

**Sarante v Courtlandt Dev., LLC**

2024 NY Slip Op 34721(U)

July 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 27096/2019E

Judge: Myrna Socorro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 9**

-----X  
**JOSE SARANTE,**

**Plaintiff,**

**Index №. 27096/2019E  
Motion seq #6, 7, and 8**

**-against-**

**COURTLANDT DEVELOPMENT, LLC and  
A&A BUILDING CONSULTANTS, INC. and  
AB CAPSTONE BUILDERS CORP.,**

**Defendants.**

**DECISION & ORDER**

**Hon. Myrna Socorro, J.S.C.**

-----X  
**COURTLANDT DEVELOPMENT LLC,  
Third-Party Plaintiff,**

**-against-**

**GOLD LION STEEL LLC,  
Third-Party Defendant.**

-----X  
**AB CAPSTONE BUILDERS CORP.,  
Second Third-Party Plaintiff,**

**-against-**

**GOLD LION STEEL LLC,  
Second Third-Party Defendant.**  
-----X

The following papers were read on the motion by the plaintiff (Seq. No. 6) for **summary judgment** noticed for November 8, 2023, and submitted on March 13, 2024; on the cross-motion by defendants/third-party plaintiff and second third-party plaintiff Courtlandt Development LLC and AB Capstone Builders Corp. (Seq. No. 6) for **summary judgment** noticed for January 19, 2024, and submitted on March 13, 2024; on the motion by the defendant/third-party defendant/second third-party defendant Gold Lion Steel LLC (Seq. No. 7) for **summary judgment** noticed for November 8, 2023, and submitted on March 13, 2024; on the cross-motion by defendants/third-party plaintiff and second third-party plaintiff Courtlandt Development LLC and AB Capstone Builders Corp. (Seq. No. 7) for **summary judgment** noticed for January 19, 2024, and submitted on March 13, 2024; and on the motion by third-party defendant/second third-party defendant Gold Lion Steel LLC (Seq. No. 8) for **summary judgment** noticed for November 28, 2023, and submitted on March 13, 2024.

Papers	NYSCEF Doc. #
<b>Motion Seq #6.</b>	
Notice of Motion by Plaintiff – Affirmation in Support, Statement of Material Facts and Exhibits	# 157-172
Notice of Cross-Motion by Defendants Courtlandt Development, LLC and AB Capstone Builders Corp. – Affirmation in Support, Statement of Material Facts, Exhibits	# 294-314
Defendants Courtlandt Development, LLC's and AB Capstone Builders Corp.'s Affirmation in Opposition, Response Statement of Material Facts, Statement of Material Facts, Exhibits	# 273-293
Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Affirmation in Opposition, Response Statement of Material Facts, Memorandum of Law in Opposition, Affidavits and Exhibits	# 342-363
Plaintiff's Affirmation in Opposition to Cross-Motion, Memorandum of Law in Opposition and Exhibits	# 364-371
Plaintiff's Reply Affirmation	# 392
Defendants Courtlandt Development, LLC's and AB Capstone Builders Corp.'s Reply Affirmation and Response Statement of Material Facts	# 388-389
<b>Motion seq #7</b>	
Notice of Motion by Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC – Affirmation in Support, Memorandum of Law in Support, Affidavit, and Exhibits	# 173-194
Notice of Cross-Motion by Defendants Courtlandt Development, LLC and AB Capstone Builders Corp. – Affirmation in Support, Statement of Material Facts, and Exhibits	# 315-338
Defendants Courtlandt Development, LLC's and AB Capstone Builders Corp.'s Affirmation in Opposition, Response Statement of Material Facts, and Exhibits	# 227-249
Plaintiff's Affirmation in Opposition, Memorandum of Law in Opposition, and Exhibits	# 372-379
Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Reply Affirmation, Memorandum of Law in Reply, and Exhibits	# 393-396
Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Reply Affirmation to Defendant Courtlandt Development, LLC's Opposition	# 397

Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Affirmation in Opposition to Cross-Motion, Memorandum of Law in Opposition, Response Statement of Material Facts, Affidavits, and Exhibit	# 380-385
Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Reply Affirmation and Response Statement of Material Facts	# 390-391
<b>Motion seq #8</b>	
Notice of Motion by Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC – Affirmation in Support, Memorandum of Law in Support, and Exhibits	# 203-222
Defendants Courtlandt Development, LLC's and AB Capstone Builders Corp.'s Affirmation in Opposition, Statement of Material Facts, and Exhibits	# 250-272
Third-Party Defendant/Second Third-Party Defendant Gold Lion Steel, LLC's Reply Affirmation to Defendant AB Capstone Builders Corp.'s Opposition	# 398

Motion by the plaintiff (Mot. Seq. No. 6), for an order pursuant to CPLR 3212, granting judgment of his claim under Labor Law 240(1) against all defendants; cross-motion by defendants/third-party plaintiff and second third-party plaintiff Courtlandt Development LLC (“Courtlandt”) and AB Capstone Builders Corp. (“AB Capstone”) (Mot. Seq. No. 6), for an order pursuant to CPLR 3212, dismissing the plaintiff’s complaint; motion by defendant/third-party defendant/second third-party defendant Gold Lion Steel LLC (“Gold Lion”) (Mot. Seq. No. 7), for an order pursuant to CPLR 3212, dismissing the plaintiff’s complaint and dismissing the third-party complaint; cross-motion by defendants/third-party plaintiff and second third-party plaintiff Courtlandt and AB Capstone (Mot. Seq. No. 7), for an order pursuant to CPLR 3212, granting judgment on their third-party claims for contractual indemnification and breach of contract for failure to procure against Gold Lion; and on the motion by third-party defendant/second third-party defendant Gold Lion (Mot. Seq. No. 8), for an order pursuant to CPLR 3212, dismissing the second third-party complaint, are decided as follows:

According to the plaintiff, on the day of the accident, he was employed by third-party

defendant/second third-party defendant Gold Lion as a fireguard and torch operator at a renovation project of a two-story commercial building located at 354 East 149th Street, Bronx County. Gold Lion was retained by AB Capstone to perform steel fabrication work as part of the interior renovation of the building. Pursuant to a construction contract, AB Capstone was hired by Courtlandt, as owner of the premises, to serve as general contractor of the project and to hire the subcontractors and coordinate site safety on the project. The plaintiff testified that he worked at the project for about four (4) months mainly to perform fireguard duties before the accident occurred. He testified that he received instructions and was assigned daily tasks only from a Gold Lion foreman. Plaintiff testified that Gold Lion provided the equipment and tools for his work. On the date of the accident, the plaintiff, Fernando, and two other workers were setting up for the day “to connect a beam as a support for another three beams that were already there.”

Before the accident occurred, the plaintiff testified that they began to lift and place the I-beam, weighing several thousand pounds and measuring at least six feet long, into place. He testified that the I-beam was being lifted from the first floor with intention to move it down under the first floor level to then bring it back up to attach to the existing three beams already situated. He further testified that there was an opening at the first floor level leading to the basement level. The plaintiff testified that a manual hoist was used to lift this beam wherein Fernando welded a post or pole with a hoist attached to a metal beam and that the beam they were attempting to move was attached to a hoist by metal chain and hook. He testified that after the subject beam was hoisted to a level under the existing beams, Fernando and another worker would proceed to the basement to move the lowered beam into place. The plaintiff was operating the manual hoist for the first time to lift the beam from the first floor level while standing on the middle of the three existing beams. He testified that the base of the hoist was on the very beam he stood on. He further testified that other than the hook being attached to the beam, it was not secured in any other way to the hoist and that there would be a loop in the center of the beam for the hook to go through. He also testified that Fernando and another worker (Baudilio) secured the beam to the chain and hook and that Fernando instructed the plaintiff to operate the hoist that day. The plaintiff testified that Gold Lion owned the makeshift hoist and that he recalled Fernando and the crew brought the subject hoist from the Gold Lion shop to the job site. The plaintiff was not aware of any prior complaints about the hoist before his

