At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of April, 2024.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

----------X

LUIZ RENATO PORTES,

Plaintiff,

-against-

Index No. 517861/2019

206 KENT INVESTOR LLC, CORNELL REALTY MANAGEMENT LLC AND SEVENTH FLOOR SERVICES, INC.,

DECISION AND ORDER

Defendants.

----------X

206 KENT INVESTOR LLC, CORNELL REALTY MANAGEMENT LLC AND SEVENTH FLOOR SERVICES, INC.,

Third-Party Plaintiffs,

-against-

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Defendant.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	187-209; 210-226; 227-253
Opposing Affidavits/Answer (Affirmations)	258-261, 268-270; 265-267 271; 262-264, 272
Affidavits/ Affirmations in Reply	277-278; 274-276

Upon the foregoing papers in this action to recover damages for personal injuries, defendants/third-party plaintiffs, 206 Kent Investor LLC (Kent), Cornell Realty

Management LLC (Cornell Realty), and Seventh Floor Services, Inc. (SFS) (collectively, the defendants) move (Seq. 08) for an order, pursuant to CPLR § 3212, granting them: (1) summary judgment dismissing plaintiff Luiz Renato Portes' (plaintiff) Labor Law §§ 200, 240 (1), 241 (6), and common law negligence claims; and (2) summary judgment against third party defendant, Magellan Concrete Structures Corp. (Magellan) on the third-party claims for contractual indemnification and breach of contract for failing to comply with the insurance procurement clause. Plaintiff moves (Seq. 09) for an order, pursuant to CPLR § 3212, granting summary judgment on the issue of liability on his Labor Law § 240 (1) claim against Kent and SFS. Magellan moves (Seq. 10) for an order, pursuant to CPLR § 3212, dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and dismissing defendants' breach of contract for failure to procure insurance claim.

Background

Plaintiff commenced the instant action by filing a summons and verified complaint on August 13, 2019 (NYSCEF Doc No. 1). According to the complaint, plaintiff was injured on January 10, 2019, while working at the premises located at 200 Kent Avenue, Brooklyn, New York, (jobsite/premises/200 Kent project) when he was caused to fall (*id.* at ¶¶ 1-2, 82).[1] Plaintiff asserts four causes of action against the defendants: (1) negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240 (1); and (4) violation of Labor Law § 241 (6). Defendants filed their answer on November 12, 2019, and asserted 18 affirmative defenses (NYSCEF Doc No. 6).

[1] A five to seven story commercial building was being constructed at the site (Garcia's EBT tr at page 20, line 17 to page 21, line 4).

Defendants subsequently filed a third-party summons and complaint on April 18, 2022 (NYSCEF Doc No. 49). In their third-party action, defendants allege that Kent hired Magellan to perform certain demolition, construction, and/or renovation work and services, and to supply equipment and/or materials at the premises (*id.* at ¶¶ 6-7). The third-party summons and complaint asserts the following causes of action against Magellan: (1) contractual indemnification; (2) failure to procure insurance; and (3) common law indemnification and contribution. Magellan filed an answer to the third-party summons and complaint on June 6, 2022 (NYSCEF Doc No. 71). In its answer, Magellan denied defendants' contentions, raised 15 affirmative defenses, and asserted two counterclaims for: (1) indemnification; and (2) contribution (*id.*).

Kent, who was the owner of the subject premises, hired SFS as the general contractor for the 200 Kent project and Magellan was contracted to perform concrete foundation installation at the subject premises.[2] Shragy Hirsch (Hirsch) testified that he was the owner of Construction Consulting Company of New York who was managing and executing work for Cornell Realty as the project manager for the 200 Kent project.[3] Hirsch testified that Kent was paying SFS to carry out and give their insurance and permits for the 200 Kent project.[4]

Plaintiff, who was employed by Magellan, testified that he arrived at the jobsite around 7:00 a.m. on the date of the accident.[5] He was provided a harness and yo-yo every

[2] Hirsch EBT tr at page 21, line 21 to page 23, line 17; page 41, lines 19-25.
[3] Hirsch EBT tr at page 14, line 3 to page 15, line 10; page 18, line 21 to page 19, line 6; page 25, line 5 to page 27, line 17; page 33, lines 22-25.
[4] Hirsch EBT tr at page 23, line 18 to page 24, line 8.
[5] Plaintiff's EBT dtd 9/28/2021 at page 69, lines 14-25; page 84, lines 5-8.

morning.[6] On the date of the accident, he was stripping forms and was using a chain rather than a yo-yo.[7] According to plaintiff, his foreman, Cotinha, authorized him to strip columns that day and he fell while in the process of doing so. [8] Specifically, plaintiff stated that he climbed to the top of the 12-foot tall column and removed the first square. On the second or third square, he fell while attempting to place the chain as the square came loose.[9] Plaintiff testified that he felt dizzy at the time the square came loose and believed that the gas or smoke from the radiators caused his dizziness.[10] After plaintiff's fall, he was lowered via cart to the ground level and taken to the hospital. Plaintiff alleges that he sustained various injuries as a result of his fall (NYSCEF Doc No. 194).

