the 1635 Defendants assert good cause for motion sequence #6 having been made late, this issue is not otherwise raised by the Plaintiff or A&A, and the reasons provided by the 1635 Defendants are reasonable and support a finding of good cause. *See Brill v. City of New York*, 814 N.E.2d 431 [2003]; see

dismissal of the Labor Law 240(1) and 241(6) claims against Defendants Riegler and 52 Street. The Plaintiff opposes and does not object to the fact that this relief is not referenced in the notice of motion.

The 1635 Defendants specifically contend that they did not supervise the means and methods of the Plaintiff's work and were not otherwise negligent in relation to maintaining a safe premises. Defendants 1635 and Riegler, contend that they are not liable as they are shielded by the "Homeowners Exemption" of the Labor Law in that the "[p]roperty was a one family dwelling being renovated for Mr. Riegler's intended personal residence." As to A&A, the 1635 Defendants contend their entitlement to 1) contractual indemnity and, 2) a finding of breach of contract to procure insurance. The 1635 Defendants argue that they were "not actively at fault in causing the Plaintiff's accident", and that "Plaintiff was an employee of A&A Masonry, acting in the scope of his employment, when he was allegedly required to work from a scaffold with a rotten plank and was specifically denied use of a harness." The 1635 Defendants further contend that they were not named as additional insureds of the A&A insurance policy, assuming such a policy existed. Accordingly, in the event that the 1635 Defendants are successful in their position, they argue that A&A's counterclaims against them must accordingly be dismissed.<sup>2</sup>

The Plaintiff and A&A oppose the motion. The Plaintiff also cross-moves (motion sequence #7) for summary judgment on the issue of liability against the 1635 Defendants and

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also *Jerry v. New York City Hous. Auth.*, 285 AD2d 531, 728 N.Y.S.2d 497 [2d Dept 2001]; see also, *Armentano v. Broadway Mall Properties, Inc.*, 48 A.D.3d 493, 852 N.Y.S.2d 266 [2d Dept 2008].

<sup>2</sup> The 1635 Defendants also seek dismissal of the Plaintiff's claims based upon New York Labor Law §§241(1-5); 241(7-10) and 241-a. Although not explicit in the notice of motion, "[t]he court may grant relief that is warranted pursuant to a general prayer contained in the notice of motion, "if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party." *Shaw v. RPA Assocs., LLC*, 75 AD3d 634, 635-36, 906 N.Y.S.2d 574, 576 [2d Dept 2010] The Plaintiff in opposition does not address these provisions, therefore, the Defendants' motion in relation to these provisions is granted and will not be addressed herein further. See *Elam v. Ryder Sys., Inc.*, 176 A.D.3d 675, 675, 107 N.Y.S.3d 718 [2d Dept 2019].

Defendant The Riegler Group, Inc. (the “Riegler Group”) alleging their liability for the Plaintiff’s alleged injuries pursuant to Labor Law 240, 241(6) and 200 and common law negligence. As to his Labor Law 241(6) claim, the Plaintiff alleges violations of the New York State Industrial Code sections – 1.5(c)(1)(2) and (3), 23-5.1(a)(c)(e)(f)(g) and (j) and 23-1.17, in addition to the violation of various OSHA regulations. The 1635 Defendants oppose the motion in its entirety and A&A partially opposes the motion. A&A does not oppose that aspect relating to the 200 claim and common law negligence claim against the 1635 Defendants. Although the 1635 Defendants oppose the Plaintiff’s motion, the opposition papers do not state that the papers relate to opposition by named Defendant the Riegler Group, Inc. (the “Reigler Group”). As such, motion sequence #7 would be deemed unopposed by the Riegler Group. However, Plaintiff in reply concedes that Defendant Riegler Group did oppose motion sequence #7 (See Plaintiff’s Reply Papers, Paragraph 4).

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98, 100 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

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

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site.” *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. “Cases involving Labor Law §200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed.” *Ortega v. Puccia*, 57 AD3d 54, 61, 866 N.Y.S.2d 323, 329 [2d Dept 2008]. “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.” *Id.* “By contrast, when the manner of work is at issue, ‘no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed.’” *Id.*, quoting *Dennis v. City of New York*, 304 AD2d 611, 611, 758 N.Y.S.2d 661, 663 [2d Dept 2003]. “Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it

is shown that the party to be charged had the authority to supervise or control the performance of the work.” *Id.* “For an owner to be liable for common-law negligence or pursuant to Labor Law § 200, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident.” *Saverino v. Reiter*, 1 AD3d 427, 428, 767 N.Y.S.2d 445, 447 [2d Dept 2003]; *Garcia v. Petrakis*, 306 AD2d 315, 316, 760 N.Y.S.2d 551, 553 [2d Dept 2003].