accident occurred. He testified that he wore work clothes, work boots, a harness, hard hat and a vest. He stated that he was attached to a harness to the second floor while on the beam at the first floor level. The accident occurred as the beam was coming up and the plaintiff was standing on the middle existing beam while lifting it when “after the beam touched the other three beams, in two seconds it popped, bringing the beam down” with the makeshift welded pole to the existing beam and the force of which caused the beam to “pull[] [him] down” resulting in injury. The plaintiff testified that the accident occurred when the vertical part welded to the beam broke off. After the hoist and the beam came loose, the subject beam subsequently fell to the basement level. He believed the hoist came loose because it was not welded properly or the beam was too heavy for the makeshift hoist apparatus.

In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, the deposition testimonies of the plaintiff, Jaime Contreras (“Contreras”) (AB Capstone property management and construction safety employee), Fernando Bermeo (“Bermeo”) (Gold Lion foreman), and a DOB (NYC Department of Buildings) Incident Report. Contreras testified that he visited the job site on behalf of AB Capstone on a weekly basis but that AB Capstone was not aware of what the subcontractors were doing on any particular day. He further testified that he investigated the subject accident and filled out the incident report in connection with it. Bermeo testified that he oversees and provides instructions to 3 to 4 Gold Lion employees as foreman. He testified that he believed Baudilio, another Gold Lion foreman, performed the weld on the manual hoist system. Bermeo further testified that he operated the pulley and lowered the beam to the basement floor. After he raised the beam up to the intended level, Bermeo passed the chain hoist to the plaintiff as he and Baudilio were putting the beam in place. Bermeo testified that Baudilio instructed the plaintiff to continue pulling the chain over his objection. He further testified that there were no prior complaints regarding the hoist and that it was inspected when it left the Gold Lion ship and inspected again at the job site. He believed the I-beam fell because the plaintiff kept pulling the chain and too much pressure was applied on the system. He further testified that he and Baudilio connected the beam to the chain. The plaintiff contends that the defendants violated Labor Law 240(1) by failing to provide an adequate safety device to securely hoist and lift a heavy steel I-beam while the plaintiff was pulling the chain of a makeshift hoist before it failed and caused him to sustain injury.

In support of their cross-motion for summary judgment seeking to dismiss the plaintiff's complaint, defendants/third-party plaintiff and second third-party plaintiff Courtlandt and AB Capstone submitted, *inter alia*, deposition testimonies of the plaintiff, Contreras (AB Capstone property management and construction safety employee), Bermeo (Gold Lion foreman), the construction contract between Courtlandt and AB Capstone, the subcontract between AB Capstone and Gold Lion, and the plaintiff's bill of particulars. Said defendants argue that Labor Law 240(1) does not apply where there was no significant physical elevation differential and the plaintiff's exertion of excessive force on the chain hoist pulley was the sole proximate cause of his injuries. As for the Labor Law 200 and/or common-law negligence claims, said defendants contend that neither Courtlandt nor AB Capstone determined the means and methods over the plaintiff's work and that plaintiff's work was directed and controlled by his employer (Gold Lion). Further, said defendants seek dismissal of the Labor Law 241(6) claim on the ground that the Industrial Code provisions alleged to be violated are not applicable to the facts herein.