Miguel Garcia (Garcia), who was employed by Magellan as the project manager/supervisor on the jobsite, was deposed on Magellan's behalf.[11] Garcia testified that he was in charge of doing reports and making sure everything was working securely.[12] Garcia testified that on the date of the accident, Magellan employees were assigned to clean the first and second floors of the jobsite which required them to organize material and put it in place.[13] Garcia claimed that no one was assigned to do any type of work on the third or fourth floors on the date of the accident.[14]

---

[6] A yo-yo is a round component with a cable that one would clip to his or her harness on one end and to a column or some type of metal structure on the other end. A yo-yo is used when a person is working at a height and it is intended to prevent one from falling (Plaintiff's EBT dtd 9/28/2021 at page 87, line 23 to page 89, line 3).
[7] A chain, like a yo-yo, is used to prevent a person from falling and depending on the column, the hook located at the end of the chain locks into holes on the form (Plaintiff's EBT dtd 9/28/2021 at page 90, line 5 to page 94, line 10; page 103, lines 6-11, Plaintiff's EBT dtd 4/17/2023 at page 51, line 3 to page 52, line 9).
[8] Plaintiff's EBT dtd 9/28/2021 at page 91, lines 24 to page 92, line 2; page 92, lines 15-24.
[9] Plaintiff's EBT dtd 9/28/2021 at page 97, line 3 to page 98, line 10; page 113, lines 2-15.
[10] Plaintiff's EBT dtd 9/28/2021 at page 104, lines 10-22.
[11] Garcia's EBT tr at page 20, lines 9-16.
[12] Garcia's EBT tr at page 16, line 21 to page 17, line 5.
[13] Garcia's EBT tr at page 24, line 14 to page 25, line 8.
[14] Garcia's EBT tr at page 25, lines 15-12.

Garcia stated that training was provided to plaintiff and other workers on how to properly remove forms, a task that requires two or more people to perform depending on the size of the wall or column.[15] He testified that once cement is poured, it takes 24 hours for the concrete to dry before the forms can be removed.[16] When removing forms, a ladder or baker's scaffold is typically required if sufficient space exists around the column.[17] When Garcia was made aware that plaintiff was on the floor, he went to investigate and found plaintiff on the floor with his harness on.[18] Garcia testified that he did not observe any clamps removed from any column around plaintiff and no forms were on the ground in close proximity to plaintiff other than 2 or 4 feet away as he was not supposed to be removing clamps on that floor because the concrete did not yet cure.[19] Garcia did not see any ladder, scaffold, or baker's scaffold near plaintiff and no other person was on the floor besides Alexander Castro (Castro), who found plaintiff while inspecting the perimeter of the floor.[20] Garcia further stated that safety lines had been installed on the fourth floor before they poured the concrete.[21]

Garcia explained that workers are required to wear the proper equipment including a harness with a yo-yo, which could be secured to the available safety lines attached to the ceiling, termed the safety point or anchor point.[22] Garcia testified that he did not see a

---

[15] Garcia's EBT tr at page 30, line 11 to page 32, line 23.
[16] Garcia's EBT tr at page 32, line 24 to page 33, line 5.
[17] Garcia's EBT tr at page 34, lines 12-16.
[18] Garcia's EBT tr at page 36, lines 2-20.
[19] Garcia's EBT tr at page 36, line 24, to page 37, line 10.
[20] Garcia's EBT tr at page 38, lines 6-19.
[21] Garcia's EBT tr at page 38, lines 20-24.
[22] Garcia's EBT tr at page 45, line 18, to page 46 line 14.

lanyard/chain attached to plaintiff's harness.[23] Garcia asserted that on the date of the alleged fall, the fourth floor had heaters on the scaffold intended to help cure the concrete which is why no one should have been there.[24] Garcia also noted that the accident could have been prevented if plaintiff followed instructions given to him by his supervisors and used the chain or yo-yo and attached it to the safety point or anchor point. He testified that if anyone climbed the forms without the aid of a ladder, baker's scaffold or safety device, they were doing so at their own risk because no one was supposed to be doing that.[25]

An affidavit from Cleidiano Silverio Da Cunha (Da Cunha), signed and notarized on June 12, 2023, was submitted on the instant motions. Da Cunha avers that he was employed by Magellan and was the general foreman on the jobsite on the date of the accident (NYSCEF Doc No. 203 at ¶¶ 1-2). Da Cunha proclaims that he was in charge of assigning laborers to specific daily tasks and would hold safety meetings every morning during which different safety procedures were discussed (*id.* at ¶ 3-4). Da Cunha asserts that he assigned plaintiff to work on the lowest floor, known as the cellar, to remove posts so that a crane could move the posts to the next floor (*id.* at ¶ 6). Da Cunha avers that he never assigned plaintiff to perform any work on the fourth floor and notes that plaintiff never informed him that he was leaving his assigned work area to go to the fourth floor (*id.* at ¶ 7). He attests that no work was to take place on the fourth floor since the cement had not yet cured from the prior day's pour which was evidenced by the fact that the heaters were present on the fourth floor to dry the cement (*id.*). Da Cunha states that the heaters

[23] Garcia's EBT tr at page 46, line 24, to page 47 line 2.
[24] Garcia's EBT tr at page 40, line 20, to page 41 line 8.
[25] Garcia's EBT tr at page 60, lines 2-8.

were operated by diesel fuel and thus they would not have had workers performing work while the heaters were running (*id.*). Da Cunha alleges that plaintiff told him that he was stripping the column on the fourth floor by himself and slipped and fell when he went up to get a drill he left on the scissor clamp of the column (*id.* at ¶ 8-9).

Parties' Contentions

In support of that branch of their motion (Seq. 08) for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, defendants contend that plaintiff was the sole proximate cause of the fall. In this regard, defendants contend that they provided all safety devices and equipment and a safe workplace, and that plaintiff disregarded his employer's instructions and chose to work on his own in an unsafe and unapproved manner, thereby acting as a recalcitrant worker (NYSCEF Doc No. 188 at ¶ 9). Next, defendants argue that plaintiff was not supposed to be on the fourth floor as he was assigned to work on the first floor, and that a minimum of three workers were needed to strip the forms (*id.*). They further argue that plaintiff should have followed his superior's instruction and used a safety rope (*id.*). Defendants highlight that plaintiff testified that he was provided with all the necessary personal protective equipment, including a harness with a retractable yo-yo and hard hats (*id.* at ¶ 20). In addition, defendants note that the columns on the fourth floor were not ready to be stripped as the concrete had been poured less than 24 hours prior, and for unknown reasons, plaintiff was on that floor stripping forms on his own which was contrary to his assignment and lacked the requisite assistance of co-workers to complete the task safely (*id.* at ¶ 21). Lastly, defendants assert that plaintiff failed to tie his yo-yo into the available safety line that was installed to protect him, instead choosing to use a

chain to tie to the very form he was removing (*id.* at ¶ 22). Thus, defendants argue that plaintiff was the sole proximate cause of his accident as he was a recalcitrant worker who failed to utilize the available safety line installed by his employer, failed to remove the forms using the proper method, and was in a location where he was not authorized to work at the time of the accident (*id.* at ¶ 25). As Magellan also moves (Seq. 10) to dismiss plaintiff's Labor Law § 240 (1) claim, reciting the same contentions asserted by defendants, the Court will forego restating those arguments.

In opposition to defendants' motion and in support of his own (Seq. 09), plaintiff contends that he is entitled to summary judgment on his Labor Law § 240 (1) claim because Kent and SFS were obligated, but failed, to provide him with the proper equipment and/or safety devices to protect him against injuries resulting from elevated risks (NYSCEF Doc No. 211 at ¶ 57). Plaintiff, at his deposition, testified that when he arrived at the jobsite, he was told by either Rafael, Cotinha's sub-foreman, or Cotinha, his foreman, to begin stripping forms from columns on the fourth floor.[26] Plaintiff contends that more than 20 people were working on the fourth floor that day and that he was partnered with a helper whose job was to place things on the floor after plaintiff removed them.[27] Plaintiff further contends that at the time of his fall, he was utilizing all available and required safety equipment and had his safety chain attached to the square or bracket since he did not see any safety lines running down from the ceiling on the fourth floor. Plaintiff maintains that he was removing the brackets at an elevated height using the only means available to him

[26] Plaintiff's EBT tr dtd 4/17/2023 at page 60 line 2 to page 61, line 22.
[27] Plaintiff's EBT tr dtd 4/17/2023 at page 63 line 24 to page 64, line 4; page 64 lines 5-20; page 66 lines 17-25.

– the brackets themselves – because he was not provided with an elevated platform, ladder, or baker's scaffold (*id.* at ¶ 69). Thus, plaintiff asserts that the foregoing evidence establishes his Labor Law § 240 (1) claim as Kent and SFS did not provide the proper equipment and/or safety devices so as to protect him from falling from an elevated height (*id.* at 57).

In addition, plaintiff argues that he was not a recalcitrant worker since there is no evidence that he disregarded an immediate instruction to avoid an unsafe practice, and therefore any conduct by plaintiff would only raise an issue as to plaintiff's possible comparative negligence (*id.* at ¶ 5). Plaintiff claims that his work activity, the stripping of concrete forms from 14- to 18-foot-high columns, constitutes a protected activity under Labor Law § 240 (1) and thus defendants were required to provide safety precautions contemplated by the statute (*id.* at ¶ 11). Furthermore, plaintiff asserts that SFS, as the general contractor, was obligated to ensure safety at the site but was absent as it only provided its insurance for permit purposes in exchange for a fee (*id.* at ¶ 14). Thus, plaintiff claims that SFS defaulted on its contractual obligations since it did not undertake any safety responsibilities (*id.*).

Plaintiff further contends that his conduct cannot be deemed to be the sole proximate cause since defendants never provided him with proper equipment to perform his work such as a scaffold, ladder, or other platform (*id.* at ¶ 20). Although plaintiff was provided with a hard hat, a harness, a yo-yo, and a chain, plaintiff asserts that such safety equipment proved inadequate for the task at hand (*id.*). In addition, plaintiff highlights that Garcia's deposition testimony indicates that there were no ladders or scaffold on the fourth floor on

the day of the accident.[28] Plaintiff asserts that the fact that ladders were available elsewhere on site is insufficient as a matter of law so as to place the burden on the worker since it would effectively eviscerate the very protections that the legislature codified (*id.* at ¶ 22).

Furthermore, plaintiff argues that defendants' contention that the accident occurred because plaintiff became dizzy from the gas heaters located nearby is a red herring since it is irrelevant whether plaintiff experienced dizziness as defendants failed to provide adequate safety devices in the first instance (*id.* at ¶ 25). Plaintiff claims it is also irrelevant whether he was, or was not, supposed to be working on the fourth floor at the time of the accident because the mere allegation that plaintiff disobeyed his supervisor's instructions does not provide a basis for a defense to a Labor Law § 240 (1) claim (*id.* at ¶ 27). Additionally, plaintiff asserts that defendants cannot establish that plaintiff was a recalcitrant worker merely by demonstrating that he was instructed to avoid an unsafe practice (*id.* at ¶ 30). Thus, plaintiff asserts that the recalcitrant worker defense is not triggered given the circumstances of his accident (*id.* at ¶ 31).

In opposition to plaintiff's motion, defendants contend that a review of deposition transcripts, the affidavit of Da Cunha, and the incident report, establish that plaintiff was the sole proximate cause of the accident and was provided all safety devices and equipment (NSYCEF Doc No. 271 at ¶ 7). Defendants reiterate that plaintiff disregarded his employer's instruction and chose, on his own, to work in an unsafe and unapproved manner without utilizing the safety devices provided (*id.*). Thus, defendants assert that plaintiff's

[28] Garcia's EBT tr at page 56, line 21 to page 57, line 2.

motion for summary judgment must be denied as sufficient evidence and testimony has been raised establishing that plaintiff was the sole proximate cause of the accident.

Discussion

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*). If there are triable issues of fact as to how the alleged accident occurred, then the motion should be denied (*see Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dep't 2022]). "Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Murray v Community House Development Fund Company, Inc.*, 223 AD3d 675, 677 [2d Dep't 2024]; *Chiara v Town of New Castle*, 126 AD3d 111 [2d Dep't 2015]).

Additionally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and where conflicting inferences may be drawn, the court must draw those most favorable to the nonmoving party" (*Murray*, 223 AD3d at 676-677; *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002, 1005 [2d Dep't 2016]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Khutoryanskaya v Laser & Microsurgery*,

P.C., 222 AD3d 633, 635 [2d Dep't 2023]; *Schumacher v Pucciarelli*, 161 AD3d 1205 [2d Dep't 2018]).

Labor Law § 240 (1)

Labor Law § 240 (1) mandates that all building owners and contractors:

> "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) imposes on owners, general contractors, and their agents a nondelegable duty to provide safety devices to protect against height-differential hazards on construction sites, and they will be absolutely liable for any violation that results in injury, regardless of whether they supervised or controlled the work (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-288 [2003]). "Section 240 (1) aims to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015]). "To achieve that goal, the statute imposes absolute liability where the failure to provide proper protection is a proximate cause of a worker's injury" (*id.*).

However, the protections of the statute apply to a narrow class of dangers and Labor Law § 240 (1) "relates only to special hazards presenting elevation-related risks"(*id.*). "Liability may, therefore, be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising

from a physically significant elevation differential" (*id.*). "To recover under section 240 (1), the plaintiff must demonstrate that a violation of section 240 (1) proximately caused his or her injury" (*Thorpe v One Page Park, LLC*, 208 AD3d 818, 820 [2d Dep't 2022]). "Although 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 own injuries, there can be no liability under Labor Law § 240 (1)" (*Mushkudiani v Racanelli Construction Group, Inc.*, 219 AD3d 613, 614-615 [2d Dep't 2023]). "A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (*id.* at 615*; Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2d Dep't 2020]).

Here, those branches of the parties' (defendants and Magellan) respective motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim are denied as issues of fact exist as to whether plaintiff's own actions were the sole proximate cause of the accident. In this regard, plaintiff, defendants, and Magellan submitted evidence that depicts differing accounts as to how the accident occurred.[29] During his deposition, plaintiff testified that on the date of the accident, he was authorized by his foreman to strip columns[30]and that there were a number of people working on the fourth floor along with plaintiff that day.[31] Plaintiff testified that they would use a chain, instead of a yo-yo, when

---

[29] The Court finds that the affidavit of Da Cunha is admissible as it complies with the requirements of CPLR §2101 (*Ivasyuk v Raglan*, 197 AD3d 635, 636 [2d Dep't 2021]; *see also Salazar v Kellari Parea, LLC*, 189 AD3d 1490, 1492 [2d Dep't 2020]).
[30] Plaintiff's EBT dtd 9/28/2021 at page 91, line 19 to page 92, line 2.
[31] Plaintiff's EBT dtd 9/28/2021 at page 93, lines 2-12; page 95, lines 12-24; page 96, lines 5-10.

climbing columns to remove the squares, starting with the square closest to the ceiling.[32] Plaintiff further averred that the chains would lock into the squares so that one would be able to remove the squares above it and that plaintiff was not required to obtain permission to use a chain rather than a yo-yo.[33] Plaintiff states that he was partnered up with a helper who was tasked with picking up the squares after he removed them.[34] After removing the first square on the column, plaintiff hooked the chain onto either the second or third square, when it released causing him to fall.[35]

According to plaintiff, in order to remove a form with brackets, he had to climb up the brackets and use a hammer to hit the keys, which were wide, flat nails that went through the holes in the bracket and attached to the wooden form, in order to release them.[36] The brackets then became a ladder which would be used to reach the forms on the top of the column. Plaintiff testified that everyone removes forms this way and that this is how Cotinha instructed him to do it[37] Furthermore, plaintiff did not recall specifically seeing safety lines running down the ceiling on the fourth floor and averred that these lines were usually found on the edges of the building and would not be found where he was working on the date of the accident.[38] Lastly, plaintiff does not remember if there were any baker's scaffolds or A-frame ladders at the jobsite.[39]

---

[32] Plaintiff's EBT dtd 9/28/2021 at page 90, lines 5-8.
[33] Plaintiff's EBT dtd 9/28/2021 at page 90, line 9 to page 91, line 3.
[34] Plaintiff's EBT dtd 9/28/2021 at page 93, lines 2-6.
[35] Plaintiff's EBT dtd 9/28/2021 at page 96, line 24 to page 98, line 21.
[36] Plaintiff's EBT dtd 4/17/2023 at page 69, lines 1-12.
[37] Plaintiff's EBT dtd 4/17/2023 at page 69, line 23 to page 70, line 12.
[38] Plaintiff's EBT dtd 4/17/2023 at page 71, lines 4-18.
[39] Plaintiff's EBT dtd 4/17/2023 at page 72, lines 6-22.

Conversely, defendants and Magellan present a conflicting version of events that took place that day. According to the deposition testimony of Garcia, all of Magellan's employees were assigned to clean the first and second floors of the jobsite.[40] No one was assigned to do any type of work on the third or fourth floors that day.[41] Garcia testified that plaintiff had knowledge and experience in the removal of forms and was provided training and instructions.[42] Defendants note that the forms on the fourth floor could not be removed on the date of the accident since the concrete was poured less than 24 hours prior and had not yet cured. Garcia stated that after he was notified that plaintiff fell, he went up to the fourth floor to inspect what happened and found plaintiff on the floor. Garcia observed that no clamps were on the ground and none were removed from any column around plaintiff.[43] Garcia did not see any ladder or baker's scaffold near plaintiff and no one else was on the fourth floor except the person who found plaintiff.[44] Garcia further testified that there were safety lines on the fourth floor ceiling and were installed before the concrete was poured.[45] In addition, Garcia stated that plaintiff knew how to use the safety lines as he was instructed on their use.

The contradictory evidence presented, including whether plaintiff was directed to clean the first and second floors of the jobsite or was instructed to strip forms from the fourth-floor columns, raises credibility questions that cannot be determined on the instant

---

[40] Garcia's EBT tr at page 24, lines 4-24.
[41] Garcia's EBT tr at page 25, lines 6-8.
[42] Garcia's EBT tr at page 30, lines 11-25.
[43] Garcia's EBT tr at page 36, line 24 to page 37, line 10.
[44] Garcia's EBT tr at page 38, lines 6-19.
[45] Garcia's EBT tr at page 38, line 20 to page 39, line 2.

motions for summary judgment (*Gamez v New Line Structures & Development, LLC*, 218 AD3d 446, 448 [2d Dep't 2023]). Even if plaintiff was instructed to strip forms on the fourth floor, a fact that is controverted by deposition testimony, issues of fact exist as to whether adequate safety devices were provided or readily available, such as scaffolds, ladders, or other elevated platforms, on which to perform the work safely (*Lorde v Margaret Tietz Nursing and Rehabilitation Center*, 162 AD3d 878, 879 [2d Dep't 2018]). Additionally, if adequate safety devices were not provided, issues of fact exist as to whether such a violation was the proximate cause of plaintiff's injuries, rather than some other cause such as plaintiff's dizziness. As it is evident that "credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Heras v Ming Seng & Associates, LLC*, 203 AD3d 1146, 1146 [2d Dep't 2022]).

Labor Law § 241 (6)

Defendants and Magellan also seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim. "Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers on the premises" (*Venezia v State*, 57 AD3d 522, 522 [2d Dep't 2008]). "[T]o establish liability under Labor Law § 241 (6), a [plaintiff] is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command" (*id.*). "Liability under this statute is limited to accidents where the work being performed involves construction, excavation or demolition work" (*Peluso v 69 Tiemann Owners Corp.*, 301 AD2d 360, 360 [1st Dep't 2003]).

In his bill of particulars, plaintiff alleges violations of Industrial Code §§ 23-1.5, 23-1.7 (b) (i), 23-2.5 (a) and (b), 23-5.1 (e) (1), (f), and (h) (NYSCEF Doc No. 194). Defendants and Magellan have made a prima facie showing that the above-referenced Industrial Code sections are either too general to support a Labor Law § 241(6) claim, not appliable herein, or was not violated. In opposition, the plaintiff fails to address the above-referenced code provisions, and thus they are deemed abandoned (*Sanchez v BBL Construction Services, LLC*, 202 AD3d 847, 851 [2d Dep't 2022]). Plaintiff, however, asserts, for the first time, additional violations of Industrial Code sections 23-2.2 (a) and (b) which relate to forms used in concrete work.

As an initial matter, "a plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law § 241 (6) claim for the first time in opposition to a motion for summary judgment if the allegation involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendants" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dep't 2011]; *Simmons v City of New York*, 165 AD3d 725, 729 [2d Dep't 2018]; *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 889 [2d Dep't 2016]). Thus, Industrial Code §§ 23-2.2 (a) and (b) are a proper predicate for a Labor Law § 241 (6) cause of action (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 606 [2d Dep't 2013]).

12 NYCRR 23-2.2 (a) states that forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape. 12 NYCRR 23-2.2 (b) provides that designated persons shall continuously inspect the stability

of all forms, shores and reshores including all braces and other supports during the placing of concrete. It further provides that any unsafe condition shall be remedied immediately. Here, "[i]n the absence of any expert opinion addressing the issue of whether 12 NYCRR 23-2.2 (a) applies where the forms are in the process of being stripped, the [defendants and Magellan], as the proponents of the motion[s], did not establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action to the extent that it was premised upon an alleged violation of Industrial Code § 23-2.2 (a)" (*Ross*, 109 AD3d at 606). Furthermore, the Court finds that defendants and Magellan have failed to meet their prima facie burden dismissing plaintiff's Labor Law § 241 (6) claim premised on an alleged violation of Industrial Code § 23-2.2 (b). In this regard, they failed to establish that the stability of the forms, shores, and reshores were continuously inspected by a designated person (*see generally Simmons*, 165 AD3d at 729).

Labor Law § 200/Common-Law Negligence

"Labor Law § 200 is a codification of the common-law duty imposed on property owners, contractors, and their agents to provide construction site workers with a safe place to work" (*Sanchez*, 202 AD3d at 849). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dep't 2015]). The manner in which the work was performed is implicated here. As such, "[t]o be held liable under Labor Law § 200 for injuries arising from the manner in which work is

performed, a defendant must have authority to exercise supervision and control over the work" (*Hamm v Review Associates*, LLC, 202 AD3d 934, 938 [2d Dep't 2022]).

Here, the Court finds that defendants met their burden establishing that they did not supervise, direct, or exercise any control over plaintiff's activities, nor did they have any actual or constructive notice of the allegedly dangerous activity. Plaintiff did not oppose this branch of defendants' motion (NYSCEF Doc No. 262 at n 2). Accordingly, plaintiff's Labor Law § 200 and common law negligence claims are dismissed as against the defendants.

Defendants' Third-Party Claims

Defendants contend that Magellan breached its agreement with Kent (the contract) by failing to procure insurance pursuant to the requirements set forth in Articles 13 and 14, Exhibit F labeled "Insurance Graph and Agreement Rider," and the "Owner/Contractor Agreement Rider" of the contract (NYSCEF Doc No. 188 at ¶ 26; NYSCEF Doc No. 207). Defendants assert that the contract sets forth that all certificates shall contain an endorsement that the policies are primary, non-contributory, and shall contain a waiver of subrogation and that neither Kent, nor any other additional insureds, nor their agents, employees or assigns, shall be liable to Magellan or its agents, employees or assigns for any loss or damage covered by the insurance policy as described in Exhibit F (*id.* at ¶ 26). Furthermore, defendants allege that the indemnity provision on page 15 of the contract applies to plaintiff's claim as the accident arose out of his performance of the work Magellan was contracted to perform, thus triggering the indemnity obligation of the contract (*id.* at ¶ 27). Lastly, defendants argue that Magellan breached the insurance

procurement clause of the contract as it had not procured a minimum of one million or three million dollars of excess insurance coverage (*id.* at ¶ 28).

Magellan opposes defendants' motion for summary judgment on their contractual indemnity claims contending they are barred by the anti-subrogation doctrine (NYSCEF Doc No. 268 at ¶ 34). Magellan notes that all defendants in the present action are currently being defended by Accident Fund Insurance Company of America (Accident Fund) and thus the third-party claims are essentially causing Accident Fund to litigate against its own insureds for damages covered by Accident Fund's policy (*id.* at ¶ 36). Magellan asserts that the third-party claims should be dismissed or severed given that there is no verdict or finding that plaintiff is entitled to recover in excess of Accident Fund's two million dollar per occurrence insurance policy. In this regard, Magellan notes that its excess carrier (Starr) responded to defendants' tender advising that it agreed to provide coverage in excess of the underlying Accident Fund policy up to one million dollars in accordance with the contract requirements upon exhaustion of the limits of Accident Fund's policy (*id.* at ¶¶ 37-38).

Next, Magellan claims that defendants' motion is premature as there has not been a finding of negligence and defendants failed to prove that they were free from negligence as SFS has a written safety policy and was responsible for supervising the work (*id.* at ¶¶ 42-44). Nevertheless, Magellan states that the third-party claims and instant motion for summary judgment against it are moot as defendants' tender to Magellan was accepted by its insurer, Accident Fund, which agreed to defend and indemnify defendants in the subject lawsuit (*id.* at ¶ 45).

In their reply to Magellan's opposition, defendants assert that the indemnity/hold harmless provisions in the contract applies to plaintiff's claim as his accident arose out of the work Magellan was contracted to perform (NYSCEF Doc No. 278 at ¶ 3). Defendants further note that neither the motion nor opposition raised the issue of the limit to which any party was entitled to indemnification in this action by reason of the doctrine of anti-subrogation. They contend that their motion seeking contractual indemnity should be granted solely to the extent that plaintiff's damages exceed the amount of insurance coverage provided by Accident Fund, or over and above such coverage once exhausted (*id.* at ¶ 10). Lastly, defendants argue that the indemnity provision in the contract does not require negligence on the part of the subcontractor to trigger the indemnity obligation. Rather, the loss need only arise out of or in connection to the work of the subcontractor. Defendants note that plaintiff testified that only his employer provided him with direction as to his work, which leaves the defendants free of liability.

Contractual Indemnification

"The right to contractual indemnification depends upon the specific language of the contract" (*Crutch v 421 Kent Development, LLC*, 192 AD3d 982, 983 [2d Dep't 2021]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Selis v Town of North Hempstead*, 213 AD3d 878, 880 [2d Dep't 2023]). "In addition, 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor'" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dep't 2010],

quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2d Dep't 2009]).

Here, the relevant indemnity provision set forth in Article 14 of the Owner/Contractor Agreement with Magellan provides that Magellan is obligated to defend, indemnify and hold harmless Kent, as the owner, and its directors, officers, shareholders, employees and agents "from and against any costs, claims and damages of every nature . . . which *arise out of or relate to the Project or this Contract* and/or any failure of the Contractor [Magellan] to perform its obligations as required by the Contract and the other Contract Documents (NYSCEF Doc No. 207, Owner/Contractor Agreement, Article 14 [emphasis added]). In opposition, Magellan acknowledges that Accident Fund agreed to defend and indemnify defendants and therefore argues that the relief sought by them is moot (NYSCEF Doc No. 268 at ¶ 45).

That branch of defendants' motion seeking summary judgment on its contractual indemnity claim against Magellan is granted. As discussed above in relation to plaintiff's Labor Law § 200 claim, defendants have established that they are free from any negligence in the happening of plaintiff's accident. Further, it is undisputed that the plaintiff's injuries arose out of Magellan's work on the project, thereby triggering the indemnification provision at issue. Accordingly, that branch of defendants' motion seeking contractual indemnification as against Magellan is granted.

Breach of Contract for Failure to Procure Insurance

That branch of Magellan's motion for summary judgment dismissing defendants' breach of contract for failure to procure insurance claim is granted as Magellan has

established that sufficient insurance, including excess coverage, was procured. Pursuant to Exhibit F of the contract, Magellan was to obtain a general liability insurance policy with limits as follows: Option 1: $2 million per occurrence/$4 million general aggregate and an Umbrella/Excess Liability policy of $1 million; OR Option 2: $1 million per occurrence/$2 million general aggregate and an Umbrella/Excess Liability policy of $3 million (NYSCEF Doc No. 246 at 80). In accordance with the contract, Magellan purchased a commercial general liability policy from Accident Fund with limits in the amount of $2 million per occurrence/$4 million general aggregate per project (Policy No. FTL1000007-00), an excess liability policy from Starr (Policy No. 1000585251181), and a second excess liability policy with Evanston Insurance Company with limits of $2 million per occurrence aggregate (Policy No. MKLV1EUE100231) (NYSCEF Doc Nos. 250, 251).

Defendants' claim that Magellan failed to procure the requisite insurance since Starr (1) denied it was obligated to pay the full amount unless and until the underlying insurance had paid, or was obligated to pay, the full amount of its limits, (2) denied any request for coverage under the policy, and (3) denied any duty to defend under its policy until underlying insurance had ceased to apply, is without merit. Starr did not deny the tender, rather it set forth the events that are required to trigger the coverage – such as an exhaustion of the underlying Accident Fund policy. Thus, the Court finds that Magellan established its prima facie entitlement to judgement as a matter of law dismissing the cause of action alleging that it failed to procure insurance and no triable issues of fact were raised in opposition (*McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dep't 2018]).

Conclusion

All arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this Court, regardless of whether they are specifically discussed herein.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (Seq. 08) dismissing plaintiff's Labor Law §§ 240 (1) claim is denied; that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted *except to the extent* that said claim is predicated upon Industrial Code sections 23-2.2 (a) and (b); that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 and common law negligence claims is granted and said claims are hereby dismissed; that branch of defendants' motion seeking summary judgment on their third-party claim for contractual indemnification against Magellan is granted; and that branch of defendants' motion seeking summary judgment on their third-party claim against Magellan for breach of contract for failure to procure insurance is denied; and it is further

ORDERED that plaintiff's motion for summary judgment (Seq. 09) on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that Magellan's motion for summary judgment (Seq. 10) to dismiss plaintiff's Labor Law § 240 (1) claim is denied, and granted as to section 241 (6) *except to the extent* that said claim is predicated upon Industrial Code sections 23-2.2 (a) and (b);

that branch of Magellan's motion seeking dismissal of the third-party claim for failure to procure insurance is granted and said claim is hereby dismissed.

This constitutes the decision and order of the Court.

ENTER

J. S. C.

HON. WAVNY TOUSSAINT
J.S.C.

KINGS COUNTY CLERK
FILED
2024 APR 10 A 10: 24