In this case the Plaintiff alleges that his accident occurred when a defective plank on the scaffold he was using failed, causing him to fall. The 1635 Defendants contend in motion sequence #6 that the Plaintiff’s Labor Law 200 and common law negligence claims against them should be dismissed as they did not control the means and methods of the work being performed by the Plaintiff and were not otherwise negligent. In support of this position, the 1635 Defendants rely on the deposition testimony of the Plaintiff, the deposition of Joseph Riegler, the deposition of Shulem Neiman, and the deposition of Alexander Shvartzberg.

#### *Plaintiff’s Deposition Testimony*

When asked the name of the company he was working for when his accident occurred, the Plaintiff stated, “A & A Masonry.” (See Defendants’ Motion, Exhibit “J”, Page 18). When asked what type of work he was engaged in, the Plaintiff stated “[l]aying -- we were laying bricks.” (See Defendants’ Motion, Exhibit “J”, Page 20). When asked about scaffolding, the Plaintiff initially states that, “[t]here were no scaffolding there, during all the days while I was at this side [sic].” (See Defendants’ Motion, Exhibit “J”, Page 26). The Plaintiff thereafter stated, “[i]t’s small scaffold [sic] near the wall.” (See Defendants’ Motion, Exhibit “J”, Page 28). When asked who installed the scaffold, the Plaintiff stated, “I don’t know.” (See Defendants’ Motion, Exhibit “J”,

Page 29). When asked if the planks for the scaffold were changed as he moved up the building, the Plaintiff stated, “[y]es.” (See Defendants’ Motion, Exhibit “J”, Page 30). When asked if the planks were moved by helpers employed by A&A, the Plaintiff stated, “[y]es.” (See Defendants’ Motion, Exhibit “J”, Page 32). When asked how many planks there were when he was working on the first floor, the Plaintiff stated, “[o]ne plank I was standing on, and one plank was at my chest level.” (See Defendants’ Motion, Exhibit “J”, Page 33). When asked about the difference between the width of the scaffold on the second floor level in relation to the first floor level, the Plaintiff stated, “[a] little bit less.” (See Defendants’ Motion, Exhibit “J”, Page 46). When asked if the width was approximately 25 to 35 centimeters on the second floor, the Plaintiff stated “[u]h-huh, yes between the wall and the scaffolding.” When asked the width of the scaffold at the third floor level, the Plaintiff stated, “[o]n the third floor, it was ten, 15 centimeters.” (See Defendants’ Motion, Exhibit “J”, Page 47). When asked who directed him, the Plaintiff stated the “[t]eam master.” (See Defendants’ Motion, Exhibit “J”, Page 48). When asked whether anyone who did not work for A&A instructed him regarding his work, the Plaintiff stated, “[n]o.” (See Defendants’ Motion, Exhibit “J”, Page 48). When asked if he ever spoke to anyone from Greenfield Custom Builders, the Plaintiff stated, “[n]o.” (See Defendants’ Motion, Exhibit “J”, Page 49). When asked whether he knew who owned the building, the Plaintiff responded, “[n]o, I don’t know.” (See Defendants’ Motion, Exhibit “J”, Page 50). When asked whether he checked the planks when he moved up to the third floor level, the Plaintiff stated that “on the third level, I told them that the planks were rotten, damaged, rotten, and they should be replaced.” When asked who he told this to, the Plaintiff stated, “I told it to well to the helpers.” (See Defendants’ Motion, Exhibit “J”, Page 53). When asked what these “helpers” said, the Plaintiff stated, “they said its ok.” (See Defendants’ Motion, Exhibit “J”, Page 54). When asked how long he was on the third level before there was a problem,

the Plaintiff stated, “[f]ive or six minutes.” (See Defendants’ Motion, Exhibit “J”, Page 61). When asked what he told the team master, the Plaintiff stated “[t]his plank is rotten. It won’t hold me.” (See Defendants’ Motion, Exhibit “J”, Page 62). When he was asked “[w]hat did the plank do that caused you to fall from the scaffold,” the Plaintiff replied, “[i]t like collapsed.” He then clarified “[i]t collapsed because it was rotten.” (See Defendants’ Motion, Exhibit “J”, Page 76-77). When asked what happened when the plank collapsed, the Plaintiff stated “I fell down.” When asked where he landed, the Plaintiff stated “[o]n the ground.” When asked if he hit anything on the way down, the Plaintiff stated “I hit myself against scaffolding, against the wall.” When asked if the plank fell also, the Plaintiff stated “[w]hen the guys were helping me, they were removing the plank, pieces of plank from me and pieces of brick.” (See Defendants’ Motion, Exhibit “J”, Page 90).

*Deposition Testimony of Joseph Riegler*

When asked whether he was familiar with a property located at 1635 52nd Street in Brooklyn, Defendant Joseph Riegler stated, “[y]es.” (See Defendants’ Motion, Exhibit “M”, Page 9). When asked to describe the property, Mr. Riegler stated “[i]t was a residential home and it stayed a residential home.” (See Defendants’ Motion, Exhibit “M”, Page 9). When asked why he purchased the property, Mr. Riegler stated, “[t]o potentially live there.” When asked if he ever lived there, he stated, “[n]o.” (See Defendants’ Motion, Exhibit “M”, Page 10). When asked if the property remained vacant until the time when he sold it, he stated “[y]es.” (See Defendants’ Motion, Exhibit “M”, Page 11). When asked who he dealt with at Defendant Greenfield, he stated, “I dealt with Shulem Neiman, that’s all that I know.” (See Defendants’ Motion, Exhibit “M”, Page 14). When asked if he visited the site during construction, Mr. Riegler stated, “I checked, I just

went to look here and there to observe, that's all.” (See Defendants’ Motion, Exhibit “M”, Page 14). When asked how often, Mr. Riegler stated, “[s]ometimes I went once a week, sometimes I went once in a couple of months, no, I was not involved.” (See Defendants’ Motion, Exhibit “M”, Page 15). When asked if he knew who paid for the scaffolding, Mr. Riegler stated, “[n]o.” He then stated, “I paid money to Neiman when he asked me for it, I wasn't technical, I didn't deal with any vendors.” (See Defendants’ Motion, Exhibit “M”, Page 19). When asked if he was involved in hiring anyone else, Mr. Riegler stated, “[n]o.” (See Defendants’ Motion, Exhibit “M”, Page 22).

*Deposition Testimony of Shulem Neiman*

When asked what his relationship to Defendant Greenfield was, Shulem Neiman stated, “I asked him [Greenfield] if he would take all of these jobs under his name and we could run it under the same permit, under the same insurance.” (See Defendants’ Motion, Exhibit “N”, Page 21). When asked what his role was on the site, Mr. Neiman stated, “I entered in subcontracts with subcontractors, I ran the job.” (See Defendants’ Motion, Exhibit “N”, Page 25). When asked if he operated on behalf of Greenfield, Mr. Neiman stated, “[y]es.” (See Defendants’ Motion, Exhibit “N”, Page 25). When asked if one of his subcontractors was A&A, he stated, “[y]es.” (See Defendants’ Motion, Exhibit “N”, Page 25). Mr. Neiman stated, “Mr. Joseph Riegler, the home owner, hired me, spoke to me about building his home.” (See Defendants’ Motion, Exhibit “N”, Page 26). When asked if he entered into the contract on behalf of Greenfield, Mr. Neiman stated, “[t]hat's correct.” (See Defendants’ Motion, Exhibit “N”, Page 30). When asked if he was present when the scaffolding was installed, he stated “[y]ou asked me if I was present, no, but I was at this job site when the process was going on.” (See Defendants’ Motion, Exhibit “N”, Page 34). When asked who was hired to build the scaffold, Mr. Neiman stated, “[i]t was completely done by A & A Masonry.” (See Defendants’ Motion, Exhibit “N”, Page 34). When asked about his contact with

A&A employees, Mr. Neiman stated, "I would come to the job site every day, once, twice, as many times as needed and make sure that the work gets done the proper way, the way that I asked them to do." (See Defendants' Motion, Exhibit "N", Page 35-36). When asked if he would ever tell the A&A workers how to do their job, he stated, "I would usually ask -- if I see something that I don't like, I would call up Alex or his father. I would try not to speak to the employees." (See Defendants' Motion, Exhibit "N", Page 36). When asked why he had the opportunity to walk on the scaffold, Mr. Neiman stated, "[i]f I have to check high up how the work is getting done, that everything is done right, the waterproofing, etcetera." (See Defendants' Motion, Exhibit "N", Page 37). When asked if he had ever checked the planks on the scaffold, Mr. Neiman stated, "I wouldn't specifically go check for planks." (See Defendants' Motion, Exhibit "N", Page 40). When asked if he was familiar with a company called Expert Group Enterprises, Mr. Neiman stated that, "back in 2016 I was not involved in any scaffolding, meaning when I would hire the company for bricks or any kind of exterior work, they would be responsible and taking care of the scaffolding or any other way of them doing the work." (See Defendants' Motion, Exhibit "N", Page 48). When asked how long he would spend at the job site when he came by, Mr. Neiman stated, "[s]ometimes it is 15 minutes, sometimes it would be a half hour." (See Defendants' Motion, Exhibit "N", Page 50). When asked if he ever spoke with anyone about workers wearing harnesses, Mr. Neiman stated, "I don't remember." (See Defendants' Motion, Exhibit "N", Page 52).

*Deposition Testimony of Alexander Shvartsberg*

When asked what his position was with A&A, Alexander Shvartsberg stated "[t]he, um, president/owner." (See Defendants' Motion, Exhibit "O", Page 9). When asked what the scope of work was for A&A on the Premises, Mr. Shvartsberg stated, "[i]nstallation of brick." (See

Defendants' Motion, Exhibit "O", Page 16). When asked if A&A hired the sub-contractor to erect the scaffold, he stated, "[n]o." (See Defendants' Motion, Exhibit "O", Page 18). When asked if A&A installed it themselves, he stated, "[n]o." (See Defendants' Motion, Exhibit "O", Page 19). When he was asked who did, Mr. Shvartsberg stated, "[n]o idea." (See Defendants' Motion, Exhibit "O", Page 19). When asked if he ever inspected the scaffold, he stated, "[y]es. The lower sections." (See Defendants' Motion, Exhibit "O", Page 20). When asked who provided the planks to the scaffold, he stated, "I don't know." (See Defendants' Motion, Exhibit "O", Page 21). When asked if he was on the job site on the day of the accident, he stated, "[n]o." (See Defendants' Motion, Exhibit "O", Page 23).

In relation to the Plaintiff's Labor Law § 200 and common-law negligence claim (motion sequence #6), the Defendants argue that they cannot be held liable for the Plaintiff's injuries pursuant to Labor Law § 200 given that they contend that they did not supervise or control the work of the Plaintiff. As an initial matter the subject matter of this claim relates to means and methods not an unsafe construction site. The papers generally concede this and the facts as alleged support it. *See Medina-Arana v. Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1667, 131 N.Y.S.3d 110 [2d Dept 2020][scaffold allegation]; and *Roblero v. Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447, 109 N.Y.S.3d 329 [2d Dept 2019][fall from scaffold]. "When the methods or materials of the work are at issue, 'recovery against the owner or general contractor cannot be had... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work.'" *Messina v. City of New York*, 147 A.d.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept 2017], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2nd Dept 2008]. The moving Defendants argue that Plaintiff's claim arises out of the unsafe and dangerous means and methods used by the Plaintiff to perform his work, and, thus, there can be no liability imposed

upon them as they did not direct, supervise, instruct or control the work Plaintiff performed. Here, the court finds that, as the Plaintiff's claim is based on the manner in which the work was performed (*i.e.*, that the scaffolding plank was rotten), the moving Defendants, as owner and general contractor, have established, *prima facie*, that none of them supervised or controlled the means and methods of the work that the Plaintiff was performing while in the employ of Third Party Defendant A&A. *See Teodoro v. C.W. Brown, Inc.*, 200 A.D.3d 999, 160 N.Y.S.3d 345, 349 [2d Dept 2021].

In opposition, the Plaintiff failed to raise a material issue of fact that would prevent the Court from granting summary judgment. The Plaintiff argues that Mr. Riegler had control over the project in as much as he hired the contractor. The Plaintiff also contends that Mr. Neiman would inspect the Premises. However, speculative assertions regarding a party's ability to direct or control the manner and method of the work is not sufficient to raise a material issue of fact. *See Mondragon-Moreno v. Sporn*, 189 AD3d 1574, 1576, 138 N.Y.S.3d 606, 608 [2d Dept 2020]. Visits to "the work site to inspect the work, make requests, and ask questions does not preclude summary judgment, as [m]ere general supervisory authority at [the] work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200." "Moreover, although [General Contractor] employees had the power to stop any unsafe work at the site, this alone is insufficient to impose liability under Labor Law § 200." *Debenedetto v. Chetrit*, 190 A.D.3d 933, 938, 140 N.Y.S.3d 569 [2d Dept 2021]. Accordingly, the Plaintiff's Labor Law 200 and common law negligence claims against all of the 1635 Defendants and the Reigler Group are dismissed.

### *Homeowner's Exemption of Labor Law 240(1) and 241(6)*

Labor Law 240(1) is designed to protect workers on construction sites from elevation-related risks. This section provides that:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted.” *Walker v. City of New York*, 72 AD3d 936, 937, 899 N.Y.S.2d 322, 323 [2d Dept 2010]. In order to prevail on a Labor Law 240(1) cause of action, “[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries.” *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]; see *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Robinson v East Med. Ctr., L.P.*, 6 NY3d 550 [2006]. “Liability may, therefore, be imposed under the statute only where the ‘plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.’” *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

Labor Law § 241(6) also contains a homeowner’s exemption and provides that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

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

To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2d Dept 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2d Dept 2010].

### ***Homeowner's Exemption***

The Defendants move for Summary Judgment pursuant to CPLR 3212 and seek an order dismissing the action as against Defendants 52 Street and Riegler arguing that the “homeowner’s exemption” provided in Labor Law §§ 240(1) and 241(6), exempts “owners of one and two-family dwellings who contract for but do not direct or control the work from the absolute liability imposed by these statutory provisions.” *Bartoo v. Buell*, 87 N.Y.2d 362, 367, 662 N.E.2d 1068, 1070 [1996]. First, these Defendants have shown that 52 Street was the owner of the Premises and Riegler was the principal of the limited liability company, it is a one family dwelling and the renovation of the Premises was in relation to Riegler’s intention of moving in after the work was complete. The fact that a property is being renovated and the owner intends to occupy the premises as their home is sufficient to meet the first prong of the homeowners exemption. In *Khela v. Neiger*,

the Court held that the homeowner's exemption applied when an accident occurred during the renovation of a building that the owner had planned to convert from a three rental unit property to a two-family home where his family would reside. *See Khela v. Neiger*, 85 N.Y.2d 333, 336, 648 N.E.2d 1329, 1330 [1995]. In *Stejskal v Simons*, the Court held that the homeowner's exemption applied to a property that was being renovated from a rental property to a single family home that would be utilized by the owner's family for their residence. *See Stejskal v. Simons*, 309 AD2d 853, 855, 765 N.Y.S.2d 886, 888 [2d Dept 2003], *aff'd*, 3 N.Y.3d 628, 816 N.E.2d 186 [2004]; *see also Marquez v. Mascioscia*, 165 AD3d 912, 913, 86 N.Y.S.3d 180 [2d Dept 2018].

However, in opposition, the Plaintiff raises an issue of fact that prevents this Court from granting summary judgment to Defendants 52 Street and Riegler. The Plaintiff contends that Defendants 52 Street and Riegler should not receive the benefit of the homeowner's exemption because he did not reside in the Premises and later sold the property without having resided there. As stated above, when asked why he purchased the property, Mr. Riegler stated, "[t]o potentially live there." When asked if he ever lived there, he stated, "[n]o." (See Defendants' Motion, Exhibit "M", Page 10). When asked if he bought the property for \$1,550,000.00, the Plaintiff stated, "[c]orrect." When asked how much he sold it for, he stated "4, I believe 4.2." (See Defendants' Motion, Exhibit "M", Page 11). When asked if construction was ongoing when he sold the property, Mr. Riegler stated "[c]orrect." (See Defendants' Motion, Exhibit "M", Page 29).

While the intent of the owner to occupy the premises is a necessary and permissible component to the Homeowner's exemption, "renovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose." *Landon v. Austin*, 88 AD3d 1127, 1128, 931 N.Y.S.2d 424 [2d Dept 2011] Moreover, in *Batzin v. Ferrone*, the Court denied the Defendant's application for summary judgment under the homeowner's exemption and held that

“there is no evidence, other than the defendant's own deposition testimony, of his intent at the time of the accident to reside in the [single family home], his credibility should be resolved on cross-examination before a fact finder, rather than on summary judgment.” *Batzin v. Ferrone*, 140 AD3d 1102, 1104, 32 N.Y.S.3d 660, 662 [2d Dept 2016]; *see also Chorzepa v. Brzyska*, 143 AD3d 935, 937, 39 N.Y.S.3d 518, 520 [2d Dept 2016]. Accordingly, the application for summary judgment dismissing Plaintiff's Labor Law 240(1) and 241(6) claims as against Defendants 52 Street, and Riegler (including the Riegler Group) on the basis of the Homeowner's Exemption is denied.

### ***Labor Law § 240(1)***

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

“All contractors and owners and their agents ... who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted.” *Walker v. City of New York*, 72 A.D.3d 936, 937, 899 N.Y.S.2d 322, 323 [2<sup>nd</sup> Dept, 2010]. In order to prevail on a Labor Law § 240 (1) cause of action, “[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries” *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]; *see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Robinson v East Med. Ctr., L.P.*, 6 NY3d 550 [2006]. “Liability

may, therefore, be imposed under the statute only where the “plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

Turning to the merits of the Plaintiff’s motion, the Court finds that the Plaintiff has met his *prima facie* burden against the Defendants. The Plaintiff argues that the scaffold and supportive planking that was provided to him was inadequate for the task at hand and other safety equipment had not been provided to him. As stated above, when asked what type of work he was engaged in, the Plaintiff stated “Laying -- we were laying bricks.” (See Plaintiff’s Motion, Exhibit “B”, Page 20). When asked what caused him to fall, the Plaintiff stated “[t]he plank was rotten.” When asked what the plank did that caused him to fall, the Plaintiff stated “[i]t, like, collapsed.” (See Plaintiff’s Motion, Exhibit “B”, Page 76). The Plaintiff thereafter stated “[i]t collapsed because it was rotten.” (See Plaintiff’s Motion, Exhibit “B”, Page 77). When asked if the planks were secured, the Plaintiff stated “[t]hey just placed them.” (See Plaintiff’s Motion, Exhibit “B”, Page 93). When asked if he told anyone or asked for the plank to be changed, the Plaintiff stated “[y]es.” The Plaintiff then stated “I asked Barot, I asked about it to our team master Shamsedin, and to the help -- and to Barot, the helper [sic] -- a helper.” (See Plaintiff’s Motion, Exhibit “B”, Page 122). When asked if he understood the requirements regarding harnesses and scaffolds, Shulem Neiman of Defendant Greenfield Custom Buildings, Inc. stated “[a]ny time that you work on scaffolding or you work on the edge of a roof or the edge of a platform you have to wear a harness.” When asked if he made any effort at all to make sure the workers on this job site were using harnesses, Mr. Neiman stated “[n]o.” (See Plaintiff’s Motion, Exhibit “D”, Page 53) This testimony, taken together, is sufficient for the Plaintiff to meet his *prima facie* burden regarding the accident at issue since the evidence

support's the Plaintiff's position. "Since the scaffold collapsed, the plaintiff established, *prima facie*, that he was not provided with an adequate safety device to do his work, as required by Labor Law § 240(1), and that this statutory violation was a proximate cause of his injury." *Bermejo v. New York City Health & Hosps. Corp.*, 119 A.D.3d 500, 501–02, 989 N.Y.S.2d 490, 493 [2d Dept 2014], quoting *Tapia v. Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801, 899 N.Y.S.2d 303, 305 [2d Dept 2010].

In opposition, the Defendants have failed to raise a material issue of fact regarding the Plaintiff's Labor Law 240(1) claim. The Defendants argue that the Plaintiff was provided with a harness and that his failure to wear the harness was the reason for his accident. The Defendants rely on the testimony of Alexander Shvartsberg, who at the time of the incident was the owner of A&A. When asked if he inspected the scaffold after it was constructed, Mr. Shvartsberg stated "[y]es." (See Defendants' Motion, Exhibit "O", Page 21). When asked how often they were inspected, he stated "[u]m, I'd say, every other day." (See Defendants' Motion, Exhibit "O", Page 22). When asked if he was on the job site that day, Mr. Shvartsberg stated "[n]o." (See Defendants' Motion, Exhibit "O", Page 23). When asked if he saw the broken plank, Mr. Shvartsberg stated "[y]es." (See Defendants' Motion, Exhibit "O", Page 40). When asked during his deposition of the Plaintiff was wearing a harness at the time of his accident, Mr. Shvartsberg states "I don't know. But he was supposed to. I provide them with harness and a tie-off." (See Defendants' Motion, Exhibit "O", Page 46) When asked how he provided the harness to the Plaintiff he stated "I just hand it to him." (See Defendants' Motion, Exhibit "O", Page 46). When asked when, Mr. Shvartsberg stated "I don't remember exactly when." (See Defendants' Motion, Exhibit "O", Page 46).

The deposition testimony of Mr. Shvartsberg does not serve to rebut the testimony of the Plaintiff or create a material issue of fact. “A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a ‘recalcitrant worker,’ he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available.” *Lojano v. Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162, 134 N.Y.S.3d 363 [2d Dept 2020]. “To establish a sole proximate cause defense under Labor Law § 240 (1), a defendant must demonstrate that the plaintiff had ‘adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose for no good reason not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured.’” *Szymkowiak v. New York Power Auth.*, 203 AD3d 1618, 1620, 166 N.Y.S.3d 759 [4th Dept 2022], quoting *Fazekas v. Time Warner Cable, Inc.*, 132 AD3d 1401, 1403, 18 N.Y.S.3d 251 [4th Dept 2022]. “Neither the mere presence of alleged safety devices somewhere on the job site (*see, Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524; *Heath v Soloff Constr.*, 107 AD2d 507, 512), nor the mere fact that generalized safety instructions were given at some point in the past (*see, Gordon v Eastern Ry. Supply, supra; Stolt v General Foods Corp., supra; compare, Jastrzebski v North Shore School Dist.*, 223 AD2d 677, *affd* 88 NY2d 946) are sufficient to raise a triable issue of fact as to the defendants' recalcitrant worker defense.” *Davis v. Bd. of Trustees of the Hicksville Pub. Libr. of the Hicksville Union Free Sch. Dist.*, 240 AD2d 461, 463, 658 N.Y.S.2d 648 [2d Dept 1997]. Accordingly, the Plaintiff's motion is granted.<sup>3</sup>

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<sup>3</sup> Accordingly, the Court also finds that the dismissal of the Plaintiff's Labor Law 240 (1) claim as part of the Defendants' motion (motion sequence #6) is denied.

**Labor Law § 241(6)**

Labor Law §241(6) imposes on owners and contractors a non-delegable duty “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.” *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2<sup>nd</sup> Dept, 2015]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2<sup>nd</sup> Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2<sup>nd</sup> Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2<sup>nd</sup> Dept, 2010].

The Plaintiff’s motion addressed specific provisions.

Industrial Code §1.5(c) addresses the Condition of Equipment and Safeguards and subsections (1), (2) and (3) relate to load carrying equipment and operable safety devices. However, subsections (1) and (2) are not concrete provisions. Accordingly, the Plaintiff’s motion relating to these provisions is denied. *See Gasques v. State*, 15 NY3d 869, 870, 937 N.E.2d 79 [2010]; *Vernieri v. Empire Realty Co.*, 219 A.D.2d 593, 595, 631 N.Y.S.2d 378, 380 [2d Dept 1995]. The Plaintiff has shown that §1.5(c)(3) is applicable and sufficiently specific to support a claim based on the facts as presented by the Plaintiff. *See Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1085, 22 N.Y.S.3d 545, 546 [2d Dept 2015]. However, the Court finds that the Plaintiff has failed to establish that a violation of Industrial Code §1.5(c) (3) occurred.

Industrial Code §23-5.1 addresses the General Condition of Scaffolds and subsections (a), (c), (e), (f) (g) and (j) relate to scaffold structure, scaffold loading, scaffold planking and scaffold

maintenance and repair. Subsections (a) and (f) are not sufficiently concrete, therefore the Plaintiff's application in relation to these provisions is denied. *See Karwowski v. Grolier Club of City of New York*, 144 AD3d 865, 866, 41 N.Y.S.3d 261 [2d Dept 2016]. The Plaintiff has shown that subsection (c),(e),(g) and, (j) are sufficiently specific to support a claim based on Labor Law 241(6). *See Debenedetto v. Chetrit*, 190 A.D.3d 933, 140 N.Y.S.3d 569, 575 [2d Dept 2021]; *Klimowicz v. Powell Cove Assocs., LLC*, 111 AD3d 605, 607, 975 N.Y.S.2d 419 [2d Dept 2013]. However, the Court finds that there is an issue of fact as to whether there was a violation of any of these code provisions and that such violation was a proximate cause of the Plaintiff's injuries. *See Abreo v. URS Greiner Woodward Clyde*, 60 A.D.3d 878, 881, 875 N.Y.S.2d 577, 580 [2d Dept 2009].

Industrial Code § Section 23-1.17, which addresses the standards for safety nets, is "inapplicable here because the plaintiff was not provided with any such devices." *Venegas v. Shymer*, 201 AD3d 1001, 1002, 157 N.Y.S.3d 765 [2d Dept 2022]; *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD3d 616, 619, 852 N.Y.S.2d 138, 143 [2d Dept 2008]; *see also Forschner v. Jucca Co.*, 63 A.D.3d 996, 999, 883 N.Y.S.2d 63, 67 [2d Dept 2009]. Therefore, the Plaintiff's application in relation to this provision is denied.

### ***Contractual Indemnification***

The Court grants Defendant Greenfield's application for its Third Party Claim for contractual indemnification as against A&A. Defendant Greenfield contends that A & A Masonry agreed to indemnify them in the indemnity clause of the contract between them. Paragraph 1 of the subcontract provides in pertinent part that:

1 Indemnity. in consideration of the Contract Agreement and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless ... the Contractor, ... the Owner of the property, and the officers, directors,

agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties.

Generally, “[a] party's right to contractual indemnification depends upon the specific language of the relevant contract.” *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. In the instant proceeding, Defendant Greenfield has shown that A&A had a duty to indemnify them under the terms of the contract. While A&A argues that it had an agreement with Traditional Custom Builders, and annexes the proposal for 1635 52<sup>nd</sup> Street in support of this position, a review of the Subcontract Agreement Rider shows that it was signed both by Alexander Shvartsberg on behalf of A&A and Defendant Sholem Greenfield on behalf of Defendant Greenfield Custom Builders. (See Defendants’ Motion, Exhibit “S”). However, a party seeking indemnification must establish its freedom from liability and Greenfield has liability pursuant to Labor Law 240(1). Notwithstanding this, Greenfield’s liability is passive, vicarious liability as a consequence of statute. There is no allegation of actual negligence on the part of Greenfield. See *Giangarra v. Pav-Lak Contracting, Inc.*, 55 A.D.3d 869, 871, 866 N.Y.S.2d 332, 334 [2d Dept 2008]; see also *Connolly v. Brooklyn Union Gas Co.*, 168 AD2d 477, 478, 562 N.Y.S.2d 718 [2d Dept 1990].

The Court also grants the application for summary judgment on its Third Party action for breach of contract as it relates to Defendant Greenfield. The Defendants contend that “the contract

required A & A Masonry to procure \$1,000,000 in commercial general liability coverage and name the contractor (Greenfield) and Owner (1635 52nd Street) as additional insureds.” A review of the contract between Greenfield and A&A shows that A&A did agree to procure insurance “including contractual liability with minimum limits of \$1,000,000 each occurrence, \$2,000,000 aggregate with either per project or per location endorsement for property damage and bodily injury.” In opposition, A&A argues that the contract between the parties is unclear as to who the “owner and “contractor” are for the purposes of indemnification. As to Defendant Greenfield, the provision of the contract provided clearly identifies Greenfield as the Contractor and party to the agreement.

However, the provisions provided do not clearly identify the owner or any other Defendant. Accordingly, the remaining moving Defendants have failed to make a *prima facie* showing that A&A agreed to indemnify and provide insurance for these Defendants. The agreement between A&A and Defendant Greenfield, merely referencing “Owner” without further identifying the Owner, or even providing an address, fails to establish that the remaining Defendants/Third Party Plaintiffs, were intended. *See Pope v. Supreme – K.R.W. Constr. Corp.*, 261 AD2d 523, 524, 690 N.Y.S.2d 632 [2d Dept 1999]. ““Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor.”” *Persaud v. Bovis Lend Lease, Inc.*, 93 A.D.3d 831, 833, 941 N.Y.S.2d 208, 210–11 [2d Dept 2012], quoting *Waitkus v. Metro. Hous. Partners*, 50 A.D.3d 260, 854 N.Y.S.2d 388 [1<sup>st</sup> Dept 2008]. Although the word Owner may serve to incorporate the indemnity obligation to that party or parties, no such reference is made in the subject contract indemnity provisions. *See Goya v. Longwood Hous. Dev. Fund Co., Inc.*, 192

A.D.3d 581, 582, 146 N.Y.S.3d 59, 62 [1<sup>st</sup> Dept 2021]. Accordingly, that aspect of the motion by the remaining Defendants/Third Party Plaintiffs (motion sequence #6) seeking summary judgment on their Third Party Claim for contractual indemnification as against A&A is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

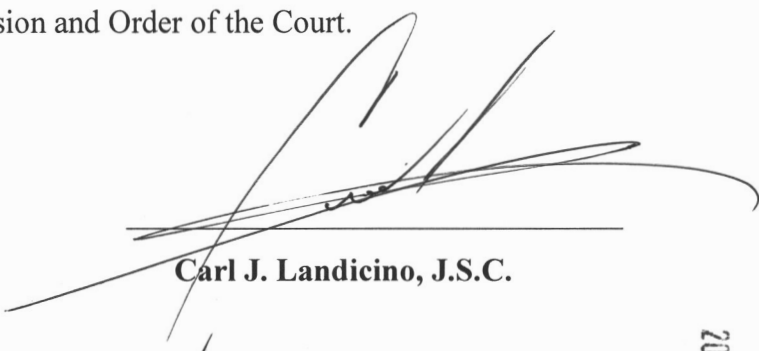
The motion (motion sequence #6) by the 1635 Defendants is granted solely to the extent that the Plaintiff's Labor Law 200 and common law negligence cause of action is dismissed as against Defendants 1635 52 Street LLC, Joseph Raizel Riegler, The Riegler Group, Inc. and Greenfield Custom Buildings, Inc. The 1635 Defendants' motion is also granted to the extent that Plaintiff's claims based upon New York Labor Law §§241(1-5), 241(6), 241(7-10) and 241-a are dismissed. The 1635 Defendants' application for summary judgment as against A&A for their Third Party contractual indemnification and breach of contract claims and to dismiss any counter-claims by A&A is granted solely as it relates to Defendant Greenfield.

The Plaintiff's motion (motion sequence #7) for summary judgment on the issue of liability is granted to the extent that Plaintiff's claim pursuant to Labor Law 240(1) is granted.

Any relief not explicitly granted herein is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino, J.S.C.**

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