In support of its motion for summary judgment seeking dismissal of the plaintiff's complaint as well as dismissal of the third-party complaint by Courtlandt, third-party defendant/second third-party defendant Gold Lion submits, *inter alia*, a copy of the commercial general liability policy of insurance issued to Gold Lion, a copy of an engineer drawing of the chain pulley system operated by the plaintiff, and a sworn affidavit by Alex Soto, a Gold Lion foreman, who inspected the chain pulley hoist when it left the Gold Lion shop and averred that the plaintiff was trained on how to operate the chain pulley hoist and follow instructions of his foreman when using the system prior to his alleged accident. Gold Lion contends the evidence demonstrated that the I-beam was adequately secured for the purpose of the undertaking and that the plaintiff's disregard of his training and foreman's instructions at the time of the accident was the sole proximate cause of his injuries serving as a complete bar to his Labor Law 240(1), 200, and 241(6) claims.

In support of their cross-motion for summary judgment seeking judgment of their third-party claims for contractual indemnification and breach of contract for failure to procure against Gold Lion, defendants/third-party plaintiff and second third-party plaintiff Courtlandt and AB Capstone submit, *inter alia*, deposition testimonies of the parties, the construction contract between Courtlandt and

AB Capstone, the Gold Lion subcontract, a copy of the commercial general liability policy of insurance issued to Gold Lion, an affidavit of no excess insurance by the owner of Gold Lion, and a copy of a tender response by Gold Lion's insurer. Courtlandt and AB Capstone thereupon argue that judgment should be granted on their third-party claims for contractual indemnity on the basis that the plaintiff's injuries arose out of Gold Lion's work on the site and that Courtlandt and AB Capstone have demonstrated their freedom from negligence. Courtlandt and AB Capstone further argue that Gold Lion breached its contractual obligations by failing to procure excess insurance and including them as additional insureds.

In support of its motion for summary judgment seeking dismissal of the second third-party complaint by AB Capstone, third-party defendant/second third-party defendant Gold Lion submits, *inter alia*, the deposition testimonies of the parties, the construction contract between Courtlandt and AB Capstone, the Gold Lion subcontract, and a copy of the commercial general liability policy of insurance issued to Gold Lion. Gold Lion seeks dismissal of second third-party claims for contractual indemnity, common-law indemnity and/or contribution, and breach of contract for failure to procure. It contends that the contractual indemnity claim violates the anti-subrogation rule; that the common-law indemnity and/or contribution claims should be dismissed where the plaintiff did not sustain a "grave" injury; and that it complied with its contractual obligations to procure insurance with Courtlandt and AB Capstone as additional insureds.

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381

[2004].

**Labor Law 240(1)**

Labor Law 240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.” *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

Here, the Court finds the plaintiff established his *prima facie* entitlement to judgment on his Labor Law 240(1) claim as the evidence shows that his injuries were caused by the failure to provide an adequate safety device to secure a heavy steel I-beam, weighing several thousand pounds, as it was being manually hoisted and that said injuries flowed directly from the application of the force of gravity to the makeshift hoist or pulley when the pole to the hoist broke away from the weld, fell and struck the plaintiff. *See Runner v New York Stock Exch., Inc.*, 12 NY3d 599 [2009].

In opposition, Courtlandt, AB Capstone or Gold Lion failed to raise triable issues of fact. To the extent that they argue that the plaintiff's accident did not stem from a significant physical elevation differential, the pole component of the makeshift hoist fell from a distance that was not *de minimis* where the metal pole as welded onto the beam with the hoist attached was able to generate a large amount of force during its descent. *See Ruiz v Phipps Houses*, 216 AD3d 522 [1st Dept 2023]. Further, any sole proximate cause/recalcitrant worker arguments fail if their statutory violation served as a proximate cause for the accident, thus, the plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. Moreover, any allegations that the plaintiff was continuously pulling the hoist chain, in contravention of instructions by his foreman, would only amount to comparative negligence, which is not a defense to Labor Law 240(1). *See Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 542 [1st Dept 2022].

