

**Barrera-Romero v Wythe Holdings LLC**

2024 NY Slip Op 30163(U)

January 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 501879/2020

Judge: Debra Silber

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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 10<sup>th</sup> day of January, 2024.

P R E S E N T:

HON. DEBRA SILBER, Justice.

-----X  
SIDNEY BARRERA-ROMERO,

Plaintiff,

-against-

WYTHE HOLDINGS LLC.,  
PH 296 WHYTHE I LLC.  
and Y.N.H. CONSTRUCTION INC.,

Defendants.

-----X  
WYTHE HOLDINGS LLC.,  
PH 296 WHYTHE I LLC.  
and Y.N.H. CONSTRUCTION INC.,

Third-Party Plaintiff(s),

-against-

CORE SCAFFOLD SYSTEMS, INC.,

Third-Party Defendant(s).

-----X  
CORE SCAFFOLD SYSTEMS, INC.,

Second Third-Party Plaintiff,

-against-

K&V GARCIA CORP.,

Second Third-Party Defendant.

-----X  
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Replies \_\_\_\_\_

98-124, 128-129, 131  
134-135, 140-143, 145, 146-152  
144, 155, 158, 162, 164, 172

Upon the foregoing papers, all three defendants/third-party plaintiffs, Wythe Holdings LLC., (Wythe), PH 296 Wythe I LLC (PH 296) and Y.N.H. Construction, Inc., (YNH) (collectively, defendants) move (in motion [mot.] sequence [seq.] number [no.] 4) for an order: 1) pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint, which asserts claims under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence; 2) granting them summary judgment against third-party defendant Core Scaffold Systems Inc., (Core) and second third-party defendant K&V Garcia Corp., (K&V) on defendants' third-party claims and cross claims for contractual indemnification, breach of contract to provide insurance coverage, common law indemnification and contribution; 3) granting them summary judgment dismissing any and all cross claims and/or counterclaims asserted against defendants by Core; and 4) pursuant to CPLR 3124, 2221, 3212 (a), and 2004, for leave to conduct the examination before trial of Core and to renew and/or refile the instant summary judgment motion after completion of said examination before trial.<sup>1</sup> Plaintiff Sidney Barrera-Romero (plaintiff) cross-moves (in mot. seq. no. 5) for an order granting him partial summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims.

### ***Background and Procedural History***

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<sup>1</sup> At oral argument, defendants withdrew the branch of their motion seeking to depose Core and to re-file the motion afterwards.

Defendants Wythe and PH 296 (the owner defendants) were the joint owners of the premises located at 296 Wythe Avenue in Brooklyn, New York at the time of plaintiff's accident. Plaintiff was working there on a project which involved the demolition of an existing building and the construction of a new building. The owners retained YNH as its construction manager for the project. YNH subcontracted with Core for the construction of the scaffolding and sidewalk bridge. Core then sub-subcontracted with second third-party defendant K&V to actually perform the scaffolding and sidewalk bridge work. Plaintiff testified at his EBT that he was employed by Core as a helper and that he received all of his instructions regarding what work to perform from a Core foreman. Specifically, he testified that his supervisor was a person named Vicente. Plaintiff's duties included bringing materials and tools to his coworkers who were working on constructing the sidewalk bridge and the scaffolding. The sidewalk bridge was approximately 14 feet high. Plaintiff had been working at the site for approximately three days prior to his accident, which occurred on September 13, 2019. On that day, he was working on top of the sidewalk bridge with several coworkers. After working for two to three hours, plaintiff attempted to descend from the sidewalk bridge to the sidewalk. With his left foot and hands on the platform of the sidewalk bridge, plaintiff put his right foot on the first horizontal cross beam, but plaintiff was not able to then bring his left foot down to a cross beam, so he attempted to move his right foot to the other side of the cross beam. At that point, his right foot slipped, causing plaintiff to fall to the ground and sustain injuries. Plaintiff testified that there was no ladder present at the site to use to access the platform of the sidewalk bridge, or any type of lift or elevator.

He further testified that there was no guardrail or safety railing in the area where he was working.

On or about January 24, 2020, plaintiff commenced this action against defendants, asserting claims for negligence and the violation of Labor Law §§ 200, 240(1) and 241(6). Defendants joined issue via the e-filing of a verified answer dated March 16, 2020. Defendants commenced the First Third-Party Action against Core via e-file on June 12, 2020. Core answered and asserted counter claims against defendants, by e-filing an answer on August 19, 2020. Core commenced the Second Third-Party Action against K&V via e-file on July 19, 2021. K&V was served via the New York State Secretary of State on July 26, 2021. Defendants allege that they served their cross claims [Doc 96] against K&V via e-file and/or first class mail<sup>2</sup> on January 13, 2022. K&V did not answer the second third party action or the cross claims.

The parties engaged in discovery and plaintiff filed his Note of Issue and Certificate of Readiness on November 22, 2022. Defendants then timely moved for summary judgment. Plaintiff's cross motion was filed approximately two weeks past the deadline for moving for summary judgment.<sup>3</sup> However, the law in the Second Department is that “[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds” (*Munoz v*

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<sup>2</sup> The affidavit of service is ambiguous [Doc 96].

<sup>3</sup> Pursuant to the Uniform Civil Term Rules of the Supreme Court, Kings County, a motion for summary judgment must be made no later than 60 days after the filing of the note of issue, unless leave of the court is obtained on good cause shown (*see Goldin v New York and Presbyt. Hosp.*, 112 AD3d 578, 579 [2nd Dept 2013], citing Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6).

*Salcedo*, 170 AD3d 735 [2d Dept 2019]). Accordingly, the court will determine the merits of both motions.

### ***The Parties' Motion and Cross Motion***

All three defendants seek an order: 1) pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's claims arising under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence; and 2) for summary judgment on behalf of all defendants/third-party plaintiffs against Core and K&V on defendants' claims for contractual indemnification, breach of contract to provide insurance coverage, common law indemnity and contribution. Defendants also seek an Order dismissing Core's counterclaims for common law indemnification and contribution. Plaintiff cross-moves for an order granting him partial summary judgment under his Labor Law §§ 240 (1) and 241 (6) claims.

In support of their motion, defendants argue that plaintiff's complaint should be dismissed as against all defendants because he was the sole proximate cause of his accident. Defendants claim that plaintiff decided to descend the sidewalk bridge by using the cross beams without any instruction or direction to do so from the moving defendants. They further assert that all of plaintiff's claims should be dismissed as against YNH, as it was merely the construction manager and thus is not subject to liability. In this regard, defendants contend that YNH was only responsible for scheduling subcontractors' work at the job site, ensuring that the subcontractors' work fell within the budget and was performed in a timely manner. YNH maintains that it exercised only general supervisory control over the work being performed and did not have the authority to stop plaintiff's work.

Specifically, defendants argue that plaintiff's Labor Law § 240 (1) claim should be dismissed as there is no evidence that the sidewalk bridge was defective or inadequately secured. They contend that plaintiff's accident was caused solely by his misstep on a metal beam while descending the sidewalk bridge. Defendants note that there is no testimony establishing that the sidewalk bridge collapsed, tipped over, wobbled, or moved in any respect. Defendants further point out that plaintiff and his coworkers had used the horizontal beams to ascend and descend from the bridge on the days prior to, and on the day of his accident, without incident, and that plaintiff did not identify any defect in the beams.

In opposition, and in support of the branch of plaintiff's cross motion seeking summary judgment in his favor on his Labor Law § 240 (1) claim, plaintiff argues that defendants' failure to provide him with adequate safety devices was the proximate cause of his fall and resulting injuries. Specifically, plaintiff notes that his testimony is undisputed - he was not provided with a ladder to safely access the sidewalk bridge, and the sidewalk bridge lacked any form of railing to prevent the workers from falling off the edge during the construction of the scaffold. Plaintiff further points out that defendants concede that they did not provide a safety belt, harness or any type of safety line to plaintiff. Thus, plaintiff argues that defendants violated Labor Law § 240 (1) and any actions he took could not be considered the sole proximate cause of his accident.

### *Discussion*

“Summary 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, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). “The proponent for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [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 admissible evidence to establish the existence of material issues of fact which require a trial for resolution (see *Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

***Labor Law § 240 (1)***

Labor Law § 240 (1), states, in relevant part, 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 . . .

The purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v DD 11th Ave., LLC.*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries” (*id.*). “A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability” (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003];

*see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). In this regard, “where . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker’s conduct cannot be deemed solely to blame for it” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). In cases involving falling workers, “[w]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his or her materials” (*Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020], quoting *Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011]).

Here, the court finds that defendants have failed to establish their entitlement to summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim. It is undisputed that plaintiff was not provided with any safe means to ascend or descend the sidewalk bridge, such as a ladder or lift, and had no option but to climb up and down on the beams of the sidewalk bridge itself in order to access his worksite (*see Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020] [denying defendants’ summary judgment motion dismissing plaintiff’s Labor Law § 240 (1) claim where “defendants submitted no evidence showing that appropriate safety devices were ‘readily available’ to the injured plaintiff within the meaning of the statute”], quoting *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Additionally, the court finds no merit to defendants’ assertion that plaintiff was the sole proximate cause of his accident because he decided to descend using the cross beams without any instruction or direction from defendants. As plaintiff points out in opposition,

a plaintiff's actions cannot be the sole proximate cause of an accident where a statutory violation has been found.

“A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she (1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices 'were available and that [he or she was] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had [he or she] 'not made that choice'" (*Iannaccone v United Natural Foods, Inc.*, 219 AD3d 819, 820 [2d Dept 2023], quoting *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; see *Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2d Dept 2020]). Here, no evidence has been presented to demonstrate that plaintiff was instructed to use a ladder, or that there even was a ladder or other safety device available for his use (see *Cardona v New York City Hous. Auth.*, 153 AD3d 1179, 1179-1180 [1<sup>st</sup> Dept 2017] [holding that “defendants' contention that plaintiff fell from the sidewalk bridge as a result of his “carelessness” and “bad decisions,” . . . is unavailing. Any comparative negligence by plaintiff is not a defense to his Labor Law § 240 (1) claim”]).

To the extent that defendants argue that plaintiff's claims should be dismissed as against YNH because it served as a construction manager and not a general contractor, the court finds that defendants have failed to make a prima facie showing that YNH was neither a “general contractor” nor a “statutory agent” within the meaning of the Labor Law. Although a construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240(1), or 241(6), when it functions as an agent of the property

owner or the general contractor in circumstances where it has the ability to control the activity which brought about the plaintiff's injury, responsibility will attach (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Mitchell v 148th St. Jamaica Condominium*, \_\_AD3d \_\_, 2023 NY Slip Op 05497 [2d Dept 2023] [holding tat “[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured”]; *Jin Gak Kim v Kirchoff-Consigli Constr. Mgt., LLC*, 197 AD3d 1289, 1290-1291 [2d Dept 2021]; *Maurisaca v Bowery at Spring Partners, L.P.*, 168 AD3d 711, 712 [2d Dept 2019]). Specifically, YNH’s status as a contractor subject to the Labor Law is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (*see Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782, 784 [2d Dept 2021]; *Johnsen v City of New York*, 149 AD3d 822, 822 [2d Dept 2017]; *Samaroo v Patmos Fifth Real Estate, Inc*, 102 AD3d 944, 945 [2d Dept 2013]; *Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]).

The contract entered into between the owners and YNH states that “[t]he Construction Manager shall coordinate and be fully responsible for the work, acts, and omissions of its subcontractors and of persons either directly or indirectly employed by its subcontractors” (NYSCEF Doc No.116 at Page 9, at ¶ 22). The contract additionally provides that: “[t]he Construction Manager shall be solely responsible for the construction means, methods, techniques, and procedures of the Work. The Construction Manager shall be responsible for the safety of visitors to the Site, invitees, and agents and employees of the Construction Manager and subcontractors of Construction Manager” (*Id* at Page 7, at ¶ 4).

Moreover, plaintiff, in his opposition, points out that in the contract between YNH and Core, [Doc 117] YNH specifically refers to itself as a general contractor. Additionally, the contract between YNH and the owners includes a proposal at Page 17, signed by both parties, which refers to YNH as the general contractor and provides that “Owner and General Contractor agree that General Contractor shall manage and control all labor, Site Supervision, materials, equipment and all required permits etc., necessary for prosecution and completion of all work and related work for the project...” (Doc 116 at Page 17, at ¶ 5).

Since YNH had the authority to choose/hire the subcontractors who did the work, including plaintiff's employer, and directly entered into contracts with them, it had the authority to exercise control over the work, even if YNH did not actually do so (*see Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018]; *Williams*, 276 AD2d at 626). Under these circumstances, defendants have failed to establish that YNH was not a general contractor and/or a statutory agent within the meaning of the Labor Law (*see Eliassian v G.F. Constr., Inc.*, 163 AD3d 528, 529-530 [2d Dept 2018]; *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 1131-1132 [2d Dept 2007]). Since defendants have failed to establish their prima facie entitlement to summary judgment dismissing the complaint as against YNH, the court need not address the sufficiency of the plaintiff's papers in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Based upon the foregoing, the branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

The court finds that the plaintiff has made a prima facie showing for summary judgment. He has established that he was exposed to an elevation-related risk for which no

safety devices were provided to prevent him from falling, and that such failure was a proximate cause of his injuries (*see Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640, 643-644 [2d Dept 2023]; *Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1<sup>st</sup> Dept 2021]; *see Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1163 [2d Dept 2020]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695[2d Dept 2006]). Accordingly, the branch of plaintiff's cross motion seeking summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted.

***Labor Law § 241 (6)***

Labor Law § 241 (6), provides, in pertinent part, that:

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 persons employed therein or lawfully frequenting such places.

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Moscatti v Consolidated*

*Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011]).

In his bill of particulars, plaintiff alleges violations of Industrial Code §§ 23-1.5, 23-1.8, 23-1.16, 23-1.18, 23-1.21, and 23-5.1, as well as violations of several OSHA rules.<sup>4</sup> As an initial matter, defendants have made a prima facie showing that 12 NYCRR §§ 23-1.5, 23-1.8, 23-1.16, and 23-1.21 are either too general to support a Labor Law § 241 (6) claim, or are inapplicable given the circumstances of the accident. In any event, plaintiff has not discussed these regulations in his opposition papers and has not moved for summary judgment in his favor based upon a violation of any of these regulations, and therefore has abandoned his Labor Law § 241 (6) claim to the extent it is based upon alleged violations of these provisions (*see Kempisty v 246 Spring Street, LLC*, 92 AD3d 474, 475 [1<sup>st</sup> Dept 2012] [holding that “[w]here a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

The court next turns to the remaining Industrial Code regulations, 12 NYCRR §§ 23-1.18 and 23-5.1. Section 23-1.18 (b) (2) relates to sidewalk shed construction and provides in pertinent part that:

(2) The outside edge and the ends of the deck of every sidewalk shed shall be provided with a substantial enclosure at least 42 inches in height, consisting of boards not less than one inch thick laid close, or of screening formed of not less than No. 16 U.S. gage steel wire mesh with openings which will reject a one and one-half inch diameter ball, or of corrugated metal sheet of not less than No. 22 U.S. gage or of exterior grade plywood not less than one-half inch thick.

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<sup>4</sup> A violation of an OSHA regulation cannot serve as a predicate to liability under Labor Law § 241 (6).

Defendants argue that § 23–1.18 is not applicable and/or has not been violated because the sidewalk bridge was still under construction by plaintiff and his co-workers when plaintiff’s accident occurred, and thus, there can be no violation. In opposition, plaintiff argues that it is undisputed that the sidewalk bridge lacked any safety railings or barriers to prevent plaintiff from falling off the sidewalk bridge. The court finds that even if this Industrial Code provision was violated, plaintiff’s accident was not caused by a lack of safety railing or barrier. Here, plaintiff did not fall off the sidewalk bridge due to a lack of a safety railing. Rather, the accident occurred when he intentionally attempted to descend from the sidewalk bridge but was unable to do so safely due to the lack of an appropriate ladder or other safety device. Accordingly, the court finds that this Industrial Code section is not applicable to the facts of the instant case and cannot serve as a predicate for plaintiff’s Labor Law § 241 (6) claim (*see Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865, 867 [2d Dept 2016]; *Canosa v Holy Name of Mary R.C. Church*, 83 AD3d 635, 637 [2d Dept 2011]; *Mikcova v Alps Mech., Inc.*, 34 AD3d 769, 770 [2d Dept 2006]).

Defendants also argue that Industrial Code § 23-5.1 (j) (1) is similarly inapplicable to the facts of the case. This Industrial Code provision provides, in pertinent part, that the “open sides of all scaffold platforms . . . shall be provided with safety railings . . .” Defendants maintain that plaintiff alleges he was injured on a sidewalk bridge and that this code provision applies solely to scaffolds. In opposition, plaintiff argues that this provision applies to sidewalk bridges as well as scaffolds. The court finds that plaintiff’s accident was not caused by the absence of a safety railing and, thus, this Industrial Code provision is

inapplicable and cannot serve as a predicate for plaintiff's Labor Law § 241 (6) claim (*see Karwowski*, 144 AD3d at 867; *Canosa*, 83 AD3d at 637; *Mikcova*, 34 AD3d at 770).

Accordingly, that branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted and said claim is dismissed. That branch of plaintiff's cross motion seeking partial summary judgment on his Labor Law § 241 (6) claim is denied.

### ***Labor Law § 200/Common-Law Negligence***

Section 200 of the Labor Law statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "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" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Where "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018], quoting *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d

994, 997 [2d Dept 2017]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016]). On the other hand, “[w]here a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work.

Moreover, “the right to generally supervise the work, stop the contractor’s work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence” (*Marquez*, 141 AD3d at 698, quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; see *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], *affd on other grounds* 15 NY3d 869 [2010]; *Torre v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept 2013]).

Here, defendants argue that if the court determines that plaintiff’s accident was caused by an allegedly dangerous premises condition, they cannot be held liable because either Core or its sub-subcontractor, K&V, installed the sidewalk bridge and there is no evidence that defendants had actual or constructive notice of any defective condition involving the sidewalk bridge prior to plaintiff’s accident. Alternatively, defendants assert that if the court holds that the accident was caused by the means and methods of plaintiff’s work, defendants cannot be held liable because they did not direct, control or supervise the work that plaintiff was performing at the time of his accident.

In opposition, plaintiff argues that the branch of defendants’ motion seeking summary judgment dismissing his Labor Law § 200 and general negligence claims should be denied

with respect to YNH as it assumed responsibility for the means and methods and all operations on site pursuant to the terms of its contract with the property owner.

Here, the accident falls into the “means and manner of the work” category, rather than a premises condition (*see Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1191 [2d Dept 2020]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 606-607 [2d Dept 2013]). “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). Defendants here have demonstrated that they did not exercise any supervision over the means and methods of plaintiff’s work through the submission of an affidavit from YNH’s President, Nick Hershkowitz, affirming that YNH “did not exercise any direction, control or supervision over the means or methods used to perform any of the construction work, including but not limited to plaintiff’s work for CORE, or any sub-subcontractor of CORE, including K&V . . . YNH did not have the authority to stop the work of any contractor, subcontractor, sub-subcontractor, or any employees thereof, including CORE and K&V” (NYSCEF Doc No. 113, *Herschkowitz aff* at ¶¶ 13-14). In addition, defendants submit the testimony of Solomon Stern, the YNH project manager at the site, who testified that YNH was only responsible for ensuring that the building was being built according to the plans and within the budget, and for scheduling subcontractors (NYSCEF Doc No. 108, *Stern tr* at 20). Finally, plaintiff’s own deposition testimony demonstrates that he received all of his instruction and daily work orders from a Core foreman (NYSCEF Doc No. 107, *plaintiff tr*

at 51, lines 20-25, at 52, lines 2-13). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and negligence claims is granted and these claims are dismissed (*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 v A & M Cook, LLC*, 120 AD3d 651, 652-653 [2d Dept 2014]; *Ortega*, 57 AD3d at 61-62).

### ***Contractual Indemnification as against Core***

Defendants argue that they are entitled to contractual indemnification from Core pointing to the express terms contained in the YNH-Core subcontract. Specifically, defendants point to Article 1.0 of Exhibit D of the contract which provides, in pertinent part, as follows:

In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor (Core) shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor (YNH), all entities the Contractor is required indemnify and hold harmless, if identified herein the Owner of the property (Wythe and PH 296) . . . 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, due to negligent performance of 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 negligence of the Indemnified Parties. This indemnity agreement shall survive the completion of the Work specified in the Contract Agreement.

Defendants argue that they have demonstrated their freedom from any active negligence and note that Wythe and PH 296 are the owners of the subject premises and YNH is the

construction manager. They further point out that none of these entities performed any construction work at the site, they did not direct, control, or supervise plaintiff's work and did not have the authority to stop plaintiff's work. Moreover, defendants point out that plaintiff testified that he was employed by Core and was performing work involving the construction of the sidewalk bridge, work that is specifically covered under the subcontract between YNH and Core. Defendants note that Core has impleaded K&V based upon the sub-subcontract between Core and K&V, and has submitted an incident report which indicates that plaintiff fell from the sidewalk bridge while employed by K&V. They argue that regardless of which entity was plaintiff's employer, the accident arose out of Core's work at the construction site, which falls within the scope of the YNH-Core subcontract. Finally, defendants assert that plaintiff's accident resulted from the negligent performance of Core/K &V's work.

In opposition, Core argues that defendants are not entitled to contractual or common law indemnification from it as Core was not negligent and did not supervise the injury producing work. In this regard, Core asserts that in order for the indemnity provision at issue to be triggered, it must be demonstrated that Core was negligent. At the outset, Core points out that contrary to defendants' assertion, plaintiff was not employed by Core. In support of this contention, Core points to the determination by the Workers' Compensation Board, which Core contends found that plaintiff was not Core's employee, and discharged Core from the Workers' Compensation proceeding (NYSCEF Doc No. 143). Core further points to the deposition testimony of its CEO, Valon Pilku, who testified that: Core did not employ any laborers at the site and had subcontracted out all of the labor; did not have a

representative at the site; did not provide plaintiff with any tools or equipment and did not supervise, direct or control plaintiff's work for K&V. He further testified that Vicente Garcia was the owner of K&V - - the person plaintiff referred to as his supervisor in his testimony. Additionally, Core points out that in the YNH-Core subcontract, the language requiring Core to indemnify defendants for the negligent performance of Core's subcontractors was intentionally crossed out and thus, Core is under no obligation to indemnify defendants for plaintiff's accident, as he was employed by K&V. Finally, Core notes that all of the terms and conditions of Core's proposal/estimate was incorporated into the subcontract, including an obligation for YNH to indemnify Core "[t]o the fullest extent permitted by law ... from any claims arising out of the use, lease, rental or existence of the equipment at the project address." Thus, Core argues that since plaintiff's accident arose out of the "existence of the equipment" namely the sidewalk bridge, at the project, YNH actually owes indemnity to Core (as asserted in Core's counterclaim).

In reply, defendants argue that pursuant to the contract, Core was responsible for supplying and installing the scaffolding, and was required to provide all labor and materials, including all safety requirements, for the duration of the work. Defendants point to the testimony of Mr. Pilku, who testified that Core procured the permits for the erection of the scaffold and supplied the equipment to the jobsite, including the sidewalk shed and scaffolding materials, but did not provide any ladders or safety harnesses. Defendants also assert that Core was required to get permission from YNH prior to sub-subcontracting any of the work to K&V and failed to do so, and Core also failed to ensure that the sub-subcontract incorporated Core's duties to defendants under the YNH-Core subcontract. In

addition, defendants assert that there is no merit to Core's claim of a reciprocal duty of contractual indemnification as the subcontract's rider specifically provided that "[t]he terms and conditions of this Rider shall supersede and govern any inconsistent term found in other parts of the written agreement and other riders between the parties." Moreover, defendants argue that the Workers' Compensation decision did not determine that Core was not plaintiff's employer, just that it did not have to issue disability payments, as its carrier, the State Insurance Fund, was directed to issue such payments. Accordingly, defendants contend that they are entitled to summary judgment on their claim seeking contractual indemnification as against Core.

### Discussion

"The right to contractual indemnification depends upon the specific language of the contract" (*Pena v 104 N. 6th St. Realty Corp.*, 157 AD3d 709, 710-711 [2d Dept 2018]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). Further, "[t]he intent to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*Pena*, 157 AD3d at 710-711; *De Souza*, 155 AD3d at 606). Moreover "[a] party seeking contractual indemnification pursuant to a contract relative to the construction of a building must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (*Chuqui v Amna, LLC*, 203 AD3d 1018, 1023 [2d Dept 2022]; see General Obligations Law § 5-322.1; *Barreiros v Inter County Paving Assoc., LLC*, 192 AD3d 742, 743 [2d Dept 2021]; *Zukowski v Powell*

*Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1102 [2d Dept 2020]; *Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]).

Here, defendants have demonstrated that they were not negligent and that any liability imposed upon them is strictly statutory and vicarious. YNH's subcontract with Core contains a broadly worded indemnification provision requiring Core to indemnify defendants "from and against all liability" "due to negligent performance of 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." Thus, contrary to Core's contention, the indemnification provision does not limit indemnification only to claims arising out of Core's negligence in the performance of the work (*see Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Muhjaj v 77 Water St., Inc.*, 148 AD3d 1165, 1168 [2d Dept 2017]; *Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078 [2d Dept 2015]; *Bermejo v New York City Health and Hosps. Corp.*, 119 AD3d 500, 503 [2d Dept 2014]; *Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1019 [2d Dept 2011]; *Tobio v Boston Props., Inc.*, 54 AD3d 1022, 1024 [2d Dept 2014]).

The indemnification provision specifically requires Core to defend and indemnify YNH for work performed by Core and/or for work performed pursuant to a subcontract entered into by Core for the performance of the work, as occurred here pursuant to the Core-K&V sub-subcontract. In addition, contrary to Core's contention that it had no indemnity obligation related to work performed by K&V because the language requiring it to indemnify defendants for any negligence of its sub-subcontractors was crossed out in the Core-YNH

subcontract, a careful reading of the document, at Exhibit D, reveals that this is not the case. Exhibit D, which contains the indemnification provision, states that “[t]he terms and conditions of this Rider shall supersede and govern any inconsistent term found in other parts of the written agreement and other riders between the parties” (NYSCEF Doc No. 117). Inasmuch as the court finds the indemnity provision is applicable and defendants were not negligent, defendants are entitled to summary judgment on their claim for defense and contractual indemnification as against Core (*see Mogrovejo*, 207 AD3d at 463; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 605-606 [2d Dept 2017]; *Muevecela v 117 Kent Ave., LLC*, 129 AD3d 797, 798 [2d Dept 2015]; *Tobio*, 54 AD3d at 1024).

### ***Common Law Indemnity and Contribution as Against Core***

Defendants argue that they are entitled to common law indemnity and contribution from Core because any liability imposed upon defendants is statutory and not due to the negligence of defendants, but rather that plaintiff’s accident resulted from the negligence of Core and/or K&V.

In opposition, Core argues that the defendants have failed to demonstrate that Core was negligent or had control over the injury producing work. Core asserts that it did not supervise the means or methods of plaintiff’s work and did not even have a representative on site during the installation of the sidewalk bridge. In support of this assertion, Core points to plaintiff’s testimony that he received direction only from his supervisor Vicente or Vicente’s brother, and to the testimony of Core’s representative Mr. Pilku, establishing that Vicente was one of the owners of K&V. Thus, Core maintains that defendants’ common law

indemnity claim must be denied as against Core since it did not exercise any direction or control over plaintiff's work. Core also points to a decision issued by the Workers' Compensation Board which it maintains "determined that K&V was plaintiff's employer, not Core." However, the court notes that, despite a careful reading of the Board's decision, it remains unclear whether there was any definitive determination as to who plaintiff's employer was at the time of the accident. Although the Workers' Compensation Board's decision listed plaintiff's employer as Core Scaffold Systems Inc., it also stated that "Core Scaffold is discharged and removed from notice" (NYSCEF Doc No. 143).

"In order to establish a claim for common-law indemnification, a party must "prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017] [internal citations omitted]). "Where a defendant's alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant's favor on the basis of common-law indemnification 'is premature absent proof, as a matter of law, that [the party from whom indemnification is sought] was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff's injury'" (*Nasuro v PI Assoc., LLC*, 49 AD3d 829, 832 [2008], quoting *Benedetto v Carrera Realty Corp.*, 32 AD3d at 875; see *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]).

Here, the court finds that defendants are not entitled to summary judgment on their claim for common law indemnification as against Core, as there are issues of fact as to

whether it was Core and/or K&V that were negligent. It is also unclear which entity was plaintiff's employer and which entity was responsible for directing, controlling and supervising plaintiff's work. As it is unclear which entity was in fact plaintiff's employer, the court cannot resolve the claim for common law indemnification, as "Workers' Compensation Law § 11 unambiguously shields employers from liability to third parties for contribution and indemnity . . ." unless the employee "has sustained a 'grave injury'" (*Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 71 [2d Dept 2023], quoting WCL § 11 [1]). In the instant case, there is nothing in the record that indicates that any of plaintiff's injuries rise to the level of a "grave injury." Accordingly, the branch of defendants' motion seeking summary judgment on their claims for common law indemnification and contribution from Core is denied.

### ***Breach of Contract to Procure Insurance***

Defendants argue that they are entitled to coverage as additional insureds under the policy of insurance that Core was required to procure pursuant to the Core-YNH subcontract [Doc 117]. Specifically, they point to Section 2.1 of Exhibit D (the Indemnity/Insurance Rider) to the subcontract between YNH and Core [*id.* Page 24] which provides in pertinent part that:

"The Subcontractor shall procure and shall maintain until final acceptance of the Work, such insurance as will protect the Contractor, all entities the Contractor is required indemnify and hold harmless, if identified here in [*sic*] the Owner, and their officers, directors, agents and employees, for claims due to the negligent performance of Subcontractor's Work under this Contract Agreement, whether performed by the Subcontractor, or by anyone directly or indirectly employed by Subcontractor, or by anyone for whose acts Subcontractor may be liable."

Defendants further point out that § 2.2 of the Indemnity/Insurance Rider to the subcontract provides that the insurance shall “include contractual liability coverage and additional insured coverage” for the benefit of YNH, Wythe and PH 296, and that Core was required to procure at least \$1,000,000 in general liability coverage and to designate defendants as additional insureds thereunder.

The motion papers include certificates of insurance indicating that Wythe and YNH are identified as certificate holders and as additional insureds on a primary and non-contributory basis. It seems that co-owner defendant PH 296 was omitted.

Core does not raise any opposition to this branch of defendants’ motion. Here, plaintiff’s accident, whether he was employed by Core or K&V, is an incident that would fall within the scope of the coverage required under the Core-YNH subcontract, as it occurred during the performance of the work pursuant to the subcontract. The record includes certificates of insurance indicating that Core has procured the requisite type and amount of coverage required under the YNH-Core subcontract and has named Wythe and YNH as additional insureds. Co-owner PH 296 seems to have been inadvertently omitted.

Accordingly, that branch of defendants’ motion seeking summary judgment on its cause of action for Core’s breach of the contract to procure insurance is granted. Defendant PH 296, however, must still demonstrate at the trial of this matter that it has incurred unreimbursed damages as the result of the breach (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 115-116 [2001]; *Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 935 [2d Dept 2015]).

***Defendants’ Cross Claims against K&V***

Defendants maintain that they are entitled to contractual indemnification from K&V, either as direct or intended beneficiaries of the sub-subcontract between Core and K&V. They have also asserted cross claims for common law indemnification, contribution and breach of contract to procure insurance against K&V.

The court notes that K&V has not answered or appeared in this action. Thus, at the time defendants attempted to assert their cross claims against K&V [Doc 96, “Notice of Cross Claims”], defendants were required to serve K&V in the same manner as with a summons and complaint (*see Hernandez*, 2022 NY Slip Op 30425[U], \*2-3; CPLR 3012 [a]). The affidavit of service is ambiguous, but seems to say the cross claims were served on K&V “via NYSCEF” and “via first class mail”.

To be clear, once a party is joined as a third-party defendant, it becomes a party to the entire action and is subject to cross-claims asserted by the direct defendants (See CPLR 3019(b); *Doyle v Happy Tumbler Wash-O-Mat, Inc.*, 113 AD3d 818 [2d Dept 1985]; *Patrician Plastic Corp. v Bernadel Realty Corp.*, 25 NY2d 599 [1970]). But the third-party defendant must be served with the cross claims. If it has appeared and answered, service of cross claims by electronic filing is sufficient. If it has not answered, it must be properly served.

Accordingly, as the court has no jurisdiction over K&V with regard to the defendants’ cross claims, the branch of the defendants’ motion which seeks summary judgment on their cross claims against K&V Garcia Corp. must be denied. It is noted that these claims are not time barred, and may still be properly asserted.

### *Conclusions of Law*

Accordingly, it is hereby

**ORDERED** that the branch of defendants' motion (mot. seq. no. 4) for summary judgment dismissing plaintiff's claims arising under Labor Law 240 (1) is denied; the branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law §§ 241 (6), 200 and common law negligence claims is granted, and these claims are dismissed; the branch of the defendants' motion seeking summary judgment on defendants' contractual indemnification claim as against Core is granted; the branch of defendants' motion seeking summary judgment dismissing Core's counterclaims for common law indemnification and contribution is granted; the branch of the defendants' motion seeking summary judgment on defendants' cross claims as against K&V is denied; the branch of the defendants' motion for summary judgment on its breach of contract to procure insurance asserted against Core is granted solely for co-defendant PH 296 and is denied for the other defendants; that branch of the motion seeking summary judgment on defendants' common law indemnification and contribution claims as against Core is denied; and it is further

**ORDERED** that plaintiff's cross motion (mot. seq. no. 5) seeking partial summary judgment on the issue of liability under his Labor Law § 240 (1) claim is granted; and the branch of his motion seeking partial summary judgment in his favor on his Labor Law § 241 (6) claim is denied; and it is further

**ORDERED** that Core is directed, to the extent that it has not already, to immediately assume defendants' defense, and to reimburse their legal fees and disbursements incurred thus far; and it is further

**ORDERED** that any dispute as to the amount of the attorneys' fees and disbursements which defendants have incurred and are entitled to be reimbursed for, for the period from the date the action was commenced to the date Core assumes its defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded.

This constitutes the decision and order of the court.

**E N T E R :**



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**Hon. Debra Silber, J.S.C.**