

Lopez v Lee Realty LLC

2024 NY Slip Op 32064(U)

June 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 521218/19

Judge: Ingrid Joseph

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At an IAS Term, Part 83 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 14th day of June, 2024.

P R E S E N T:

HON. INGRID JOSEPH

Justice.

-----X

HECTOR ROLANDO TEJADA LOPEZ,

Plaintiff,

-against-

Index No.: 521218/19

LEE REALTY LLC, LEE GARDENS, LLC, LEE GARDENS CONDO'S INC., FAIGY WALDMAN, YEDID BUILDERS INC., DYNAMIC DIGITAL CONSULTING, LLC, and HOMECORE INC.,

Defendants.

-----X

YEDID BUILDERS INC.,

Third-Party Plaintiff,

-against-

QUALITY FRAMERS LLC,

Third-Party Defendant.

-----X

YEDID BUILDERS INC.,

Second Third-Party Plaintiff,

-against-

DYNAMIC DIGITAL CONSULTING, LLC.,

Second Third-Party Defendant.

-----X

-----X
YEDID BUILDERS INC.,

Third Third-Party Plaintiff,

-against-

HOMECORE INC.,

Third Third-Party Defendant.
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____ 108-140, 141-144, 145-167

Opposing Affidavits (Affirmations) _____ 168, 169-170, 172-174, 176

Affidavits/ Affirmations in Reply _____ 175, 177, 179

Other Papers: _____

Upon the foregoing papers, plaintiff Hector Rolando Tejada Lopez (plaintiff) moves, in motion (mot.) sequence (seq.) 5, for an order pursuant to CPLR 3212 granting him summary judgment under his Labor Law §§ 240 (1) and 241 (6) claims against defendants Faigy Waldman (Ms. Waldman), Yedid Builders, Inc. (Yedid), Dynamic Digital Consulting, LLC. (Dynamic), and Homecore Inc. (Homecore). Plaintiff further moves for summary judgment against Yedid and Dynamic under his Labor Law § 200 and common-law negligence claims. Defendants Lee Gardens Condo’s Inc. (LGC) and Ms. Waldman move, in mot. seq. 6, for an order granting them summary judgment dismissing plaintiff’s complaint and all cross claims asserted against them. LGC and Ms. Waldman further move for summary judgment under their contractual and common law indemnification claims against Yedid. Defendants Yedid, Dynamic and Homecore cross-move, in mot. seq. 7, for an order granting them summary judgment dismissing plaintiff’s complaint and all cross claims asserted against them.

On July 18, 2019, plaintiff sustained various injuries after falling from a ladder while performing construction/renovation work in a condominium unit in a building located at 29 Walton Street in Brooklyn, New York (the building). The land on which the building was located was

owned by LGC and the building itself originally consisted of four units, with Ms. Waldman owning the unit on the top floor.¹ Prior to the accident, Ms. Waldman hired Yedid to serve as the general contractor on a project involving the construction of an additional apartment above her existing unit. Thus, among other things, the work required the removal of the existing roof of the building and replacing it with a new roof above the newly constructed condominium unit. After being hired as the general contractor, Yedid hired various subcontractors to perform work on the project including non-party Quality Framers (Quality) which was responsible for performing framing work. Quality, in turn, sub-subcontracted this work to plaintiff's employer, non-party Platoon Framers (Platoon). In addition to Quality, Yedid hired defendant Homecare via an oral agreement to provide a licensed construction superintendent on the jobsite. Thereafter Homecare hired Dynamic to perform this work. At his deposition, Dynamic's owner, Daniel Matovinovic, testified that he is a licensed construction superintendent and would visit the subject jobsite on a daily basis where he would "make sure that workers are ... working safely." Mr. Matovinovic further testified that he had the authority to stop any work which he deemed to be unsafe and to demand that unsafe conditions be corrected.

Approximately two to three months prior to the accident, plaintiff was hired as a carpenter by Platoon. After being hired, plaintiff worked at several different job sites including the construction project involved in this case. While performing work for Platoon, including on the underlying project, plaintiff was supervised by Moshe Glauber, who signed the subcontract agreement between Platoon and Quality on behalf of Platoon.² When working on the project, plaintiff was sometimes provided with a helper, Junior Augustine. However, on the day of the accident, Mr. Augustine was not at the jobsite and plaintiff worked alone.

On the day of the accident, plaintiff arrived at the jobsite at approximately 7:30 A.M. and met with Mr. Glauber who instructed him to install metal framing on the interior ceiling of the fifth floor of the premises using a 5-to-6-foot orange A-frame ladder that was already located on the floor. At his deposition, plaintiff testified that the area where he was installing the framing was very small and the floor in this area was wet and covered with debris including pieces of plumbing pipes, metal and wood. Plaintiff also testified that the flooring in this area, which

¹ Although Ms. Waldman owned the unit in question, she resided elsewhere as her son Joel Waldman lived there with his family.

² At his deposition, Samuel Hoffman, who was employed by Yedid as a site manager on the construction project, testified that Mr. Glauber managed Platoon's workers, including plaintiff.

consisted of a 4'x 8' piece of cement board subflooring, or "dragon board," was unlevel and shaky because it was not secured to the beams below with an adequate number of screws. However, both Mr. Hoffman and Mr. Matovinovic testified that there were no sources of water in the area where the accident took place, that there was no debris in this area, and that there were no loose or uneven floorboards in the area. Plaintiff also testified that there was a 4–5-foot square hole that was 3-4 feet deep located in front of the ladder that was surrounded by mesh netting, but not covered.

At the time of the accident, plaintiff was standing on the ladder with both feet located one step below the top of the ladder while moving a laser that he used to align the pieces of framing that he was installing. According to plaintiff's testimony, as he turned the laser, which was attached to the framing with a magnet, the ladder began to shake and he fell forward over the ladder into the hole in the floor. As he fell from the ladder, plaintiff grabbed onto a metal stud in an unsuccessful attempt to steady himself, which resulted in deep cuts to four of the (non-thumb) fingers on his left hand. Plaintiff further testified that after he landed at the bottom of the hole, the ladder fell on top of him. When asked what caused the ladder to move, plaintiff stated, "[t]here are many reasons that caused the ladder to move ... the floor was in very bad condition. There were loose and missing screws." When asked about the missing screws, plaintiff stated "[o]n the floor, the floor was shaking" and that "[t]he floor was not totally – it was imbalanced, it was not very strong. It was moving, it was not levelled" and that the floor "was not properly installed. It did not have the other screws that made the floor stable."

On September 26, 2019, plaintiff commenced the instant action by filing a summons and complaint against Ms. Waldman, LGC, Yedid, Lee Realty LLC, and Lee Gardens, LLC. The complaint alleged that plaintiff's injuries were caused by the defendants' negligence as well as their violations of Labor Law §§ 200, 241(1), and 241(6). After being served with the complaint, Ms. Waldman and LGC interposed an answer in which they asserted cross-claims against Yedid seeking common-law and contractual indemnity as well as damages for breach of contract. Yedid also interposed an answer which contained cross-claims against Ms. Waldman and LGC seeking common-law and contractual indemnification and damages for breach of contract. In addition, Yedid commenced third-party actions against Quality, Dynamic, and Homecore that were later discontinued. On April 30, 2021, a default judgment was entered against Lee Realty LLC and Lee Gardens, LLC. On August 24, 2021, plaintiff filed an amended complaint in which Dynamic and

Homecore were added as party defendants. Discovery is now complete and the instant motions are before the court.

LGC cross-moves for summary judgment dismissing all of plaintiff's claims against it. In support of its motion, LGC maintains that it is a condominium association that owns the land on which the building is located, but has no ownership interest in the condominium unit in which the accident took place. LGC further notes that it did not contract for, supervise or control any of the construction work that took place. Accordingly, LGC argues that it is not subject to liability as an owner or contractor under the Labor Law and may not be held liable under plaintiff's common-law negligence theory of liability.

In opposition to LGC's cross-motion, plaintiff initially notes that condominium associations may be held liable as owners under the Labor Law for accidents involving common areas of a building. Plaintiff further notes part of the underlying construction project involved the construction of a new roof on the building, which is a common area of the building. Accordingly, inasmuch as his accident occurred "on the preexisting roof level," plaintiff argues that LGC has failed to establish a prima facie entitlement to summary judgment dismissing his claims.

As an initial matter, the evidence before the court, including the deposition testimony of plaintiff, Mr. Hoffman, Mr. Matovinovic, and LGC's agent David Schwartz demonstrates that LGC did not have the authority to control or supervise any of the work that took place on the underlying project, including the work that plaintiff was performing at the time of the accident. Plaintiff's opposition papers do not contend otherwise. This evidence also demonstrates that LGC did not have access to Ms. Waldman's condominium unit. Accordingly, there is no basis for plaintiff's Labor Law § 200 or common-law negligence claims against LGC (*Mitchell v 148th Street Jamaica Condominium*, 221 AD3d 596, 598 [2023]).