#### **Labor Law 241(6)**

Labor Law 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law 241(6) claim, the plaintiff only addresses the contentions raised regarding Industrial Codes 12 NYCRR §§ 23-6.1(a) and (b) (General requirements to all material hoisting equipment; Maintenance), 23-6.1(c)(1) and (c)(2) (General requirements to all material hoisting equipment; Operation), 23-6.1(j)(1) (General requirements to all material hoisting equipment; Hoisting machine; Hoist brakes), and 23-6.2 (Rigging, rope and chains for material hoists), therefore, abandoning all other predicates not raised in his legal arguments, and as such

those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Since the plaintiff is entitled to summary judgment as to liability on his Labor Law 240(1) claim, the Court need not address the Labor Law 241(6) claim. However, were the Court to reach this claim, insofar as the Labor Law 241(6) claim is predicated on violations of Industrial Codes 12 NYCRR §§ 23-6.1(a) and (b), the defendants establish their *prima facie* entitlement to dismissal of same. 12 NYCRR § 23-6.1(a) in this case cannot support a Labor Law 241(6) claim as it does not set forth any safety standards, general or specific. 12 NYCRR § 23-6.1(b) is also not sufficiently specific to support a statutory violation under the circumstances. *See Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 339 [1st Dept 2007].

Industrial Code 12 NYCRR § 23-6.1© is also not sufficiently specific to give rise to a triable claim under Labor Law 241(6). *See Martinez v 342 Prop. LLC*, 128 AD3d 408 [1st Dept 2015]. Further, § 23-6.1(c)(1) has been found to be “unquestionably general.” *Lopez v Halletts Astoria LLC*, 205 AD3d 573, 575 [1st Dept 2022] [citing *Sharrow v Dick Corp.*, 233 AD2d 858, 861 [4<sup>th</sup> Dept 1996], *lv denied* 89 NY2d 810 [1997]].

Industrial Code 12 NYCRR § 23-6.1(j) relates to the integrity of hoist brakes and hoisting machine anchorage to hoisting machines. Here, there is no record evidence nor any testimony from the plaintiff that hoist brakes and hoisting machine anchorage were defective or inoperable to support his Labor Law 241(6) claim as predicated on a violation of this Industrial Code. In opposition, the plaintiff failed to raise a triable issue of fact with respect to same. Thus, dismissal of the Labor Law 241(6) claim as predicated on Industrial Code 12 NYCRR § 23-6.1(j) is warranted.

Industrial Code 12 NYCRR § 23-6.2 governs the use of fibre ropes and wire ropes as hoisting rope and is found to be sufficiently specific to support a cause of action under Labor Law 241(6). *See Hayden v 845 UN Ltd. P'ship*, 304 AD2d 499 [1st Dept 2003]. Here, there is a triable issue of fact as to which of these two types of ropes was used as it pertained to the plaintiff's accident in this case.

### Labor Law 200/Common-Law Negligence

Labor Law 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. See *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]. Where an existing defect or dangerous condition causes injury, liability under Labor Law 200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. See *id.*

Here, defendant AB Capstone established its *prima facie* entitlement to dismissal of the Labor Law 200 and common-law negligence claims. There is no evidence that AB Capstone knew or should have known that the makeshift chain hoist or pulley system, inspected, provided and transported to the site by Gold Lion employees, would not be able to support the weight or the force generated by an I-beam when hoisted. See *DeJesus v 935 Bronx Riv. Ave., LLC*, 213 AD3d 552 [1st Dept 2023]. There is also no evidence in the record that AB Capstone exercised any supervision and/or control over the injury-producing work beyond general supervisory authority to cure a defective condition or correct a hazard. See *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; see also *Carranza v Memorial Hosp. for Cancer & Allied Diseases*, 225 AD3d 536; 2024 NY Slip Op 01671 [1st Dept 2024]; *Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006].

Additionally, counsel for plaintiff, at oral argument and on the record, did not oppose the branch of defendant Courtlandt's summary judgment motion seeking dismissal of the Labor Law 200 and/or common-law negligence claims as against it. Therefore, the branch of defendant Courtlandt's summary judgment motion seeking dismissal of the Labor Law 200 and/or common-law negligence claims as against it, is granted without opposition.

### Courtlandt's and AB Capstone's Third-Party Claims for Contractual Indemnity Against Gold Lion

Courtlandt and AB Capstone seek an order granting judgment on their third-party claims for contractual indemnification against Gold Lion pursuant to the indemnification provision in the subcontract between the parties, which provides as follows:

#### 4.8 INDEMNIFICATION AND LIABILITY

To the fullest extent permitted by law, the Subcontractor (Gold Lion) shall defend, indemnify and hold harmless the Owner (Courtlandt), Contractor (AB Capstone), Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses...arising directly or indirectly out of or resulting from the performance of the Subcontractor's (Gold Lion's) Work under this Agreement, provided that same are caused in whole or part by the willful misconduct, recklessness, bad faith or negligent acts or omissions of the Subcontractor (Gold Lion), the Subcontractor's sub-subcontractors, anyone directly or indirectly employed or hired by them or anyone for whose acts they may be liable, and the delivery, use or installation of any goods, or defects in quality or any dangerous condition caused by any goods sold to, delivered to or used by, Subcontractor, the Subcontractor's sub-subcontractors, anyone directly or indirectly employed or hired by them or anyone for whose acts they may be liable, in each case regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(NYSCEF Doc No. 321 at 10).

"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., Inc.*, 70 NY2d 774, 777 [1987]. Also, any argument that the third-party claims for contractual indemnity is barred by the anti-subrogation rule, said rule only bars indemnification after the insurance limits of the particular policy have been exhausted. *See Bosquez v Rxr Realty Llc*, 195 AD3d 536 [1st Dept 2021]; *see also New York City Dept. of Tramp, v Petric & Assoc, Inc.*, 132 AD3d 614 [1st Dept 2015].

Although Courtlandt and AB Capstone demonstrated their freedom from negligence and the subject indemnification provision does not run afoul of General Obligations Law § 5-322.1, conditional judgment on the issue of contractual indemnity is premature where triable issues of fact exist as to the indemnitee's (Gold Lion's) negligence or that any negligence on its part proximately caused the plaintiff's accident. *See Mohammed v Silverstein Props., Inc.*, 74 AD3d 453 [1st Dept 2010].

**Courtland's and AB Capstone's Third-Party Claim for Common-Law Indemnity and/or Contribution Against Gold Lion**

As to Courtland's and AB Capstone's third-party claims sounding in common-law indemnity and contribution against Gold Lion, the plaintiff's employer, this Court finds Gold Lion failed to demonstrate a *prima facie* entitlement to dismissal of said claims by failing to make a showing through competent medical evidence that the plaintiff did not sustain a "grave" injury under Workers' Compensation Law § 11. *See Moises-Ortiz v FDB Acquisition LLC*, 206 AD3d 451 [1st Dept 2022]; *see also O'Flaherty v Columbo*, 202 AD3d 509 [1st Dept 2022].

**Courtland's and AB Capstone's Third-Party Claims for Breach of Contract for Failure to Procure Insurance Against Gold Lion**

A party moving for summary judgment on its claim for breach of contract for failure to procure insurance establishes its *prima facie* entitlement by demonstrating that a contract provision requiring procurement of insurance was not complied with. *See Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]. The burden then shifts to the opposing party to "raise an issue of fact by tendering the procured insurance policy in opposition to the motion." *Id.* at 506. Here, the parties' agreement required Gold Lion to procure commercial general liability insurance coverage with a combined single limit of at least \$10 million per occurrence and in the aggregate and that "[t]his limit may be provided through a combination of Primary and Umbrella/Excess Liability policies." (NYSCEF Doc No. 188, Gold Lion subcontract, Exhibit A at 22). The agreement also required Gold Lion to include Courtlandt and AB Capstone as additional insureds under the policy "for both ongoing and completed operations."

In opposition, Gold Lion appended a copy of its commercial general liability policy that was effective on the date of the accident, which included blanket endorsements that covered its obligations to provide insurance to the owner and contractor as additional insureds, in contractual limits of \$2 million for each occurrence and \$4 million in the general aggregate. However, Gold Lion failed to raise a triable issue of fact by tendering admissible evidence that it complied with its contractual obligation to procure \$10 million worth of insurance coverage. Whether the insurer

agrees to indemnify AB Capstone and Courtlandt does not alter the fact that the insured (Gold Lion) breached its contractual obligation to procure the required coverage limits. *See generally Perez v Morse Diesel Int'l, Inc.*, 10 AD3d 497 [1st Dept 2004].

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby,

**ORDERED**, that the summary judgment motion by the plaintiff (Mot. Seq. No. 6) seeking judgment on the Labor Law 240(1) claim, is **GRANTED**; and it is further

**ORDERED**, that the plaintiff is awarded judgment as to liability with respect to the Labor Law 240(1) claim against defendants Courtlandt and AB Capstone; and it is further

**ORDERED**, that cross-motion for summary judgment by defendants Courtlandt and AB Capstone (Mot. Seq. No. 6) seeking dismissal of the plaintiff's complaint, is **GRANTED IN PART**; and it is further

**ORDERED**, that the Labor Law 200 and/or common-law negligence claims and Labor Law 241(6) claim as predicated on alleged violations of Industrial Codes 12 NYCRR §§ 23-6.1(a), (b), [c], and (j) as against Courtlandt and AB Capstone, are dismissed; and it is further

**ORDERED**, that the summary judgment motion by third-party defendant/second third-party defendant Gold Lion (Mot. Seq. No. 7) seeking dismissal of the plaintiff's complaint as well as the third-party complaint by defendant/third-party plaintiff Courtlandt, is **DENIED**; and it is further

**ORDERED**, that the cross-motion for summary judgment by defendants/third-party plaintiff and second third-party plaintiff Courtlandt and AB Capstone (Mot. Seq. No. 7) seeking judgment on

their third-party claims against third-party defendant/second third-party defendant Gold Lion for contractual indemnification and breach of contract for failure to procure, is **GRANTED IN PART**; and it is further

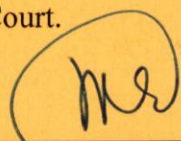
**ORDERED**, that defendants/third-party plaintiff and second third-party plaintiff Courtlandt and AB Capstone are entitled to conditional summary judgment on their third-party claims against third-party defendant/second third-party defendant Gold Lion for breach of contract for failure to procure only; and it is further

**ORDERED**, that the summary judgment motion by third-party defendant/second third-party defendant Gold Lion (Mot. Seq. No. 8) seeking dismissal of the second third-party complaint by defendant/second third-party plaintiff AB Capstone, is **DENIED**; and it is further

**ORDERED**, the movants of each motion shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

**Dated: July 8, 2024**



**HON. MYRNA SOCORRO**

**HON. MYRNA SOCORRO, J.S.C.**

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
  
  - 2. PLAINTIFF'S MOTION (SEQ. NO. 6)  
IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  
  - 3. DEFENDANTS COURTLANDT AND  
AB CAPSTONE CROSS-MOTION (SEQ.  
NO. 6) IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  
  - 4. THIRD-PARTY DEFENDANT/SECOND  
THIRD-PARTY DEFENDANT GOLD  
LION'S MOTION (SEQ. NO. 7  
IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  
  - 5. DEFENDANTS COURTLANDT AND  
AB CAPSTONE CROSS-MOTION  
(SEQ. NO. 7) IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  
  - 6. THIRD-PARTY DEFENDANT/SECOND  
THIRD-PARTY DEFENDANT GOLD  
LION'S MOTION (SEQ. NO. 8) IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
  
  - 7. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE  
 FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT