

**Quevedo v Brooklyn Urban Retail Partners, LLC**

2023 NY Slip Op 34840(U)

July 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 505003/18

Judge: Wavny Toussaint

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At an IAS Term, Part 70 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 July, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

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GEORGE J. QUEVEDO,

Plaintiff,

Index No. 505003/18

-against-

**DECISION, ORDER AND JUDGMENT**

BROOKLYN URBAN RETAIL PARTNERS, LLC  
and ZDG, LLC,

Defendants.

Mot. Seq. #04-06

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BROOKLYN URBAN RETAIL PARTNERS, LLC  
and ZDG, LLC,

Third-Party Plaintiffs,

-against-

OLIVEIRA CONTRACTING, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Cross Motion, Affirmations,  
Memoranda of Law, and Exhibits Annexed \_\_\_\_\_

93-116; 120-134; 136-148

Affirmations in Opposition \_\_\_\_\_

152; 153; 156

Reply Affirmations and Exhibits Annexed \_\_\_\_\_

158-159; 160; 162-163; 164-165; 166

Upon the foregoing papers in this action to recover damages for personal injuries, defendants/third-party plaintiffs Brooklyn Urban Retail Partners, LLC (“BURP”) and ZDG, LLC (“ZDG”; collectively with BURP, “defendants”) move for an order, pursuant to CPLR § 3212, granting them: (1) summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240 (1), and 241 (6) claims of plaintiff George J. Quevedo (“plaintiff”); (2) summary judgment against plaintiff’s employer, third-party defendant Oliveira Contracting, Inc. (“Oliveira”), on their claim for breach of contract and for an award

of conditional contractual indemnification; and (3) summary judgment dismissing Oliveira's counterclaims against them (Motion Seq. No. 04). Plaintiff opposes and cross-moves for an order, pursuant to CPLR § 3212, granting him partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims (Motion Seq. No. 06). Lastly, Oliveira moves for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing defendants' third-party claims (Motion Seq. No. 05).

### **Background**

On a clear afternoon of October 6, 2017 (the "incident date"), plaintiff, a 33-year-old union laborer, was participating with his coworkers at Oliveira in the "concrete pour on grade beam [in] Building A" at a construction site.<sup>1</sup> He had been working for Oliveira at the same site for the past three months, and received all instructions from his employer's on-site foremen/managers.<sup>2</sup>

On the incident date, at his foreman's direction, plaintiff joined a group of five-to-six coworkers who were standing around the elevator foundation that was in the process of being constructed at the grade (or soil) level (the "foundation"). The inner perimeter of the foundation was covered by one or more rebar grids (oriented parallel to the ground) (collectively, the "rebar grid"). The outer perimeter of the foundation was surrounded by the vertically standing, five-foot high formwork (the "formwork").<sup>3</sup> The walls of the formwork

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<sup>1</sup> Daily Job Report, October 6, 2017.

<sup>2</sup> Plaintiff's EBT tr at page 15, line 4 to page 16, line 11.

<sup>3</sup> Plaintiff's EBT tr at page 20, lines 9-10.

were constructed of wood partitions that were tied at the top by one or more pieces of rebar (collectively, the “rebar tie”).

The outer perimeter of the foundation was further surrounded by the vertical footings to be constructed of concrete (the “footings”). To that end, ground holes for the footings had been previously excavated in the ground alongside the outer perimeter of the foundation (the “pre-dug holes”).<sup>4</sup> The pre-dug holes measured three-to-four feet deep, whereas the entirety of the footings (both inside and outside the pre-dug holes) measured at six feet in length.<sup>5</sup>

To build the foundation, Oliveira’s workers were required to pour and spread concrete in two areas sequentially: first, within the inner perimeter of the foundation; and second, into the pre-dug holes alongside the outer perimeter of the foundation. The entire pour-and-spread task over both areas was to be performed on the same day.<sup>6</sup> In preparation for the pour-and-spread, fresh concrete had been transferred from the cement truck into a 6’ x 6’ bucket (the “bucket”) which was suspended above the ground by chains attached to the arm of an excavator.<sup>7</sup> Shortly before the incident, plaintiff had been directed by his foremen to “get on the bucket and pour” – a task he had performed “maybe over a hundred times” previously.<sup>8</sup> Specifically, plaintiff was directed to guide (and when appropriate to signal to the excavator operator to tilt) the bucket to pour and spread the concrete within (and across) the inner perimeter of the foundation. After placing both hands on top (and in front) of the bucket,

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<sup>4</sup> Sanders’ EBT tr at page 28, lines 15-17 (“Q. What purpose would holes like that [would] have served? A. For footings.”).

<sup>5</sup> Sanders’ EBT tr at page 28, lines 15-17; page 29, lines 3-17 and 22-24; page 30, lines 3-23.

<sup>6</sup> Sanders’ EBT tr at page 30, line 10 to page 31, line 11.

<sup>7</sup> Sanders’ EBT tr at page 31, line 12 to page 32, line 6.

<sup>8</sup> Plaintiff’s EBT tr at page 24, lines 24-25; at page 25, line 22.

plaintiff took one step forward (or traversed a distance of only one foot) when his right leg landed (and descended up to the level of his right knee) into one of the adjacent pre-dug holes intended for the footings.<sup>9</sup>

It is undisputed that plaintiff's right leg, once he stepped into the pre-dug hole, did not reach its bottom. Plaintiff estimated the size of the pre-dug hole to have been as much as six feet deep and three feet wide. In contrast to the foregoing, plaintiff's foreman Sanders emphasized in his pretrial testimony that the pre-dug hole at issue (or any other pre-dug hole for the footings for that matter) could not have been deeper than four feet.<sup>10</sup> Sanders further confirmed that no six-foot (or any other) trenches were located near the footings at the worksite.<sup>11</sup>

As the result of his (mis)step, plaintiff's body frame of 6'1" in height and 210 pounds in weight shifted to his right, causing several of his right ribs to strike the rebar tie that was

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<sup>9</sup> Plaintiff described the incident multiple times – at his pretrial deposition, at his workers' compensation hearings and in his workers' compensation incident reports – as follows: (Plaintiff's EBT at page 23, lines 17-24 (“So as soon as I got over there I went to the concrete bucket, and I just put my hands on the bucket . . . to pour the concrete into the forms, and as soon as I got there I stepped right in the hole, . . . fell down up to my knee. There was rebar [tie] sticking out [of the formwork]; I fell into it. And that was pretty much what I recall.”); page 31, lines 2-4 (“the hole was next to a piece of formwork”); at page 31, lines 8-10 (testifying that no part of his right leg touched the bottom of the pre-dug hole).

*See Workers' Compensation Hearing, July 25, 2018, at 7* (“as I was walking with the bucket pouring the walls, there was a hole in the floor, I stepped into the hole and as I was going down, there was a piece of rebar sticking out of the floor and I landed, my [right] ribs landed on the rebar [tie] and . . . the way I fell on the rebar [tie], my neck and my back were hurt”); *Workers' Compensation Hearing, July 25, 2018, at 17* (Administrative Law Judge's summary of plaintiff's testimony, “Walking with the bucket, [the claimant] stepped into a hole in the ground by mistake. Injured [right] ribs.”).

*See also Plaintiff's Employee Claim C-3 Form, dated October 30, 2017, at 1, § D.6* (“While pouring concrete[,] [I] tripped into [an] uncovered hole, [and was] injured during fall.”); *Plaintiff's Employee Claim C-3 form, dated February 16, 2018, at 1, § D.6* (“While working, pouring concrete[,] . . . I stepped into a hole.”).

<sup>10</sup> Sanders' EBT tr at page 30, lines 3-6 (“From the top of the working [surface] to the bottom of the footing[,] [the pre-dug hole] never exceeded six-foot [in depth]. It was more or less in the three to four-foot area.”); at page 38, lines 2-20 (testifying that footings would never exceed the depth of four feet).

<sup>11</sup> Sanders' EBT tr at page 37, lines 21-25.

protruding from the top of the formwork he was then facing.<sup>12</sup> At the time of the incident, the rebar tie at issue was not capped because Oliveira's standard operating procedure was to place the rebar caps *after* the pour-and-spread was fully completed (*i.e.*, the pour-and-spread within the inner perimeter of the foundation, as well as the pour inside the pre-dug holes for the footings).<sup>13</sup> Although uncapped, the rebar tie at issue did not pierce or cut (nor did it create a wound in) plaintiff's skin as a result of the incident.<sup>14</sup> Plaintiff did not lose consciousness, nor did he fall to the ground.<sup>15</sup> He was back at work at Oliveira on the following business day. He now claims injuries to the cervical and lumbar sections of his spine.<sup>16</sup>

### Procedural History

On March 12, 2018, plaintiff commenced this action against BURP and ZDG (as the owner representative and the construction manager, respectively) asserting causes of action sounding in common-law negligence and violations of Labor Law §§ 240 (1), 241 (6) and 200. On May 31, 2018, defendants commenced a third-party action against Oliveira, asserting a single cause of action for contractual indemnification. By third-party answer, dated June 20, 2018, Oliveira asserted counterclaims against defendants for common-law contribution and indemnification.

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<sup>12</sup> Plaintiff's EBT tr at page 30, lines 18-30 (the rebar "was like sticking out [from] the top of the form [*i.e.*, the rebar tie]. And it was [the] rebar on the side of the [pre-dug] hole, yes, on the floor. . . . On the sides of the form, to hold the walls together when they pour so the walls don't open up," [*i.e.*, the rebar tie]); at page 10, lines 22-24 (describing plaintiff's height and weight at the time of the incident).

<sup>13</sup> Sanders' EBT tr at page 46, lines 4-9.

<sup>14</sup> Plaintiff's EBT tr at page 35, lines 13-18.

<sup>15</sup> Plaintiff's EBT tr at page 51, lines 8-10.

<sup>16</sup> Plaintiff's Third Supplemental Bill of Particulars, dated April 6, 2022.

After a note of issue/certificate of readiness was filed on April 6, 2022, defendants timely moved for summary judgment. Although plaintiff's cross motion and Oliveira's motion were each served outside the 60-day summary judgment deadline, both requests will be considered by the Court because defendants' timely motion was made on nearly identical grounds (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]).

The Court heard oral argument and reserved decision. Additional facts will be stated when relevant to the discussion below. The well-established summary-judgment standard of review is omitted in this decision/order in the interest of brevity.

### Discussion

#### Plaintiff's Claims Against Defendants

##### *Labor Law § 240 (1)*

Labor Law § 240 (1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against height-differential hazards on construction sites, and they will be absolutely liable for any violation that results in injury, regardless of whether they supervised or controlled the work (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-288 [2003]). Where the use of a statutorily mandated safety device would defeat or be contrary to the purpose of the work, no liability will attach for the failure to provide such a device (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). The "integral-to-work" defense applies when eliminating the alleged defective condition would be "impractical and contrary to the very work at hand" and inconsistent with accomplishing a task that was "an integral part of the job" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]). Post-*Salazar*, the First Judicial Department

clarified that “the ‘integral-to-work’ defense . . . applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident” (*Krzyzanowski v City of New York*, 179 AD3d 479, 481 [1st Dept 2020]).

Here, defendants have established, prima facie, that the installation of a protective device “would have been contrary to the objectives of the work” (*Salazar*, 18 NY3d at 139-140). Contrary to plaintiff’s contention, this action does not involve any equivalent to a failed scaffolding or other safety device, inasmuch as the pre-dug hole and the adjacent formwork could not have been covered or otherwise protected (nor could the offending rebar tie be capped), while plaintiff was pouring (or, more precisely, was about to pour) the concrete at the time of the incident (*Salazar*, 18 NY3d at 139-140; *Maldonado v AMMM Props. Co.*, 107 AD3d 954, 955 [2d Dept 2013]).<sup>17</sup>

While not necessary to its determination, the Court notes that plaintiff’s principal contention that the “uncontroverted evidence establishes that [his] right leg fell into an unguarded six foot deep trench,” is unsupported by his pretrial testimony. Carefully parsed, his pretrial testimony which was hesitant, evasive and essentially non-responsive on this point fails to establish that the pre-dug hole was six feet deep (Plaintiff’s EBT tr at page 29, lines 16-17 (testifying that the pre-dug hole at issue measured at “[t]hree feet wide by – I don’t

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<sup>17</sup> Plaintiff’s reliance on *Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463, 464 (1st Dept 2017), and *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 810 (2d Dept 2010), is unavailing. In *Gjeka* (unlike the instance here), “[t]he testimony and plaintiff’s expert affidavits . . . showed that a barrier on the west side of the pit, where plaintiff was working, would not have impeded the work of excavating dirt from the pit, notwithstanding the conclusory assertion to the contrary by [defense] expert” (internal citations omitted). *Ortiz* is inapposite because the worker in that case “fell through an unprotected hole or opening in the temporary plywood floor, constituting ‘an elevator shaft,’ which had not been properly covered.”

know. I didn't – maybe six feet deep?"; underlining added). As the underlining reflects, his pretrial testimony was triple-qualified; first, by a vague "maybe"; second, by the negatives of "I don't know" and "I didn't"; and finally (and crucially) by the phrasing of his answer in the form of a question.<sup>18</sup>

In sum, plaintiff's Labor Law § 240 (1) claim is not viable. Accordingly, the portion of the initial branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is granted, whereas the initial branch of plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim is denied, as more fully set forth in the decretal paragraphs below.<sup>19</sup>

*Labor Law § 241 (6)*

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers on the premises" (*Venezia v State*, 57 AD3d 522, 522 [2d Dept 2008]). "[T]o establish liability under Labor Law § 241(6), a [plaintiff] is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command" (*id.*).

Here, although plaintiff cited in his pleadings several provisions of the Industrial Code to support his Labor Law § 241 (6) claim, he has since abandoned most of them, thus obviating their further discussion (*Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]; *Pita v Roosevelt Union Free School Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). Two of the five

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<sup>18</sup> Further lending support to plaintiff's lack of opinion on the depth of the pre-dug hole is his omission to quantify its depth in his sworn testimony before the Administrative Law Judge, as well as in his workers' compensation incident reports.

<sup>19</sup> Plaintiff's further contention that defendants' failure to produce certain documents in discovery should entitle him to a negative inference is meritless. Unlike the authorities he cites, he has sought no discovery sanctions.

remaining Industrial Code provisions on which plaintiff relies are § 23-1.7 (b) (1) (“Falling hazards/Hazardous openings”) and § 23-1.7 (e) (2) (“Tripping and other hazards/Working areas”), whereas the three remaining provisions – §§ 23-4.2 (h), 23-4.2 (i), and 24-4.3 – all relate to the “Trench and area type excavations,” and the “Access to excavations.”

As was the instance with his Labor Law § 240 (1) claim, the entirety of plaintiff’s Labor Law § 241 (6) claim – irrespective of the applicability (or not) of any of the five aforesaid Industrial Code provisions – fails to overcome the “integral to work” defense. Like its Labor Law § 240 (1) counterpart, a Labor Law § 241 (6) claim is not viable where, as here, the allegedly dangerous condition or the object that caused plaintiff’s injury was an integral part of the work being performed (*Salazar*, 18 NY3d at 140; *Tucker v Tishman Const. Corp. of NY*, 36 AD3d 417, 417 [1st Dept 2007]; *Dubin v S. DiFazio & Sons Const., Inc.*, 34 AD3d 626, 627 [2d Dept 2006]; *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002]).

Additionally, two of the five remaining Industrial Code provisions are inapplicable for other reasons. First, Industrial Code § 23-1.7 (e) (2) – “Tripping and other hazards/Working areas” – does not apply because the rebar tie which plaintiff hit with his right side upon his misstep did not constitute debris, scattered tools and materials, or a sharp projection; rather, the rebar tie had been installed specifically for his pour-and-spread work (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 866 [2d Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 614 [1st Dept 2013]; *Tucker*, 36 AD3d at 417).<sup>20</sup>

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<sup>20</sup> Equally without merit is plaintiff’s citation to *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984 (2d Dept 2014), *lv denied* 26 NY3d 905 (2015), where an uncapped piece of a vertical rebar which  
(footnote continued)

Second, Industrial Code § 23-1.7 (b) (1) – “Falling hazards/Hazardous openings” – is “inapplicable where [, as here,] the hole is too small for a worker to fall through” (*Alvia*, 287 AD2d at 423; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]).<sup>21</sup>

In sum, there is likewise no viable claim under Labor Law § 241 (6) under the facts of this case. Accordingly, the portion of the initial branch of defendants’ motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim is granted, and the remaining branch of plaintiff’s cross motion for partial summary judgment on the issue of liability on his Labor Law § 241 (6) claim is denied, as more fully set forth in the decretal paragraphs below.

*Labor Law § 200/Common-Law Negligence*

“Labor Law § 200 is a codification of the common-law duty imposed on property owners, contractors, and their agents to provide construction site workers with a safe place to work” (*Sanchez v BBL Constr. Servs., LLC*, 202 AD3d 847, 849 [2d Dept 2022]). “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 work site, and those involving the manner in which the work is performed” (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). “To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work” (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept

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impaled the worker was held to constitute a “sharp projection” that should have been capped under the circumstances of that case. Unlike *Lopez*, plaintiff here was not impaled; in fact, he was not even cut by the rebar tie which he struck.

<sup>21</sup> Plaintiff’s reliance on *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 (2d Dept 2012), is unavailing because in that case the hole through which the injured worker partially fell through “was large enough for his body to have passed through.” Here, however, it cannot be disputed that the pre-dug hole at issue was not large enough for plaintiff’s body to have passed through.

2010] [internal quotation marks omitted]). “Where a plaintiff’s injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition” (*id.* at 1047 [internal quotation marks omitted]).

Here, defendants have established, *prima facie*, that the pre-dug hole and the rebar tie – the immediate cause of plaintiff’s misstep and his alleged ensuing injuries – were not defects inherent at the worksite, but rather were created by the manner/methods in which Oliveira (plaintiff’s employer) performed its work, over which defendants had no authority or control (*Letterese v A&F Commercial Builders, L.L.C.*, 180 AD3d 495, 495 [1st Dept 2020]; *Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 866 [2d Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]).

In opposition, plaintiff has failed to raise a triable issue of fact. Contrary to his contention, the unauthenticated (and thus inadmissible) progress photographs of the worksite do not establish an allegedly dangerous condition at the time of the incident (*Gallis v 23-21 33 Rd., LLC*, 198 AD3d 730, 733 [2d Dept 2021]; *Rodriguez v Sheridan One Co., LLC*, 177 AD3d 801, 802 [2d Dept 2019]; *Matter of Bramble v New York City Dept. of Educ.*, 125 AD3d 856, 859 [2d Dept 2015]).<sup>22</sup> Inasmuch as plaintiff’s Labor Law § 200/common-law negligence

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<sup>22</sup> Plaintiff’s reliance on *Carthen v Sherman*, 169 AD3d 416 (1st Dept 2019), is unavailing because the admissibility/authenticity of the photographs was not at issue in that case.

claim is not viable, the remainder of the initial branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence is granted, as more fully set forth in the decretal paragraphs below.

### Defendants' Third-Party Claims Against Oliveira

#### *Contractual Indemnification Claim*

“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 Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted], *motion to amend remittitur dismissed* 70 NY2d 999 [1988]). “A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence” (*George v Marshalls of MA, Inc.*, 61 AD3d 931, 932 [2d Dept 2009]).

Here, the Trade Contract, dated July 21, 2017, between BURP and Oliveira (the “Trade Contract”) presents two interpretational challenges. The first interpretational challenge arises from the fact that the Trade Contract contains two separate and seemingly inconsistent indemnification provisions; the first indemnification provision is in Section 29 of terms/conditions of the Trade Contract, whereas the second indemnification provision is in Section 6 of Exhibit F to the Trade Contract.<sup>23</sup> Fortunately, resort to Section 47 of

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<sup>23</sup> Trade Contract, page 17 (Section 29 of terms/conditions) and pages 103-104 (Section 6 of Exhibit F).

terms/conditions resolves the inconsistency.<sup>24</sup> Section 47 of terms/conditions provides that “if any of the provisions of this Trade Contract are inconsistent with any of the provisions of the Exhibits . . . , then the provision which would remove or reduce, or work the greater reduction of, an obligation of [Oliveira] or a right or entitlement of [BURP, and by extension, ZDG] shall be disregarded.” Inasmuch as the indemnification provision in Section 29 of terms/conditions of the Trade Contract, if applied, could potentially reduce Oliveira’s concomitant obligation,<sup>25</sup> Section 6 of Exhibit F to the Trade Contract *is* the governing provision.

The second interpretational challenge arises from the allegedly ambiguous wording of the introductory clause of Section 6 of Exhibit F. The introductory clause reads: “To the fullest extent permitted by law, Trade Contractor [Oliveira] agrees to indemnify, defend and hold harmless the Indemnitees [defendants] and the Site Logistics trade contractor (*to the extent Trade Contractor or its subcontractors utilize such hoist, scaffolding or bridging equipment*) . . . from any and all losses, claims,” etc. (emphasis added). Oliveira contends that the italicized parenthetical phrase modifies everything that precedes it, including the words “the Indemnitees.” Defendants urge a contrary interpretation of the parenthetical phrase, construing it to modify only the words “the Site Logistics trade contractor” that immediately precedes it. Defendants’ interpretation of the applicability of the parenthetical phrase is

<sup>24</sup> Trade Contract, page 24 (Section 47 of terms/conditions).

<sup>25</sup> The substantive difference between the two indemnification provisions – the one at Section 29 of terms/conditions and the other at Section 6 of Exhibit F – is that the latter includes “[t]o the fullest extent permitted by law” language as required by General Obligations Law § 5-322.1, whereas the former does not. “[I]n the context of construction contracts, contractors are [statutorily] prohibited from seeking contractual indemnification for their own negligence” (*Barreiros v Inter County Paving Assoc., LLC*, 192 AD3d 742, 743 [2d Dept 2021] [citation omitted]). Thus, were defendants to seek indemnification under Section 29 of terms/conditions (rather than under Section 6 of Exhibit F), they would have to each “prove [itself] free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

reasonable. The parenthetical phrase cannot limit the otherwise broadly worded indemnification provision of which such phrase is only a small part. Thus, the parenthetical phrase modifies only the words “the Site Logistics trade contractor” that immediately precedes it.

The indemnification mechanism under Section 6 of Exhibit F contemplates a showing that defendants’ “losses, claims, suits, damages, liabilities, attorneys’ fees and costs” (including for the defense of the underlying claim) “aris[e] out of or in connection with or as a consequence of the performance of the Work pursuant to this Trade Contract . . . , provided that any such loss, claim, suit, damage or liability . . . is attributable to bodily injury, sickness, disease or death. . . .”<sup>26</sup> A showing of negligence by Oliveira is not required to trigger the indemnification. Inasmuch as the underlying action is based on the work performed by Oliveira at the worksite, defendants are entitled to indemnification under Section 6 of Exhibit F. Although, as determined herein, defendants are not liable to plaintiff, their absence of liability to plaintiff does not end the inquiry on the subject of indemnification. The broadly worded indemnification under Section 6 of Exhibit F embraces defendants’ additional right to reimbursement from Oliveira for their litigation-related counsel fees, costs and expenses (*Breed, Abbott & Morgan v Hulko*, 139 AD2d 71, 74 [1st Dept 1988], *affd* 74 NY2d 686 [1989]).

Accordingly, the second branch of defendants’ motion which is for conditional summary judgment on their contractual indemnification claim against Oliveira is granted to the extent that they are permitted to recover from Oliveira their litigation-related counsel fees,

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<sup>26</sup> Trade Contract, Exhibit F, pages 103-104.

costs and expenses which they (or their insurance carriers) incurred in defending this action. Conversely, the initial branch of Oliveira's motion which is for summary judgment dismissing defendants' contractual indemnification claim is denied.

*Insurance-Procurement Claim*

Without expressly requesting such relief in their notice of motion, defendants also seek partial summary judgment on the issue of liability as against Oliveira for the latter's alleged failure to obtain the requisite insurance coverage. Although the insurance-procurement claim is not pleaded in defendants' third-party complaint, "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998] [internal quotation marks and citation omitted]). Oliveira's failure to object to the absence of the requisite pleading of the insurance-procurement claim in the third-party complaint corroborates that it "has not been misled to its prejudice" (*id.*).

"[A]n agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify" (*Longwood Cent. School Dist. v American Employers Ins. Co.*, 35 AD3d 550, 551 [2d Dept 2006] [internal quotation marks omitted]). Oliveira admits that it did not obtain the requisite liability coverage. Nonetheless, the Court's ruling that defendants are not liable to plaintiff has rendered moot both the insurance-procurement branch of defendants' motion and the corresponding branch of Oliveira's motion.

Oliveira's Counterclaims Against Defendants

The remaining branch of defendants' motion which is for summary judgment dismissing Oliveira's counterclaims is granted without opposition.

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

### Conclusion

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment (Motion Seq. No. 04) is *granted to the extent* that: (1) plaintiff's claims for common-law negligence and under Labor Law §§ 200, 240 (1), and 241 (6) claims are dismissed as against both defendants; (2) defendants are granted contractual indemnification against third-party defendant Oliveira for their litigation-related counsel fees, costs and expenses, in accordance with Section 6 of Exhibit F of the Trade Contract; and (3) Oliveira's counterclaims against defendants are dismissed without opposition; and the remainder of defendants' motion is denied as moot; and it is further

**ORDERED** that plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims as against defendants (Motion Seq. No. 06) is *denied in its entirety*; and it is further


**ORDERED** that Oliveira's motion for summary judgment dismissing defendants' third-party claims as against it (Motion Seq. No. 05) is *denied in its entirety*; and it is further

**ORDERED** that in light of the dismissal of the underlying action and the resolution of defendants' third-party claim for contractual indemnification against Oliveira, the parties' next scheduled appearance at JCP-1 on September 21, 2023 at 10 a.m. is canceled; and it is further

**ORDERED** that defendants' counsel is directed to electronically serve a copy of this decision, order and judgment on the other parties' respective counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision, order and judgment of the Court.

ENTER,

  
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J. S. C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

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KINGS COUNTY CLERK  
FILED