Turning to plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against LGC, it is well-settled that only owners, general contractors, and their statutory agents are subject to liability under these statutes (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Here, it is undisputed that LGC was not a general contractor or statutory agent since it played no role in the underlying construction work. With respect to the issue of whether or not LGC was an owner for purposes of Labor Law §§ 240 (1) and 241 (6), unlike cooperative corporations, condominium boards of managers like LGC do not qualify as owners under the statutes unless the underlying accident/work occurred in or otherwise involved a common area over which the board retains

control (*Guryev v Tomchinsky*, 20 NY3d 194, 199-200 [2012]; *Jerdonek v 41 West 72 LLC*, 143 AD3d 43, 48 [2016]). Here, while it is true that part of the underlying project involved replacing the existing roof on the building, and that the roof is a common area of the building, it is clear that the work that plaintiff was carrying out at the time of the accident had nothing to with the replacement of the building's exterior roof. In particular, when asked at his deposition when the new roof was put on the building, Mr. Hoffman stated, "much before the incident because you can see on the job site that we had insulation and we don't put any insulation before we have a roof."³ Moreover, plaintiff himself testified that he was installing ceiling framing inside the condo unit when the accident occurred and made no mention of performing any work on the building's exterior roof. Thus, LGC is not subject to liability as an owner under Labor Law §§ 240 (1) and 241 (6). Accordingly, LGC's cross motion for summary judgment dismissing plaintiff's complaint against it is granted.

Ms. Waldman cross-moves for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against her, arguing that she is exempt from liability based upon the one and two-family homeowner exception to these statutes. Although plaintiff originally moved for summary judgment against Ms. Waldman under these statutes, he states in a footnote in his opposition papers to the cross-motion that he does not oppose Ms. Waldman's cross-motion to dismiss these claims. Accordingly, plaintiff's motion for summary judgment against Ms. Waldman under his Labor Law §§ 240 (1) and 241 (6) claims is denied and Ms. Waldman's cross-motion for summary judgment dismissing these causes of action against her is granted without opposition.

Turning to plaintiff's Labor Law § 200 and common-law negligence claims against Ms. Waldman, in support of her cross-motion to dismiss these claims, Ms. Waldman maintains that all of the evidence before the court demonstrates that she did not control or supervise plaintiff's work, or any of the work that took place in the premises prior to or at the time of the accident. In addition, Ms. Waldman argues that she did not create or have notice of any dangerous condition that may have contributed to the accident as she was not present at the condo unit during the construction work.

³ At the time he was asked this question, Mr. Hoffman was looking at a photograph of the accident scene which showed insulation had been installed between the wall studs.

In opposition to this branch of Ms. Waldman's motion, plaintiff maintains that there are issues of fact regarding whether or not Ms. Waldman had constructive notice of dangerous conditions that caused the accident. In particular, plaintiff points to his own deposition testimony wherein he stated that the dragon board flooring upon which his ladder was placed was rotten, imbalanced and shaky since an insufficient number of screws were used to secure the flooring to the floor beams. In addition, plaintiff notes that he testified that the subject floor was wet and covered in debris. Finally, plaintiff points to his deposition testimony that he complained to his supervisor Mr. Glauber numerous times during the three-month period preceding the accident.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] 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" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). 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. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

Accidents such as the instant one, involving ladder collapses and/or the failure of safety equipment are deemed to arise out of the means and methods used to carry out the underlying work (*Garces v Windsor Plaza, LLC*, 189 AD3d 539 [2020]). Here, it is undisputed that Ms. Waldman, who was the out-of-possession owner of the subject unit, did not have any authority over the means and methods plaintiff used while carrying out his work. Furthermore, under the fact of this case,

the unstable flooring does not constitute a dangerous condition for which Ms. Waldman can be charged with constructive notice inasmuch as the instability allegedly arose from the manner in which the dragon board was installed (i.e., using an insufficient number of screws to secure the flooring) (*Giglio v Turner Constr. Co.*, 190 AD3d 829, 830-831 [2020]; *Schwind v Mei Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2012]). Finally, although plaintiff testified that there was construction debris and water on the floor, he also testified that when he set up the ladder prior to the accident, he made sure that its feet were in contact with the floor. Moreover, when asked to elaborate as to what caused the ladder to shake, he attributed it to the alleged loose and unlevel flooring rather than any alleged water or debris on the floor. Accordingly, those branches of Ms. Waldman's cross motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against her are granted.

Plaintiff moves for summary judgment under his Labor Law § 240 (1) claim against Yedid, Dynamic, and Homecore. At the same time, Yedid, Dynamic and Homecore cross-move for summary judgment dismissing this claim against them. In support of his motion, plaintiff points to his own deposition testimony, wherein he stated that he fell from an unsecured ladder while performing construction work when the apparatus began to shake. According to plaintiff, this constitutes prima facie evidence of a Labor Law § 240 (1) violation. Plaintiff also maintains that failure to cover and otherwise shield the hole in the floor into which he fell was a violation of the statute. In further support of his motion, plaintiff argues that, as the general contractor on the project, Yedid is subject to liability for the Labor Law § 240 (1) violation. Finally, plaintiff contends that Homecore and Dynamic are also subject to liability under the statute as they were statutory agents who were delegated the responsibility to supervise plaintiff's work and ensure that it was performed in a safe manner. Plaintiff notes that Homecare was retained in order to provide a construction superintendent for the underlying project and Homecore subsequently hired Dynamic to perform these services. Plaintiff further notes that Dynamic's construction superintendent, Mr. Matovinovic, testified that he visited the jobsite on a daily basis, was responsible for ensuring safety on the project, and had the authority to stop unsafe work and to demand that unsafe conditions and work practices be corrected.

In opposition to plaintiff's motion, and in support of their own cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, Yedid, Homecore and Dynamic argue that plaintiff's own actions in placing the ladder on an uneven, unstable floor, and in standing on

the top step of the ladder was the sole proximate cause of the accident. Yedid, Homecore and Dynamic also argue that the mere fact that plaintiff fell from a ladder is insufficient to demonstrate a violation of Labor Law § 240 (1) or that the ladder failed to provide proper protection. Finally, the defendants argue that Homecore and Dynamic are not subject to liability under the statute as they are not owners, general contractors, or statutory agents with the authority to supervise and control plaintiff's work.

Labor Law § 240(1) provides, in pertinent 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, [or] altering . . . 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) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who “are best situated to bear that responsibility” (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Further, “[t]he duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable for damages regardless of whether it has actually exercised supervision or control over the work” (*Ross*, 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In falling object cases, “the claimant must demonstrate that, at the time the object fell, it either was being hoisted or secured, or required securing for the purpose of the undertaking” (*Houston v State of New York*, 171 AD3d 1145, 1146 [2019], citing *Fabrizi v 1095 Avenue of the Ams., LLC*, 22 NY3d 658, 662-663 [2014]). In addition, the statute “does not automatically apply simply because an

object fell and injured a worker; “[a] plaintiff must show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi v 1095 Avenues of the Ams., LLC*, 22 NY3d at 663, quoting *Narducci v Manhasset Bay Assoc.*, 96 N2d 259, 268 [2001]). In falling worker cases, “[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” (*Melchor v Singh*, 90 AD3d 866, 868). Thus, the fact that a scaffold or ladder collapses constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Exley v Cassel Vacation Homes, Inc.*, 209 AD3d 839, 841 [2022]; *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2021]).

As a final matter, “[a]lthough comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her injuries [or otherwise recalcitrant], there can be no liability under Labor Law § 240 (1)” (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2020]). The sole proximate cause defense applies “when plaintiffs: ‘(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice’” (*Biacco-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

As a preliminary matter, the court must address the defendants’ argument that Homecore and Dynamic are not subject to liability under Labor Law § 240 (1). In this regard, it is undisputed that these two defendants are not owners and were not the general contractor on the underlying construction project. Thus, Homecore and Dynamic may only be held liable under the Labor Law if they qualify as statutory agents. “To hold a defendant liable as an agent of the general contractor for violations of [Labor Law § 240 (1)], there must be a showing that it had the authority to supervise and control the work” (*Van Blerkom v America Painting, LLC*, 120 AD3d 660, 661 [2014] [internal citations omitted]). Further, contractors that have “been delegated a significant degree of authority to supervise and oversee on-site safety matters” may be subject to liability as statutory agents under the statute (*Barrios v City of New York*, 75 AD3d 517 518 [2010]).

Here, the evidence before the court indicates that Dynamic had extensive authority to oversee safety matters on the construction site. In particular, Mr. Matovinovic testified that he was present at the construction site on a daily basis for anywhere between 30 minutes and two

hours. Mr. Matovinovic also testified that, “[a]s a construction superintendent my job is to . . . make sure [the contractors were] following code, making sure they’re following building plans, and make sure that workers . . . are working safely.” In addition, Mr. Matovinovic testified that he had the authority to stop work if he observed unsafe work practices and had the authority to demand that unsafe conditions be corrected. Finally, Mr. Hoffman testified that Dynamic was responsible for ensuring that all New York City safety guidelines and OSHA requirements were followed. Accordingly, Dynamic qualifies as a statutory agent and is subject to liability under Labor Law § 240 (1). Furthermore, inasmuch as Homecore was originally hired by Yedid to provide construction superintendent services on the project, but subsequently delegated this work to Dynamic, Homecore also qualifies as a statutory agent in this case.

Turning to the substance of plaintiff’s Labor Law § 240 (1) cause of action, plaintiff has made a prima facie showing that Yedid, Homecore, and Dynamic violated the statute by submitting his sworn deposition testimony stating the unsecured ladder that he was standing on began to shake, thereby causing him to fall from the apparatus and sustain injuries (*Exley*, 209 AD3d at 841; *Debenedetto*, 190 AD3d at 936; *Melchor*, 90 AD3d at 868). Accordingly, the burden shifts to the defendants to submit evidence which raises a triable issue of fact regarding whether or not they violated Labor Law § 240 (1). However, Yedid, Homecore and Dynamic have failed to meet their burden. In particular, while it is true that the mere fact that a worker fell from a ladder does not in and of itself prove that the statute was violated, uncontroverted evidence that the fall was caused by the movement or collapse of the ladder is sufficient to demonstrate that the statute was violated. Furthermore, plaintiff’s testimony that he placed the ladder on a shaky and uneven floor is insufficient to raise a triable issue of fact regarding whether or not plaintiff was the sole proximate cause of the accident since plaintiff testified that he was directed to perform work in this area by his supervisor notwithstanding the fact that he complained about these conditions prior to the accident. Finally, while it is true that Mr. Matovinovic and Mr. Hoffman’s testimony contradicted plaintiff’s claim that the floor was unstable and unlevel, plaintiff’s testimony that the ladder shook and collapsed is uncontroverted and “there is no requirement for Labor Law § 240 (1) purposes that [a] plaintiff know exactly the cause of [the] accident, or what caused the ladder to move, where there is no dispute that the safety devices failed” (*Martinez v St-Dil LLC*, 192 AD3d 511, 512-513 [2021]).

Accordingly, that branch of plaintiff's motion which seeks summary judgment under his Labor Law § 240 (1) claim against Yedid, Homecore, and Dynamic is granted. That branch of Yedid, Homecore, and Dynamic's cross-motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

Plaintiff moves for summary judgment against Yedid, Homecore and Dynamic under his Labor Law § 241 (6) cause of action.⁴ In support of this branch of his motion, plaintiff argues that his accident and injuries were caused by violations of New York State Industrial Code provisions 12 NYCRR §§ 23-1.7 (b) and (e) and 23-1.21 (b) (ii) and (e) (3). In opposition to this branch of plaintiff's motion, and in support of their own cross-motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, Yedid, Homecore and Dynamic argue that all of the Industrial Code Regulations which plaintiff alleges were violated are either too general to support a cause of action under the statute, or inapplicable given the circumstances of the accident.

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.”

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action 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 that is applicable given the circumstances of the accident, and sets forth a specific standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]).

As an initial matter, plaintiff's motion papers and opposition papers to Yedid, Homecore, and Dynamic's cross-motion papers only address the alleged violations of 12 NYCRR 23-1.7 (b) and (e) and 23-1.21 (b) and (e). Accordingly, to the extent that plaintiff's pleadings allege

⁴ The court has already determined that Homecore and Dynamic are subject to liability as statutory agents under the Labor Law.

violations of other Industrial Code provisions, plaintiff has abandoned these claims (*Rivas v Purvis Holdings, LLC*, 222 AD3d 676, 678 [2023]); *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [2012]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]).

12 NYCRR 23-1.7 (e) (2), which pertains to “tripping and other hazards,” requires that “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and scattered tools and materials ... insofar as may be consistent with the work being performed.” While it is undisputed that this provision is sufficiently specific to support a Labor Law § 241 (6) claim, there is conflicting evidence regarding whether or not this provision was violated. In particular, while plaintiff testified that the area where he set up the ladder was littered with debris, Mr. Matovinovic and Mr. Hoffman, both of whom were present on the jobsite on the day of the accident, testified that there was no debris in the accident area. Furthermore, as previously noted, plaintiff’s own deposition testimony attributed the movement of the ladder to the unstable and unlevel dragon board flooring rather than the alleged debris on the floor. Thus, plaintiff may not rely upon 23-1.7 (e) (2) in support of his Labor Law § 241 (6) claim as the accident was not caused by a violation of this provision. Accordingly, to the extent that he relies upon 23-1.7 (e) (2), plaintiff’s motion for summary judgment against Yedid, Homecore and Dynamic is denied. Further, Yedid, Homecore and Dynamic’s cross motion for summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim to the extent that he relies upon this regulation is granted.

12 NYCRR 23-1.7 (b) (1) (i), which pertains to falling hazards and hazardous openings, requires that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part [rule].” This regulation is sufficiently specific to support a Labor Law §241 (6) claim (*Bonkoski v Condos Bros. Constr. Corp.*, 216 AD3d 612, 617 [2023]). Furthermore, plaintiff has made a prima facie showing that his injuries were proximately caused by a violation of this provision. In particular, plaintiff testified that his ladder was placed beside an uncovered hole that was big enough for him to fall into and that he did in fact fall into this hole when he fell off the ladder. Moreover, although netting was placed around the hole, plaintiff testified that it was not fastened to anything and was therefore not in compliance with the Industrial Code (*see* 12 NYCRR 23-1.15). Accordingly, that branch of plaintiff’s motion which seeks summary judgment against Yedid, Homecore and Dynamic under his Labor Law § 241 (6) claim is granted to the extent that

he relies upon 23-1.7 (b) (1) (i). Yedid, Homecore and Dynamic's cross-motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is denied to the extent that he relies upon this regulation.

12 NYCRR 23-1.21 (b) (4) (ii) requires that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." Similarly, 23-21 (e) (3) requires that "[s]tanding stepladders shall be used only on firm, level footings." Both of these provisions are sufficiently specific to support a Labor Law § 241 (6) claim (*McNamara v Gusmar Enterprises, LLC*, 204 AD3d 779, 782 [2022]; *Kwang Ho Kim v D&W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]). However, there is conflicting evidence regarding whether or not these regulations were violated. In particular, plaintiff testified that the flooring upon which the ladder footing rested was unstable and not level. In contrast, both Mr. Matovinovic and Mr. Hoffman testified that the flooring was stable and level. Accordingly, to the extent that plaintiff relies upon these regulations, his motion and the defendants' cross-motion for summary judgment on the Labor Law § 241 (6) are both denied as there is an issue of fact as to whether the accident was caused by a violation of sections 23-1.21 (b) (4) (ii) and/or 23-1.21 (e) (3).

Plaintiff moves for summary judgment under his Labor Law § 200 and common-law negligence claims against Yedid and Dynamic. At the same time, Yedid, Homecore and Dynamic cross-move for summary judgment dismissing these claims against them. In support of his motion, plaintiff argues that Yedid and Dynamic had the authority to control the injury-producing work. Plaintiff further maintains that both Yedid and Dynamic had notice of the hazardous conditions that contributed to the accident. In particular, plaintiff notes that both Mr. Hoffman and Mr. Matovinovic were present at the construction site on a daily basis. Plaintiff further notes that Mr. Hoffman testified that he inspected the flooring at the time it was installed and admitted that Mr. Matovinovic raised concerns to him regarding safety barriers and hole coverings on the construction site. Accordingly, plaintiff argues that Yedid and Dynamic had constructive notice of the hazardous flooring and unsecured opening in the area where the accident occurred.

In opposition to this branch of plaintiff's motion, and in support of their own cross-motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, Yedid, Homecore and Dynamic argue that they did not control or supervise plaintiff's work. In support of this contention, the defendants note that plaintiff testified that he only received

instructions from his Platoon supervisor, Mr. Glauber. In addition, Yedid, Homecore and Dynamic maintain that they did not create or have constructive or actual knowledge of any dangerous condition that caused the accident.

Turning first to plaintiff's Labor Law § 200 and common-law negligence claims against Homecore, it is undisputed that Homecore delegated all of its responsibilities on the construction project to Dynamic. Further, Homecore personnel were not present at the jobsite at any point during the construction project. Thus, Homecore had no authority or control over plaintiff's work, and was not responsible for preventing or remedying unsafe conditions or work practices that might arise at the premises. Accordingly, there is no basis for plaintiff's Labor Law § 200 or common-law negligence claims against Homecore and that branch of Yedid, Homecore and Dynamic's cross-motion which seeks summary judgment dismissing these claims against Homecore is granted.

With respect to plaintiff's Labor Law § 200 and common-law negligence claims against Yedid and Dynamic, although both of these defendants had the authority to direct the means and methods used when installing the flooring, as previously noted, there is conflicting evidence regarding whether or not the floor was unstable and/or unlevel. In particular, although plaintiff testified that the dragon board flooring, on which the ladder rested, was not level and was unstable, both Mr. Hoffman and Mr. Matovinovic testified that the floor was in fact level and stable.⁵ Finally, while the court has determined that there was a violation of 12 NYCRR 23-1.7(b)(1)(i), standing alone, this is an insufficient basis for awarding plaintiff summary judgment under his Labor Law § 200 and common-law negligence claims since the violation of these provisions merely constitutes some evidence of negligence for the trier of fact to consider (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]). Accordingly, plaintiff's motion for summary judgment against Yedid and Dynamic under his Labor Law § 200 and common-law negligence claims is denied. Yedid and Dynamic's cross-motion for summary judgment dismissing these claims is also denied.

Ms. Waldman and LGC move for summary judgment under their contractual indemnification cross-claims against Yedid. At the same time, Yedid cross-moves for summary

⁵ The court has already determined that the alleged construction debris and water on the floor did not cause the accident. In any event, both Mr. Hoffman and Mr. Matovinovic dispute the presence of these conditions during their depositions.

judgment dismissing these cross-claims.⁶ In support of their motion for contractual indemnification against Yedid, Ms. Waldman and LGC point to two separate riders to the contract between Ms. Waldman and Yedid in which Yedid agreed to defend and indemnify Ms. Waldman and LGC:

“[F]rom and against all liability or claimed liability for bodily injury or death to any person[s] . . . 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 Contractor . . . excluding only liability created by the sole and exclusive negligence of the indemnified Parties.”

According to Ms. Waldman and LGC, these indemnification provisions were triggered inasmuch as plaintiff's injuries arose out of work contracted through Yedid. Ms. Waldman and LGC further maintain that these provisions are fully enforceable since the accident was not caused by any negligence on their part.

In opposition to this branch of Ms. Waldman and LGC's motion, and in support of its own cross-motion for summary judgment dismissing the cross-claims asserted against it, Yedid argues that the indemnification provision which LGC relies upon is unenforceable since Yedid did not receive any consideration for its promise to indemnify LGC. Yedid further maintains that Ms. Waldman's motion for contractual indemnification is premature as questions of fact exist as to whether plaintiff's injuries were the result of her exclusive negligence.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). The obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3d 925, 930 [2009]). Finally, a party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; General Obligations Law § 5-322.1).

Turning first to Ms. Waldman's contractual indemnification claim against Yedid, the underlying indemnification clause is broad and requires that Yedid indemnify Ms. Waldman for

⁶ Although Yedid, Homecore, and Dynamic's notice of cross-motion states that they are seeking summary judgment dismissing all cross-claims against them, their motion papers only discuss Ms. Waldman and LGC's contractual indemnification cross-claim against Yedid.

any claims arising out of the work covered by the contract to the extent that such work was performed by Yedid or contracted through Yedid. Here, the work plaintiff was performing at the time of the accident was contracted through Yedid since Yedid subcontracted Quality to perform this work, and Quality subsequently sub-subcontracted plaintiff's employer Platoon to perform the work. Furthermore, the indemnification provision is fully enforceable since the accident was not caused by any negligence on Ms. Waldman's part. Accordingly, Ms. Waldman's motion for summary judgment under her contractual indemnification cross-claim against Yedid is granted and Yedid's cross-motion for summary judgment dismissing this claim is denied.

With respect to LGC's contractual indemnification cross-claim against Yedid, the underlying indemnification clause contains the same language as the clause requiring that Yedid indemnify Ms. Waldman. Thus, Yedid's obligation to indemnify was triggered since the work that caused the accident was contracted through Yedid. Further, as was the case with Ms. Waldman, the clause is enforceable since the accident was not caused by any negligence on LGC's part. As a final matter, Yedid's contractual agreement to indemnify LGC was supported by adequate consideration. In particular, "[c]onsideration to support an agreement exists where there is 'either a benefit to the promisor or a detriment to a promisee'" (*Hollander v Lipman*, 65 AD3d 1086, 1087 [2009], quoting *Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 475 [1993]). In order for there to be consideration, "[i]t is enough that something is promised, done, foreborne or suffered by the party to whom the promise is made as consideration for the promise made to him," (*Hollander*, 65 AD3d at 1087, quoting *Hamer v Sidway*, 124 NY 538, 545 [1891]). The evidence before the court indicates that Yedid needed access to some of the common areas in the building in order to perform its work, including the roof and exterior walls of the building. Thus, Yedid received the benefit of LGC's permission to access these areas. Furthermore, LGC was detrimentally impacted by the construction contract to which the indemnification rider is attached since the work performed under the contract exposed LGC to potential liability. Accordingly, LGC's motion for summary judgment under its contractual indemnification cross-claim against Yedid is granted and Yedid's cross-motion for summary judgment dismissing this claim is denied.

Ms. Waldman and LGC also move for summary judgment under their common-law indemnification cross-claim against Yedid, while Yedid cross-moves to dismiss these claims. In support of their motion for common-law indemnification against Yedid, Ms. Waldman and LGC

maintain that they were not negligent and any liability that they face as a result of plaintiff's injuries are statutory in nature.

A party seeking summary judgment under a common-law indemnity claim must demonstrate that it was free from negligence regarding the occurrence of an underlying accident and that the party from which it seeks indemnity was negligent (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 657-658 [2014]). At the same time, a party moving for summary judgment dismissing a common-law indemnity claim against it must demonstrate that its negligence did not cause the underlying accident (*id.*). Here, although Ms. Waldman and LGC have demonstrated that they were not negligent, the court has determined that there are issues of fact regarding whether or not Yedid's negligence played a role in plaintiff's accident. Accordingly, Ms. Waldman and LGC's motion for summary judgment against Yedid under their common-law indemnity cross-claim is denied and Yedid's cross-motion for summary judgment dismissing these cross-claims is also denied.

Thus, it is hereby


ORDERED, that the branch of plaintiff's motion, in mot. seq. 5, which seeks an order awarding him summary judgment under his Labor Law § 240 (1) and 241 (6) claims against Ms. Waldman is denied; the branch of plaintiff's motion which seeks an order awarding him summary judgment under his Labor Law § 240 (1) claim against Yedid, Homecore and Dynamic is granted; the branch of plaintiff's motion which seeks an order awarding him summary judgment under his Labor Law § 241 (6) claim against Yedid, Homecore and Dynamic is granted only to the extent that plaintiff relies upon a violation of 12 NYCRR 23-1.7(b)(1)(i); and the branch of plaintiff's motion which seeks an order awarding him summary judgment under his Labor Law § 200 and common-law negligence claims against Yedid and Dynamic is denied; and it is further

ORDERED, that the branch of Ms. Waldman and LGC's motion, in mot. seq. 6, which seeks an order awarding them summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence claims against them is granted; the branch of Ms. Waldman and LGC's motion which seeks an order awarding them summary judgment under their contractual indemnification cross-claim against Yedid is granted; the branch of Ms. Waldman and LGC's motion which seeks an order awarding them summary judgment under their common-law indemnification cross-claim against Yedid is denied; and it is further

ORDERED, that the branch of Yedid, Homecore, and Dynamic's cross-motion, in mot. seq. 7, which seeks an order awarding them summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied; the branch of Yedid, Homecore, and Dynamic's cross-motion which seeks an order awarding them summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted only to the extent that plaintiff relies upon 12 NYCRR 23-1.7 (e) (2) in support of his Labor Law § 241 (6) claim and otherwise denied; the branch of Yedid, Homecore, and Dynamic's cross-motion which seeks an order awarding them summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them is granted with respect to Homecore and denied with respect to Yedid and Dynamic; and the branch of Yedid, Homecore, and Dynamic's cross motion which seeks an order awarding them summary judgment dismissing all cross-claims against them is denied.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice