SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

----------X

INDEX NO. 154758/2017

MAHMUD CANTIC,

Plaintiff,

- v -

MOTION DATE 11/15/2021, 12/13/2021, 12/15/2021, 12/15/2021

DBD CONTRACTING, LLC,COORDINATING METALS, INC.,MASPETH WELDING, INC.,

MOTION SEQ. NO. 005 006 007 008

Defendant.

DECISION + ORDER ON MOTION

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COORDINATING METALS, INC.

Plaintiff,

-against-

MASPETH WELDING

Defendant.

Third-Party
Index No. 595911/2017

----------X

COORDINATING METALS, INC.

Plaintiff,

-against-

MURRAY HILL, MANOR COMPANY

Defendant.

Second Third-Party
Index No. 595620/2018

----------X

COORDINATING METALS, INC.

Plaintiff,

-against-

MANHATTAN SKYLINE MANAGEMENT CORP.

Defendant.

Third Third-Party
Index No. 595381/2022

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 336, 340, 344, 348, 352, 360, 364, 368, 372, 396, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 475, 476, 500, 501, 503, 504

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 338, 341, 345, 349, 353, 361, 365, 369, 373, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 397, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 485, 499, 505, 506

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 337, 342, 346, 350, 354, 362, 366, 370, 374, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 398, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 477, 484, 486, 493, 494, 495, 496, 497, 498, 507, 508

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 339, 343, 347, 351, 355, 363, 367, 371, 375, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 466, 467, 468, 469, 470, 471, 472, 473, 474, 478, 491, 492, 509, 510

were read on this motion to/for JUDGMENT - SUMMARY.

In motion sequence number 005, second third-party defendant Murray Hill Manor Company (Murray Hill) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the second third-party complaint and defendant/third-party plaintiff Coordinating Metals, Inc's (CMI's) causes of action for common law indemnification and contribution. Murray Hill moves for an order granting summary judgment on its counterclaims and crossclaims against CMI and defendant DBD Contracting LLC's (DBD) claim for contractual indemnification. Murray Hill also moves for an order granting summary judgment as to DBD's causes of action for contractual indemnification, common law indemnification and contribution and dismissing DBD's claims against Murray Hill. Murray Hill also moves for an Order referring this matter to a referee for a determination of attorneys' fees, costs and

disbursements. Finally, Murray Hill moves for an order seeking summary judgment on defendant/third-party defendant Maspeth Welding's (Maspeth) causes of action for contractual and common law indemnification and contribution and dismissing all of Maspeth's claims against Murray Hill.

In motion sequence number 006, DBD moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff Mahmud Cantic's (plaintiff) complaint and crossclaims.

In motion sequence number 007, CMI, moves, pursuant to CPLR 3212, to dismiss plaintiff's causes of action for common law negligence and violations of Labor Law §§ 200, 241 (6) and 240 (1) and seeks dismissal of all crossclaims against it.

In motion sequence number 008, Maspeth moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiff's complaint, the third-party complaint, and crossclaims and counterclaims asserted against Maspeth.

Under each motion sequence, plaintiff cross-moves, pursuant to CPLR 3212, for an order granting summary judgment as to his claim of a violation of Labor Law § 240 (1) as against DBD, CMI, and Maspeth and opposes the summary judgment motions made by the defendants.

FACTUAL ALLEGATIONS

Plaintiff alleges that on January 9, 2015, he was injured when he fell from a ladder at the premises located at 166 East 34th Street, New York, New York ("the premises") while attempting to inspect an awning/marquee. At the time of his accident, plaintiff was employed by Manhattan Skyline Management (MSM) as a building superintendent for the premises. Murray Hill was the ground tenant of the subject building. Prior to the accident MSM and Murray Hill hired DBD to refurbish the plaza entrance and CMI to build and install a canopy. Murray Hill entered into a

contract directly with CMI dated October 11, 2013, and entered into a separate contract with DBD dated February 7, 2014. CMI subcontracted its work to Maspeth.

Plaintiff's deposition

Plaintiff testified that he was employed by MSM for thirty-five years, although his paychecks were from "Murray Hill Manor." His supervisor and head manager was Thomas Ashman (Ashman) who also worked at MSM. On January 9, 2015, plaintiff worked as superintendent of the premises. Plaintiff maintains that MSM owned and managed the building at the premises. Two porters worked at the building and reported to him. On the day of his accident, construction work was taking place at the front of the building which included floor, steps, and planter replacement. Plaintiff recalls hearing from "Weintraub," an engineer/vice-president with MSM, that DBD was the contractor at the location. Plaintiff maintains that Weintraub came to talk to the construction workers and representatives, that he observed him every day, and that he never talked to plaintiff about the job.

Plaintiff testified that "Mark" was the owner of DBD, a company which had performed painting and wallpaper work at the premises. Plaintiff testified that he went to a meeting in the basement with workers from DBD after Weintraub called him and asked plaintiff to show the workers where the support was located for the building's courtyard. Plaintiff testified as to conversations about the installation of an awning, but was not aware who was going to install it. Plaintiff maintains that there was scaffolding utilized for the purpose of placing the awning which was 15 to 20 feet in height. Plaintiff did not know of Maspeth. Plaintiff did not recall an outside vendor bringing in any type of equipment. Plaintiff testified that as superintendent, he has used an aluminum extension ladder from the storage in the building's garage. Plaintiff testified that the ladder "belong[ed] to the building."

On the night before his accident, plaintiff testified that it had snowed. On the day of plaintiff's accident, plaintiff checked on the porters and proceeded to check the building. Plaintiff testified that on that day, there were two individuals working on the awning. Plaintiff did not have any conversations with either of the two workers. The workers were on scaffolds and utilized an aluminum extension stepladder to reach the platform and work on the awning. Plaintiff testified that the stepladder was located by the side of the building, that it was 18 to 20 feet high, and that he had "no idea" who owned it. Plaintiff only knew that when the awning workers came to begin the work, "the stepladder was there."

Plaintiff maintains that he did not check on the awning workers during the course of the day at any point up to and including the day of his accident. Plaintiff did not remember seeing any dirt or debris on the sidewalk on the date of his accident. Plaintiff testified that Weintraub asked him to go look at the awning and the work which was done by the awning company. Specifically, plaintiff testified that Weintraub asked him, "did you see anybody working today on the awning? I said, I heard two guys working upstairs, they do work up there today." When Weintraub asked plaintiff what work they did that day, plaintiff said "I don't really know. It's not my department, it's not my workers." Plaintiff proceeded to testify as to the following:

> "[Weintraub] said, why don't you go look at it. I said, I want to call the [awning] company. I called the company, they told me everybody's gone for the day, nobody's there, nobody could come to inspect the job, why don't you go look at it. I call Mr. Weintraub back again, and I told him that's what they told me, to go look at it. He said, why don't you go up there and take a look at it[.]"

Plaintiff testified that Weintraub gave him the phone number to call the awning company which was presently working on-site. Plaintiff proceeded to utilize the extension ladder from the side of the building, which was about 18 to 20 feet high. Plaintiff did not know who owned it, but he had seen the awning workers utilize the ladder and extend it all the way and lean it against

the scaffold. Plaintiff did not check the ladder to see if there were any cracks or look at the condition of the ladder's feet. Once plaintiff placed the ladder, he checked to see if it was even. No one assisted him in climbing the ladder.

Plaintiff proceeded to climb the ladder to the top. He stood on a single rung, which was just below the scaffolding. He continued to climb the ladder and was about 14 feet high when he heard a "scraping noise." Plaintiff further testified that "[t]he stepladder went like somebody pulled it out from under me, like lightning." When the ladder moved, plaintiff "was on the ground in a second." He did not know if a rung of the ladder was bent on the day of his accident. Plaintiff testified that Francisco Medina, the doorman, was present and witnessed his accident.

Plaintiff testified that the ground was wet where he was located because it had snowed the day before. Plaintiff also recalls that he instructed the porter to remove ice. Plaintiff testified that other than the date of his accident, he was never asked to climb an extension ladder and go up on the side of the building. Plaintiff was never trained to utilize an extension ladder.

Plaintiff never heard of CMI or Maspeth. Plaintiff testified that Murray Hill, MHM Realty, and MSM are the same company.

Mitchell Leibson's deposition

Mitchell Leibson (Leibson) testified that he works as a "member" of DBD and supervises all construction and renovation-related activities. DBD first contracted to work at the premises in April of 2015. DBD was the general contractor with regards to the electrical work on the awning and on the marquee at the premises. DBD hired a subcontractor to place wiring throughout the awning. The work on the marquee involved the use of ladders or scaffolds. Leibson did not have any conversations with CMI employees.

Leibson testified that all of DBD's work at the site was completed through four or five subcontractors. The subcontractors included masons, steel rail, carpenters, electricians and a plumber. Leibson maintains that Weintraub, an engineer, was the point of contact for the owner. Weintraub observed the work and would provide his opinion. Leibson was at the site several times a week. Leibson recalled that plaintiff attended safety meetings and discussions regarding tenant access. Leibson did not recall meeting with plaintiff about the locations for the footings of the marquee. Leibson also testified that there was a project manager present that would conduct day to day coordination with the subcontractors.

DBD did not supply ladders at the site. However, DBD did inspect ladders to see if they were safe. The ladder which plaintiff utilized did not belong to DBD or its subcontractors. Leibson recalls being told by his electrician or project manager that the ladder belonged to the "metal guys" who he believes were CMI and Maspeth. The electricians' work involved ladders which DBD did not provide.

Leibson testified that he observed the subject ladder padlocked to the scaffolds before and after plaintiff's accident and that Weintraub utilized the ladder several times to observe the work. Leibson did not observe any issues with the subject ladder. Leibson maintains that plaintiff ran the building, while Weintraub ran the construction. DBD did not direct plaintiff to do anything regarding the work or coordinate it. Leibson did not recall anyone from the company receiving a call on the date of plaintiff's accident requesting a progress update.

Leibson testified that there was no work by DBD's subcontractors taking place at the premises on the date of plaintiff's accident and no debris or bricks on the ground. Regarding plaintiff's accident, Leibson recalls that Weintraub directed plaintiff to go up into the scaffold to see whether water was collecting into a part of the awning.

Leibson's affidavit

Along with testifying at a deposition, Leibson submits an affidavit dated April 1, 2020. Leibson states that DBD never employed plaintiff in any capacity, did not supervise or instruct plaintiff in any work he performed, and was not performing any work at the subject property on the date of plaintiff's accident. DBD did not store, or leave, any ladders at the subject property at any point in time prior to, or after the date of plaintiff's accident. Upon information and belief, the ladder involved in plaintiff's accident was left on the site by CMI or by one of its subcontractors.

A contract was entered into between Murray Hill Manor Company c/o Skyline Management Corporation, and DBD. DBD was hired to perform renovations at the subject property but was not hired to install, erect, or construct a marquee at the subject property. DBD did not enter into any contracts, subcontracts or agreements with CMI to fabricate and install the subject marquee. DBD was obligated by its contract with Murray Hill to supervise all safety precautions and programs in connection with the work as defined by contract.

As the fabrication and installation of the marquee was not part of the work as defined by the contract, "DBD had no obligation to supervise safety precautions or programs in connection with the fabrication and installation of the marquee by [CMI] and/or its subcontractors." The contract did not include any obligation that DBD had authority to supervise the safety precautions or programs for work which was outside the scope of work defined by the contract. The contract did not provide DBD with any authority to supervise the work, safety programs or the safety equipment of CMI.

Paul Santo's deposition

Paul Santo (Santo) testified that he is the vice president of CMI, which was hired to install a steel canopy and conduct fabrication at the premises. Santo was not certain who the project manager was at the premises but recalls that the project was subcontracted to Maspeth. The project manager would visit the site once a week to check on the progress of the work. CMI reported to a general contractor at the site.

Santo testified that Weintraub worked for the owner, and Santo met Weintraub at the site and discussed the timeline and schedule for the project. Santo was present at the site two to three times. Santo did not know if a ladder was utilized for the contracted work. Santo testified that CMI stopped using extension ladders in 2011 or 2012 and did not provide equipment such as ladders to Maspeth, a company performing welding. Weintraub had the authority to direct his contracted work and to stop any unsafe work at the site. Santo did not look at or inspect any ladders, did not recall anyone from DBD instructing him how to conduct his work regarding the canopy, and did not believe that DBD provided any equipment for CMI to utilize.

Santo recalls speaking with Tom Murphy, a manager at one of Maspeth's subcontractors, about the progress of the work. Santo did not know if Maspeth utilized ladders at the site. Santo did not receive any phone calls on the date of the accident and did not receive any requests inquiring about the status of the work. Santo reviewed photographs and did not recognize the ladder in question. Santo testified that CMI stopped using the type of ladder depicted in the years 2011 or 2012 because they switched to fiberglass. Santo maintained that CMI placed a stencil on a specific ladder with CMI's name on it, if the ladder belonged to the company.

Thomas Murphy's deposition

Thomas Murphy (Murphy) testified that he works in field operations for Structural Systems LLC which is an installer for Maspeth. Structural Systems LLC and Maspeth worked closely on many projects. Murphy testified that his job included being present on job sites and ensuring that things were running properly. Structural Systems LLC did not conduct any work at the premises. Murphy looked after the project for Maspeth and his role at the premises was to assist in the rigging of large pieces of material and to serve as project manager for Maspeth's on-site work. Maspeth's work included steel work, welding, grinding, and assembly of the canopy. Maspeth was at the site on a daily basis and had about two to six workers at the premises each day.

Murphy testified that he did not provide any supplies or equipment to Maspeth workers. He did not know who owned the ladder which was already located at the premises. Maspeth workers used the ladder on more than one occasion to perform their work. Maspeth coordinated the work with CMI, which did not provide Maspeth with equipment.

At his deposition, Murphy reviewed pictures of the subject ladder and testified that he used an extension ladder at the premises. The ladder Maspeth used felt safe and he did not notice anything special about it. There was only one ladder at the site which everyone utilized. Murphy testified that he would arrive at the worksite and see the extension ladder already set up and leaning on the scaffold up to the awning, and Maspeth workers already utilizing it to gain access up and down the canopy. Murphy did not recall any phone calls about the status of the welding or the work done by Maspeth on the day of the accident.

Murphy did not know who plaintiff was, but he did have general interaction with someone on behalf of the owner of the building. The workers at Maspeth informed Murphy that

the ladder plaintiff fell from was the aluminum ladder which they were regularly utilizing at the site.

Seymour Weintraub's deposition

Weintraub testified that he is employed by MSM, a building management company, which subcontracts all construction work. Weintraub maintains that MSM was the general contractor for the canopy and was managing the property at the premises. Weintraub testified that MSM had a contract with DBD for the work performed in the property. DBD did not oversee the installation of the awning but was hired to refurbish the sunken plaza entrance to the building. CMI was hired by MSM to build a canopy for the building.

Weintraub did not know if DBD brought any ladders to the project. He was not aware that Maspeth had a role at the subject site. Weintraub had not heard of MHM Realty. Plaintiff did not report to Weintraub and Weintraub did not know who plaintiff's employer was. He was not aware of how the ladders got to the project or who owned them. Weintraub testified that Plaintiff did not have any job responsibilities with regards to any ongoing construction at the property. Weintraub did not supervise the construction of the marquee on January 9, 2015, the date of the accident.

Weintraub was told that plaintiff's accident occurred after he took an existing ladder to reach the bridge that supported the canopy and the ladder went out from under him. Weintraub maintains that "the ground was probably wet and he slipped and fell." Weintraub did not talk to plaintiff on the date of his accident, did not speak with him about the work being conducted on the canopy, and did not tell plaintiff to check on the work being performed. He was not aware of any reason why plaintiff would attempt to climb a ladder to check on the marquee.

Weintraub testified he ladders were chained to the bridge so that they would be available for contractors to use the next day. He did not see any ladders which were not being used located on the ground. Weintraub does not recall a time when a ladder was left unchained when no workers were present at the site.

Weintraub testified that in 2015, plaintiff was the superintendent of the building. Weintraub was not aware of plaintiff climbing up a ladder to inspect the marquee. Weintraub was surprised that plaintiff testified that Weintraub was his boss. Weintraub maintains that inspecting the work performed by the marquee workers was outside the scope of plaintiff's work.

Weintraub recalls that there were times when he had to climb up a ladder to look at the work, including inspecting the marquee, when the ladder was leaning against the sidewalk shed and there were no workers present at the site. Weintraub personally inspected the marquee work prior to July 9, 2015, and climbed the ladder. Weintraub did not recall any issues with the ladder which he utilized. Weintraub did not know if CMI ever directed plaintiff's work at the premises at any time. Weintraub did not give plaintiff any instructions on how to utilize a ladder. Weintraub reviewed a contract between DBD and the owner Murray Hill having an office in "care of" MSM.

Scott Eisenberger's deposition

Scott Eisenberger (Eisenberger) testified that he is the CFO of CMI, an ornamental fabricator company, and serves as a partial owner. Eisenberger is in charge of payroll, bonding and insurance. Eisenberger's partner Santo serves as vice president. Eisenberger testified that he believed that Santo had a role in the contract for work at the subject premises. Maspeth was hired to conduct welding.

Eisenberger believes that CMI was contracted to provide a canopy and worked on the project from early 2014 through May of 2015. CMI mostly does not use ladders, but provides lifts. CMI includes their own labels and emblems on all of its equipment. Eisenberger did not know if his employees utilized ladders in January of 2015. He maintains that if a ladder did not have a CMI logo on it, it did not belong to the company.

Eisenberger knew Weintraub as the owner of MSM and owner of the premises. Eisenberger testified that he had not met plaintiff and recalls hearing that he fell off of a ladder. Eisenberger knew the subject ladder was not CMI's as CMI's ladders are clearly labeled and he was told that the ladder was inferior quality. CMI did not receive a call from plaintiff on the date of his accident.

Albert Berkowitz's affidavit

Albert Berkowitz (Berkowitz) submitted an affidavit dated June 11, 2020. Berkowitz is the Chief Financial Officer of MHM Realty LLC and MSM. Berkowitz states that while Murray Hill, MHM Realty and MSM are within the same corporate umbrella, the three companies are separate and distinct corporate entities and neither does business under the name of the other.

Berkowitz states that on January 9, 2015, Murray Hill was the ground tenant of 166 East 34th Street, New York, New York. Prior to that date, Murray Hill entered into separate contracts with DBD and CMI. MHM Realty served as the landlord of the residential and commercial space of the premises. MSM was the managing agent for the premises. Plaintiff was an employee of MHM Realty, and Weintraub was an engineer employed by MSM.

Summary Judgment standard

"'[T]he proponent of a summary judgment motion 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.'" *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008); *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (emphasis omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003).

DBD's Motion for Summary Judgment (Motion Seq. No. 006)

In motion sequence 006, DBD argues that based upon plaintiff's role and responsibilities, he was not engaged in an enumerated activity pursuant to Labor Law §§ 240 (1) or 241 (6) and that the allegations that DBD violated these sections must be dismissed. DBD contends that plaintiff was employed as the building superintendent at the time of his accident and that his job responsibilities did not require him to be involved in any actual performance of the construction work for either CMI's project or DBD's separate project. DBD argues that plaintiff testified that he inspected the awning installed by CMI or its subcontractor to report on the progress of the work to his alleged supervisor, Weintraub. DBD argues that plaintiff's inspection was not performed in anticipation of any further work by plaintiff or other employees of his company and plaintiff had not performed any enumerated work in connection with the construction projects prior to his accident.

DBD also contends that DBD was not an owner, contractor, or agent pursuant to the New York Labor Law. It argues that DBD's scope of work did not include fabrication or installation of the awning and that DBD's contract only gave it authority over safety procedures and means and methods of "the Work" which was then specifically described in DBD's contract not to include manufacture or installation of the awning. DBD contends that accordingly, DBD was

never given authority over CMI's work, or the work of CMI's subcontractors, to fabricate and install the awning/marquee.

In opposition and in support of his own cross-motion, plaintiff contends that he is a protected worker and had the ability to stop the work which he felt presented an unsafe condition. Plaintiff argues that he was engaged in activity as directed by his supervisor pertaining to the "constructing/erecting/altering/repairing" of the building and installation of the new awning. He maintains that he was at the top of a 15-foot extension ladder adjacent to the top of a scaffold when the ladder collapsed and that therefore, the Labor Law is applicable.

Labor Law § 240 (1) provides in part:

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

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

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places . . . ."

The Court of Appeals has held that when a plaintiff is not engaged in any of the statutes' enumerated activities at the time of an accident, summary judgment is appropriate. *Smith v Shell Oil Co.*, 85 NY2d 1000, 1001 (1995).

In the instant matter, plaintiff was employed as the superintendent of the premises at the time of the accident, and his employment responsibilities did not require him to be involved in the actual performance of construction work. Plaintiff testified that his duties as superintendent of the subject building were as follows:

> "My job, check the building in the morning, check the employees, check the time when everybody's in, do the maintenance on the building with the workers, with the handyman and the porters. That was the title every single day."

Plaintiff testified that he inspected the subject awning in order to report on the progress of the subject work to Weintraub, his supervisor. Plaintiff's inspection was not performed in anticipation of any further work by him. Furthermore, plaintiff was not conducting construction work himself, and plaintiff had not performed any enumerated work in connection with the construction projects prior to his accident.

As such, plaintiff was not involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Plaintiff was not an integral part of the work crew for the subject project and the actual construction team could safely discharge its duties without his continuous presence on the job. *Cf Longo v Metro-North Commuter R.R.*, 275 AD2d 238, 239 [1st Dept 2000] [plaintiff was a conductor with 'flagging duties' whose job it was to protect the defendant contractor from dangers arising out of conditions at the subject railroad station. "Rather than an incidental visitor to the construction site, [plaintiff] was an integral part of the work crew, full time on a daily basis. The actual construction team could not safely discharge its duties without his continuous presence on the job"].

Here, because plaintiff was only inspecting the progress of the construction work and was not engaged in an enumerated activity, that part of plaintiff's complaint alleging a violation of Labor Law § 240(1) is dismissed. Furthermore, given that plaintiff was not engaged in

construction work, plaintiff's claim under Labor Law § 241(6) is likewise dismissed. *Castaneda v Amsterco 67, LLC*, 220 AD3d 406, 406 (1st Dept 2023). *See also Yousuf v Horace Plaza, LLC*, 219 AD3d 1185, 1186 (1st Dept 2023) [internal quotation marks and citations omitted] [store manager fell from a ladder while replacing ceiling tiles damaged by recurring leaks. "The Labor Law § 240(1) claim was properly dismissed because plaintiff's work as a store manager did not involve performing construction, alteration, demolition, or similar labor, and the company he worked for did not regularly undertake enumerated activities under the Labor Law." Plaintiff was also not involved in constructing or demolishing a building in areas in which construction, excavation or demolition work was being performed in order to invoke Labor Law § 241(6)]; *DeJesus v 935 Bronx Riv. Ave., LLC*, 213 AD3d 552, 552 (1st Dept 2023) [plaintiff was an auto salesman who "engaged in property management type duties at the request of his employer's principal." Plaintiff "was not a covered person under Labor Law §§ 241(6) or 240(1). The record is clear that plaintiff's employment did not involve him performing construction, alteration, demolition, or similar labor, and the company he worked for did not regularly undertake enumerated duties under the Labor Law"]; *Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468 (1st Dept 2008) [plaintiff was a resident superintendent of a building undergoing renovation, and was injured when he fell through an uncovered area in the floor of an apartment he was inspecting in an attempt to minimize a water leak in the building. Plaintiff was not within the class of persons entitled to receive protection of the Labor Law. "Although an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law, plaintiff did not perform work integral or necessary to the completion of the construction project, nor was he 'a member of a team that undertook an enumerated activity under a construction contract'" (*quoting Prats v Port Auth. of N.Y. & N.J.* 100 NY2d 878, 882 (2003))]; *cf Channer v*

ABAX Inc., 169 AD3d 758, 759-760 (2d Dept 2019) [internal quotation marks and citations omitted] [plaintiff was injured when he fell climbing a window in a school that was undergoing an asbestos abatement project and plaintiff worked for a company hired to monitor the progress of the asbestos removal. "[P]laintiff, an environmental technician tasked with ensuring asbestos was properly removed from [a] school was a 'covered' person under Labor Law §§ 240(1) and 241(6) because his inspections were essential, ongoing and more than mere observation"].

DBD also argues that the part of plaintiff's complaint alleging common law negligence and a violation of Labor Law § 200 must also be dismissed.

Labor Law § 200 (1) states, in pertinent part, as follows:

> "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons . . . ."

Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 (1998). When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident. *See Prevost v One City Block LLC,* 155 AD3d 531, 534 (1st Dept 2017); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004).

Here, DBD did not direct or control the work or activities of plaintiff during the course of the construction project which was ongoing at the premises, and plaintiff fails to demonstrate that DBD created the condition which allegedly caused plaintiff's accident. Plaintiff testified that Weintraub was the individual who asked him to check on the progress of the subject work and that if Weintraub had not directed him to inspect the awning, he would not have. Furthermore, neither plaintiff nor the other witnesses produced for depositions were able to conclusively identify to whom the ladder belonged or demonstrate that DBD had any notice of any defect with the ladder.

Therefore, because DBD did not exercise any supervisory control over plaintiff's work, and because plaintiff cannot show that DBD created any alleged defective condition or had notice of any condition which proximately caused plaintiff's accident, the part of plaintiff's complaint as to the claims for common law negligence and violations of Labor Law § 200 as against DBD must be dismissed.

Furthermore, DBD's motion for summary judgment dismissing the crossclaims for common law indemnification and contribution by Maspeth, Murray Hill and CMI as against DBD is granted. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.'" *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 (2d Dept 2005), *quoting Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 (1st Dept 1999). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person."

Mastroianni v Battery Park City Auth., 2018 NY Slip Op 31780 [U], *15 [NY Sup Ct, New York County 2018], *quoting Godoy v Abamaster of Miami*, 302 AD2d 57, 61 (2d Dept 2003).

The defendants fail to demonstrate how DBD, was negligent or contributed to plaintiff's accident. DBD was not present at the time of plaintiff's accident, did not provide instruction to plaintiff regarding any work, and was not aware of any issues with the subject ladder. Therefore, the part of DBD's motion seeking summary judgment dismissing the other defendants' crossclaims for common law indemnification and contribution must be granted.

DBD also argues that Murray Hill's crossclaim for contractual indemnification against it must be dismissed. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 (1987) (citations and internal quotations omitted). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v Professional Data Mgt.*, 259 AD2d at 65.

The contractual indemnity provisions in the "Owner-Contractor Agreement" dated February 7, 2014, and between the "Murray Hill Manor Company having an office c/o Manhattan Skyline Management Corp, 103 West 55th Street, New York, New York 10019 ("Owner") and DBD Contracting LLC ("Contractor")" provide in relevant part:

> "[t]he Contractor shall indemnify and save harmless the Owner, Owner and the Architect (if any) and their agents and employees from any liability and cost (including but not limited to attorneys' fees and disbursements) incurred in connection with any claim for
> (a) any violation by the Contractor, its employees, subcontractors or agents of this Contract or of any Law or Regulation;

> (b) any injury, including death at any time resulting therefrom, sustained by any person in connection with the Work or caused by the Contractor, its employees, subcontractor or agents, or
> (c) any damage to any property caused during the Work by the Contractor, its employees or agents."

NYSCEF Doc. No. 291, ¶ 16.

Here, Murray Hill fails to demonstrate that the plaintiff's injury was caused by DBD, in connection with DBD's actual construction work of the marquee, or that it violated a law or regulation. While there was ongoing work at the premises, plaintiff testified that he was not involved with construction work in any manner, other than being told to check on its progress by his supervisor. Furthermore, Leibson, a member and Vice President in charge of construction operations for DBD, testified that DBD had never employed plaintiff in any capacity, did not supervise or instruct plaintiff in any work he performed, and that DBD was not performing any work at the subject property on the date of plaintiff's accident. Therefore, as DBD demonstrates that it did not cause plaintiff's injury or that his injury was caused by the ongoing work, Murray Hill's crossclaim for contractual indemnification as against DBD must be dismissed.

Finally, DBD contends that Murray Hill's claim for breach of contract to procure insurance must be dismissed. DBD argues that the contract between DBD and Murray Hill requires DBD to procure insurance naming Murray Hill as an additional insured on a commercial liability policy with $1,000,000 limits. DBD maintains that DBD complied with such obligation based upon the "Certificate of Liability Insurance" from Merchants Mutual Insurance Company which includes a blanket additional insured as required by written contract endorsement.
In opposition, Murray Hill contends that the part of DBD's motion which seeks to dismiss Murray Hill's counterclaim for failure to procure insurance must be denied because DBD has

failed to present evidence that it procured the insurance required by the DBD agreement. Murray Hill contends that the "Certificate of Liability Insurance" which DBD submits states:

> "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER AND THE CERTIFICATE HOLDER."
>
> NYSCEF Doc. No. 300.

Here, the certificate of insurance was insufficient to demonstrate that a contract existed as it states that the certificate did not constitute a contract between the issuing insurer and the certificate holder. *See American Motorist Ins. Co. v Superior Acoustics,* 277 AD2d 97, 98 (1st Dept 2000) (holding the certificate of insurance which contained disclaimers that it was for information only, that it conferred no rights on the holder, that it did not amend, extend or alter the coverage provided by the policy and that it was subject to all the terms, exclusions and conditions of the policy, was insufficient to raise a triable issue of fact as to whether plaintiffs had been named as additional insureds under the subject policies); *American Ref-Fuel Co. of Hempstead v Resource Recycling,* 248 AD2d 420, 423 (2d Dept 1998) ("the certificate of insurance recited that it was 'a matter of information only and confer[red] no rights upon' the plaintiff. Such a certificate is insufficient, by itself, to establish that the plaintiff was insured . . .").

Therefore, as the Certificate of Liability Insurance is inconclusive and does not constitute a contract, DBD has failed to demonstrate that it procured insurance required by the agreement, and the part of its motion to dismiss Murray Hill's counterclaim for failure to procure insurance must be denied.

CMI's Motion for Summary Judgment (Motion Seq. No. 007)

In motion sequence number 007, CMI seeks to dismiss plaintiff's Labor Law claims. CMI first argues that plaintiff's Labor Law § 240 (1) claim fails because plaintiff is not a member of a protected class of workers pursuant to the Labor Law. CMI contends that plaintiff was the superintendent of the subject building whose duties included checking the building and employees in the morning and conducting maintenance work. As such, CMI argues that plaintiff was not involved in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure. Plaintiff testified that he was not even aware of the names or identities of the construction companies who were working at the site.

CMI also argues that for plaintiff's Labor Law § 241 (6) claim to apply, the accident must occur in connection with construction, demolition or excavation work and that Labor Law § 241 (6) is not applicable to claims that arise out of maintenance of a building or structure outside the context of construction.

Here, as previously discussed under motion sequence 006, the part of plaintiff's complaint alleging violations pursuant to Labor Law §§ 240 (1) and 241 (6) must be dismissed. *See Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 (1st Dept 2005) (holding that plaintiff "was not within the class of persons entitled to invoke the protection of the statute"). Plaintiff was inspecting the progress of the work, was not engaged in an enumerated activity, plaintiff's work was not integral or necessary to the completion of the construction project, nor was plaintiff a member of a team that undertook an enumerated activity under a construction contract or employed by a company engaged under a contract to carry out an enumerated activity.

CMI also contends that plaintiff's Labor Law § 200 and common law negligence claims must be dismissed as against it. CMI argues that CMI did not have or exercise supervision and control over the plaintiff's activities at the time of his accident sufficient to hold it liable under common law negligence or Labor Law § 200. CMI argues that it did not supply the ladder involved in plaintiff's accident, that it did not create an alleged dangerous condition, and that CMI did not have any notice of a dangerous condition.

In opposition and in support of his cross-motion, plaintiff fails to demonstrate that CMI created a dangerous condition, had actual or constructive notice of such condition, or exercised sufficient control over plaintiff's work. Furthermore, CMI fails to demonstrate that CMI directed or controlled the work or activities of plaintiff at the time of the alleged accident or at any time prior to the accident. Therefore, CMI's motion to the extent CMI seeks to dismiss plaintiff's cause of action against CMI for common law negligence and a violation of Labor Law § 200 is granted.

With regards to defendants DBD and Maspeth's crossclaims for common law indemnification and contribution, as against CMI, such crossclaims must be dismissed as there is no evidence that plaintiff's accident was related to a negligent act or omission by CMI or that CMI contributed to its occurrence. CMI had no duty, contractual or otherwise, relating to the ownership, maintenance, or condition, of the subject ladder. Furthermore, CMI did not have any authority to direct, supervise or control the work or plaintiff. As such, CMI's motion for summary judgment dismissing these crossclaims is granted.

Furthermore, with regards to CMI's motion for summary judgment dismissing Murray Hill's crossclaims and counterclaims for contractual indemnification as against CMI, the motion

is granted. Murray Hill fails to demonstrate that plaintiff's accident was caused by CMI, its employees, subcontractors or agents during their actual construction work.

Furthermore, as to CMI's motion to dismiss Maspeth's crossclaims against CMI for contractual indemnification, the motion is granted. Maspeth fails to demonstrate that CMI was obligated to contractually indemnify Maspeth.

Finally, with regards to CMI's motion to dismiss DBD's crossclaims as against CMI for contractual indemnification, the motion is also granted. DBD fails to demonstrate that plaintiff's injury was caused by CMI or that plaintiff was engaged in the construction of the marquee. Therefore, DBD's crossclaims for contractual indemnification as against CMI must be dismissed.

Maspeth's Motion for Summary Judgment (Motion Seq. No. 008)

In motion sequence 008, Maspeth contends that plaintiff's allegation of common law negligence and a violation of Labor Law § 200 must be dismissed. Here, Maspeth demonstrates that it did not direct, control or supervise the work or activities of plaintiff during the course of the construction project that was ongoing at the premises at the time of the alleged accident. *See Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 324 (1st Dept 2005).

Furthermore, in opposition and in support of his cross-motion, plaintiff fails to demonstrate that Maspeth created any alleged defective condition or had specific notice of any condition that proximately caused plaintiff's accident. Therefore, Maspeth's motion for summary judgment dismissing plaintiff's claim of common law negligence and a violation of Labor Law § 200 is granted.

Maspeth also contends that the allegations of violations of Labor Law §§ 240 (1) and 241 (6) must be dismissed as against it. Here, as discussed above, such allegations of violations of

these sections of the Labor Law must be dismissed. Plaintiff was not a member of a team which undertook an enumerated activity pursuant to a construction contract. *See Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468, 468 (1st Dept 2008).

Finally, with regards to plaintiff's allegation of an OSHA violation, OSHA violations do not provide a basis for liability under Labor Law § 241 (6). *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 (2d Dept 2005). Therefore, the part of the complaint alleging OSHA violations must be dismissed.

Maspeth also moves for summary judgment dismissing all crossclaims as against it. This portion of the motion must be granted as DBD and CMI fail to demonstrate that Maspeth or its employees were negligent or contributed to plaintiff's accident.

Murray Hill's Motion for Summary Judgment (Motion Seq. No. 005)

In motion sequence 005, Murray Hill argues that to the extent that defendants' common law indemnification and contribution claims are based upon Murray Hill's purported vicarious liability for the actions of plaintiff or Weintraub, Murray Hill is entitled to summary judgment dismissing such claims.

Murray Hill maintains that as the ground tenant of the premises which is owned by D & D Land Company, it is a separate and distinct entity from MHM Realty, plaintiff's employer, and MSM, Weintraub's employer. Murray Hill contends that as neither plaintiff nor Weintraub are employees of Murray Hill, there is no employment relationship upon which any negligence claim can be based. Murray Hill contends that alternatively, even if vicarious liability existed, there is no evidence that Weintraub acted negligently. Murray Hill argues that Weintraub suggested that plaintiff take a look at the work and plaintiff's testimony does not specify that Weintraub

instructed him to climb the ladder. It argues that plaintiff testified that the subject ladder was not owned or associated with the building.

In opposition, DBD argues that MSM, MHM Realty, and Murray Hill are related entities, working in concert towards a joint purpose. DBD contends that Murray Hill produced Weintraub as its witness who testified that his role was to act on the owner's behalf. DBD also contends that all of the contracts Murray Hill entered into list the owner of the property as "Murray Hill Manor Company having an office c/o Manhattan Skyline Management Corp." DBD argues that Murray Hill did not have any employees and acted throughout the two construction projects through its agents MSM or MHM Realty. DBD argues that therefore, any claims by Murray Hill that it did not supervise or control plaintiff's work and/or that it is not liable for Weintraub's negligence is without merit.

In opposition, CMI contends that Murray Hill's motion for summary judgment seeking dismissal of CMI's causes of action for common law indemnification and contribution should be denied because the evidence clearly demonstrates that Murray Hill and MSM are not separate and distinct entities. CMI contends that on October 11, 2013, Murray Hill, as the owner of the premises having an office c/o Manhattan Skyline Management Corp. entered into an agreement with CMI to fabricate and erect a new building entrance marquee. CMI maintains that Weintraub, an employee of MSM, testified that MSM took the bids and negotiated contracts with both DBD and CMI. Weintraub testified that MSM usually contracted with contractors for work at the premises. CMI maintains that Weintraub prepared the scope of work included in the contracts with Murray Hill for work at the premises.

CMI maintains that its contract with Murray Hill for work at the premises was signed by Robert Eshman, an authorized representative and the president of MSM, who was also

Weintraub's supervisor. CMI maintains that the cover letter addressed to Santo of CMI referencing the enclosure of the executed Murray Hill and CMI agreement bears Weintraub's printed name and signature and the sender is Murray Hill Manor, 166 East 34th Street. CMI also argues that Weintraub was negligent by directing plaintiff to inspect the work and that material issues of fact exist as to the ownership of the ladder involved in plaintiff's accident and whether a contractor or Murray Hill owned it.[1]

"The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant within the scope of employment." *Rivera v Fenix Car Serv. Corp.*, 81 AD3d 622, 623 (2011). Here, questions of fact exist as to whether Murray Hill may be found vicariously liable for Weintraub's acts or omissions. While plaintiff testified that Murray Hill, MHM Realty, and MSM are the same company, Berkowitz of MHM Realty states that Murray Hill, MHM Realty and MSM are separate and distinct corporate entities and none do business under the name of another.

A question also exists as to whether Weintraub instructed plaintiff to inspect the awning by himself with no assistance while utilizing the subject ladder. The testimony of plaintiff is disputed by that of Weintraub who maintains that he did not instruct plaintiff. Furthermore, Leibson of DBD testified that Weintraub directed plaintiff to "go up into the scaffold" to see whether there was water collecting. *See Art Capital Group, LLC v Rose*, 149 AD3d 447, 448 (1st Dept 2017) (holding that credibility questions are questions of fact which may not be resolved by motions for summary judgment).

Murray Hill also argues that because there is no contractual indemnification provision entitling DBD or Maspeth contractual indemnification from Murray Hill, Murray Hill is entitled

[1] CMI also argues that at the very least, there is sufficient evidence to establish that Weintraub was a special employee of Murray Hill.

to summary judgment dismissing DBD and Maspeth's crossclaims. The right to contractual indemnification depends upon the language set forth in the contract. *Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 (1st Dept 2021).

In opposition, DBD and Maspeth fail to point to specific contractual language in which Murray Hill was obligated to contractually indemnify either. Therefore, the part of Murray Hill's motion seeking summary judgment dismissing DBD and Maspeth's crossclaims for contractual indemnification must be granted.

Murray Hill argues that it is entitled to summary judgment on its own contractual indemnification claims as against CMI and DBD. As discussed above, Murray Hill fails to demonstrate that CMI or DBD caused the injury to plaintiff or that the injury was a result of the construction work, thereby triggering the indemnification provision. Therefore, the part of Murray Hill's motion seeking summary judgment for contractual indemnification as against CMI and DBD must be denied.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that DBD Contracting LLC's motion for summary judgment (Mot. Seq. No. 006) is granted with the exception of the part of the motion seeking to dismiss Murray Hill Manor Company L.P.'s counterclaim for breach of contract for failure to procure insurance which must be denied; and it is further

ORDERED that Coordinating Metals, Inc's motion for summary judgment (Mot. Seq. No. 007) is granted; and it is further

ORDERED that Maspeth Welding's motion for summary judgment (Mot. Seq. No. 008) is granted; and it is further

ORDERED that Murray Hill Manor Company's motion for summary judgment (Mot. Seq. No. 005) is denied with the exception of the part of the motion seeking to dismiss the cross claims of DBD Contracting LLC and Maspeth Welding for contractual indemnification as against it which is granted; and it is further

ORDERED that Murray Hill Manor Company's motion for summary judgment (Mot. Seq. No. 005) to the extent it seeks to refer this matter to a referee for a determination of attorney's fees to be paid to Murray Hill by CMI and DBD is denied as academic; and it is further

ORDERED that plaintiff Mahmud Cantic's cross motion for summary judgment is denied.

The clerk shall enter judgment accordingly.

September 5, 2024
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE