

Litwack v Riverview E. Owners, Inc.
2024 NY Slip Op 35563(U)
February 2, 2024
Supreme Court, Queens County
Docket Number: Index No. 717441/2018
Judge: Karina E. Alomar
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE **KARINA E. ALOMAR**
JUSTICE

IAS PART 23

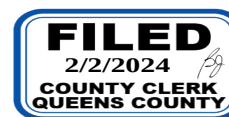
-----X
LAWRENCE LITWACK, as Administrator of the,
Estate of SEGUNDO CAI TENESACA
CHIMBORAZO, deceased and CARMEN VERONICA
PAUCAR OCHOA, individually

Index No.: 717441/2018
Motion Date: 12/14/2023
Motion Seq. No.: 6

Plaintiffs,

-against-

RIVERVIEW EAST OWNERS, INC., MILFORD
MANAGEMENT CORP, and DNA CONTRACTING
& WATERPROOFING, LLC,



Defendants.

-----X
RIVERVIEW EAST OWNERS, INC., and MILFORD
MANAGEMENT CORP,

Third-Party Plaintiffs,

-against-

DNA CONTRACTING & WATERPROOFING, LLC,
and MAYA CONTRACTING INC.,

Third-Party Defendants.

-----X
The following numbered papers 124 to 188 read on these motions by: (1) plaintiffs for an order pursuant to CPLR §3212 granting summary judgment as against defendants Riverview East Owners, Inc., Milford Management Corp., and DNA Contracting & Waterproofing, LLC on the issue of liability pursuant to Labor Law §240[1]; and (2) defendants Riverview East Owners, Inc. ("Riverview Inc"), Milford Management Corp. ("Milford"), and DNA Contracting & Waterproofing, LLC ("DNA") cross-motion seeking and order (a) granting summary judgment dismissing plaintiff's s Labor Law §§ 200 and 241(6) and common law negligence claims and (b) granting defendants Riverview East Owners, Inc ("Riverview Inc") and Milford Management Corp ("Milford") summary judgment as against third-party defendant Maya Contracting Inc ("MAYA") on its contractual indemnification, common law contribution and common law indemnification claims

PAPERS

NUMBERED

Notice of Motion, Affidavit, Exhibits..... EF No: 124 – 141

Notice of Cross-Motion, Affidavit, Exhibits..... EF No: 147 – 159

Affirmations in Opposition, Exhibits..... EF No: 164 – 181

Affirmations in Reply, Affidavit, Exhibits..... EF No: 182 – 188

Upon the foregoing cited papers, it is hereby ordered that plaintiff's motion for an order granting summary judgment as against defendants Riverview East Owners, Inc., Milford Management Corp., and DNA Contracting & Waterproofing, LLC on the issue of liability pursuant to Labor Law §240[1], and defendants cross-motion for an order dismissing plaintiff's complaint and granting defendants summary judgment as against third-party defendant MAYA, are decided as follows:

By way of background, the premises located at 251 East 32nd Street, New York, New York, (the "property") is a twenty story multi-family residential building owned by defendant Riverview Inc. and managed by defendant Milford. An exterior façade repair work was underway on the date of the accident. The repair work addressed the results of a 2012 inspection which found several deficiencies in the façade which required remediation. Defendant DNA acted as the general contractor for that work pursuant to a written contract with Riverview. Defendant DNA subcontracted defendant MAYA, which employed plaintiff's decedent Segundo Caitano Tenesaca Chimborazo ("decedent"), for a façade remediation project. The subject accident occurred while decedent and a co-worker were performing their assigned tasks atop a suspended scaffold at the 12th floor level of the building. The scaffold was supported by cornice hooks ("C-hooks") mounted atop the rooftop parapet wall. Stand-off brackets that acted as an extension to the C-hook assembly were attached to the C-hooks. It is alleged that on October 11, 2018, decedent sustained fatal injuries when a portion of the coping stone that covered the rooftop parapet wall became dislodged and fell, striking both decedent and his co-worker.

Prior to the installation of the suspended scaffold system, a letter produced by Paul Bailey, P.E. of AE Design Solutions, Inc., dated October 11, 2017 (NYSCEF doc 140) stated the following:

As requested, Engineer visited the site and based on the existing building structure the existing parapet wall is in satisfactory condition. The parapet wall is structurally satisfactory to support C-hook for suspended scaffold and for parapet clamp for tieback from C-hook and outrigger beam, and for lifeline which is structurally satisfactory and can support 1000 lbs. max load which act from suspended scaffold. Rigger Company must use wood protection around the parapet load points to distribute the load.

The scaffold needs to be tested four times the rate of load before the operation.

All Usual safety precautions, DOB regulations for suspended scaffold, and OSHA regulation must be observed for tieback. The scaffold erection and use must be overseen by a licensed rigger.

On behalf of defendant MAYA, Carlos Hidalgo, Vice President of MAYA, testified on September 17, 2021, that he was one of the main supervisors of the company. Mr. Hidalgo's duties involved safety which included "[making] sure the scaffolding met the requirements and met the paper that is provided...from the Building Department..., and [to] make sure the guys are tied correctly." Mr. Hidalgo testified that he would visit the job every day or every two days for about two to three hours per visit. He further stated that MAYA would install the scaffolding that they received from the general contractor. The subject scaffold was owned by non-party Swing Staging and was rented out by DNA. During his visits Mr. Hidalgo would examine the C-hook scaffold to make sure it was installed correctly. Mr. Hidalgo further deposed that although MAYA installed the C-hook, a certified letter by the engineer was required to determine whether a C-hook could be installed on a parapet wall. Additionally, MAYA would further conduct their own inspection before assembling the scaffold. It was MAYA's policy to inspect every scaffold intended to be used by workers on the same day. Mr. Hidalgo had the authority to decline to install a C-hook against the engineers finding if Mr. Hidalgo determined that there is something wrong with the wall. In regard to the subject parapet wall, Mr. Hidalgo deposed that he arrived at the project a month later but did not see any defects in the parapet wall on which the C-hook was installed. Mr. Hidalgo also deposed that MAYA employees only received instructions on how to do their work from MAYA itself. However, any employee could stop a job if they saw something was unsafe.

On behalf of defendant DNA, Julio Ayola testified on September 8, 2021, that at the time of the accident he worked for DNA as a supervisor and assistant to the project manager. As a supervisor Mr. Ayola would visit the site two or three times per week to ensure the work was being performed properly and that the workers were using the proper materials required for the job. Mr. Ayola deposed that DNA was the general contractor and that MAYA had overall responsibility for safety on the site, but DNA had the authority to stop any work done by MAYA if it deemed it unsafe. There was a Qualified Safety Professional's Log on site which possessed a "DNA Contracting & Waterproofing LLC" footer, but which was filled out by representatives from MAYA on a daily basis. However, Mr. Ayola testified that he observed no site safety log entry for October 10 and October 11, 2018 (the date of the accident).

At Mr., Ayola's deposition, a letter produced by Andrew Bardolf of DNA dated July 16, 2018, provided the following:

I, Andrew E. Bardolf General Contractor of DNA Contracting LLC designate Julio Ayola as the Qualified Safety Person to perform Site Safety duties in regard to RCNY 3310 which include: Site Safety Inspections; Site Safety Log; Compliance with the Site Safety Plan. In his absence Felix Benito Naula will substitute to perform these duties.

Mr. Ayola affirmed that he was appointed as the qualified safety person, but it was MAYA who had the actual responsibility for site safety. Mr. Ayola further deposed that DNA's project manager performed site safety inspections of which he sometimes joined in on. The project manager and Mr. Ayola would also sometimes inspect the scaffold, but Mr. Ayola affirmed that no one from DNA had inspected the C-hook on the day of or on the day before the accident and does not remember ever inspecting the C-hook scaffold. Mr. Ayola further deposed that non-party AE Design Solutions Inc. designed the scaffold and MAYA would install the scaffold as instructed by the AE Design Solutions Inc engineer. Mr. Ayola did a visual inspection of the C-hook after the accident and observed that the C-hook appeared to have been placed correctly.

In support of their motion, plaintiff submits, inter alia, the "Milford Management Corp Management Agreement" executed on December 20, 2013, the General Contractor Agreement executed on March 22, 2018, and the Subcontractor Agreement executed on September 7, 2018.

The Milford Management Agreement executed between Riverview Inc. and Milford, which appointed Milford as the managing agent of the residential building located at 251 East 32nd Street, New York, (the "property") read in part as follows:

The agent shall not be liable to the Owner for any loss or damage not caused by Agent's gross negligence or willful misconduct. The Owner will indemnify the Agent against and hold the Agent harmless from:

- (a) Any liability, damages, costs and expenses (including reasonable attorney's fees) sustained or incurred for injury to any person or property in, about and in connection with the building, from any cause whatsoever, unless such injury shall be caused by the Agent's own gross negligence or willful misconduct

The General Contractor agreement executed between Riverview East Owners Inc c/o Milford Management and DNA for the property project read in part as follows:

Article 9 §9.2.1

The Contractor shall supervise and direct the work, using the contractor's best skill and attention. The Contractor shall be solely responsible for and have control over the construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the contract, unless the contract documents give other specific instructions concerning these matters.

Article 9, §9.15

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees. Arising out of or resulting from performance of the work provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself). but only to the extent caused by the negligent acts or omissions of the contractor, a subcontractor, or anyone indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Article 16

The contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract. The contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

1. Employees on the work and other persons who may be affected thereby

The Subcontract Agreement executed by DNA and MAYA executed on September 7, 2018, for the property project read in part as follows:

§4.3.1

The subcontractor shall take reasonable safety precautions with respect to performance of this subcontract, shall comply with safety measures initiated by the contractor and with applicable laws, ordinances, rules, regulation and orders of public authorities for the safety of persons and property in accordance with the requirements of the prime contract.

§4.6

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architects consultants, and agents, servants, assigns, officers, directors, members, shareholders, and employees of any of them from and against claims, damages, losses and expenses, including but not limited to reasonable attorney's fees(of Contractor's choosing), arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Plaintiffs' Labor Law §240(1) Claim

The 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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

With respect to plaintiffs' motion for an order pursuant to CPLR §3212 granting summary judgment as against defendants Riverview East Owners, Inc., Milford Management Corp., and DNA Contracting & Waterproofing, LLC on the issue of liability pursuant to Labor Law §240(1). Plaintiffs allege that defendants failed and omitted to provide decedent and the workers at the subject construction site with adequate, ample and proper scaffolding.

Labor Law §240(1), commonly referred to as the “scaffold law,” provides, in relevant part:

All contractors and owners and their agents, except owners of 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 requirements of Labor Law § 240(1) are set forth in *Vasquez v Cohen Brothers Realty Corp.*, 105 AD3d 595 [1st Dept 2013]). The Court stated:

“An owner or its agent is liable under Labor Law Section 240(1) if the plaintiff was injured while engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. The statute requires “owners and their agents” to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building. The purpose of the statute is to protect workers by placing the ultimate responsibility for worksite safety on the owner, and Labor Law Section 240(1) imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury” (*Vasquez*, 105 AD3d at 597).

The purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear the responsibility, instead of on the workers, who are not in a position to protect themselves (*see John v Baharestani*, 281 AD2d 114, 117 [1st Dept 2001]).

“To recover under Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident.” (*Krarunzhiy v 91 Cent. Park W. Owners Corp.*, 212 AD3d 722 [2d Dept 2023], quoting *Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625 [2d Dept 2007]). “The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards and do ‘not encompass any and all perils that may be connected in some tangential way with the effects of gravity’.” (*Krarunzhiy*, 212 AD3d 722 [2d Dept 2023], quoting *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914 [1999]). “The core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists.” (*id.*).

Here, it is undisputed that an engineer from AE Design approved the installation for the suspended scaffold, inspected the parapet wall and confirmed that it was in satisfactory condition to structurally support a suspended scaffold (“C-hook”) and tiebacks.

The subject scaffold was owned by non-party Swing Staging and rented out to DNA, who thereafter provided it to MAYA for installation pursuant to the engineer’s instruction. On October

11, 2018, while performing their assigned tasks atop a suspended scaffold at the 12th floor level of the building, a piece of coping stone reported to be approximately three and one-half inches (3-1/2") in thickness and approximately fifteen and one-half inches by thirty-six and one-half inches (15-1/2" X 36-1/2") in area fell from the parapet wall striking decedent in the head. Photographs provided by plaintiff demonstrate that the coping stone had been located directly below the right hook of the suspended scaffold. The photographs, which depict the C-hook after the accident, further show the end of C-hook on top of and in contact with the parapet wall where the coping stone was previously located, thus showing that the coping stone had been dislodged outwards by the C-hook. As such the scaffold was defective in as much as either the tiebacks connected to the C-hook was improperly installed as contended by defendants or that the C-hook was installed on a surface unable to withstand the loads being imposed on it by the scaffold as contended by third-party defendant MAYA. In as much as Labor Law §240(1) imposes a non-delegable duty upon owners, contractors and their agents, plaintiffs' motion for partial summary judgment on the issue of Labor Law §240(1) is granted.

Plaintiffs' Labor Law §200 claim

With respect to plaintiff's Labor Law §200 and common law negligence claims. Defendants assert that Riverview Inc, Milford, and DNA ("collectively "defendants") are not liable as a matter of law under Labor Law §200 in as much as defendants did not exercise supervision or control of the work that led to the fatality.

Section § 200 of the Labor Law is not a strict liability statute but a "negligence statute" codifying the owner's or general contractor's common law duty to maintain a safe workplace (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common law negligence when the injury complained of falls into one of two categories; 1) those involving the manner in which the work was performed, or 2) those where workers are injured as a result of a dangerous condition at the work site (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Unlike §§ 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under § 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (*see Rizzuto v L.A. Wenger Constr. Co., Inc.*, 91 NY2d 343, 352 [1998]).

Hence, a party's duty under § 200 is contingent upon contractual or other actual authority to control the activity bringing about the injury (*see Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 289 [3d Dept 1985]) as well as proof that the defendant had actual or constructive notice of the alleged unsafe condition or location (*see Canning v Barney's New York*, 289 AD2d 32 [1st Dept 2001]). It is well settled that evidence of general supervisory control, presence at the worksite or authority to enforce general safety standards is insufficient to establish the necessary control over the work activity that caused the injury (*see Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 AD3d 446 (1st Dept 2013)). That a general contractor has an on-site safety manager with responsibility for the safety of the work done by subcontractor, or for holding safety meetings, does not provide "any basis for imposing liability on the general contractor based

on an injury allegedly caused by a subcontractor's work" (*see O'Sullivan v IDI Constr. Co.*, 28 AD3d 225 [1st Dept 2006]).

Rather, "[a]bsent any evidence that [the owner or general contractor] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, these entities cannot be held liable under Labor Law § 200 or for common-law negligence" (*id.*). An owner or general contractor thus will not be liable under § 200 where the evidence demonstrates that plaintiff's employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff's work was performed (*id.*). In contrast, where the general contractor has or exercises the authority to control the methods by which plaintiff's work is performed, liability may be established (*see Rizzuto*, 91 NY2d 343).

Where, however, the injury arises out of a "dangerous condition on the site," rather than "the methods or materials" used by the worker or his employer, it is "not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury producing work," only that it "had notice of the condition" (*see Minorczyk v Dormitory Auth. of State of New York*, 74 AD3d 672 [1st Dept 2010]; *Seda v Epstein*, 72 AD3d 455 [1st Dept 2010]; *Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]). "General awareness" that a dangerous condition may be present is insufficient (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]). "The notice must call attention to the specific defect or hazardous condition and its specific location" (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). Furthermore, constructive notice of a defect requires that the "defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*id.*).

Here defendants' expert affidavit provide that the C-hooks were not properly secured as required by the New York Building Code. Specifically, defendants contend that the tiebacks connected to the C-hook were installed at an angle which caused the coping stone to be pushed outwards and ultimately onto decedent. Whereas plaintiff's expert affidavit provides that the coping stone upon which the scaffold was installed was either not affixed to the parapet wall or could not support the loads being imposed on it by the suspended scaffold. Thus, plaintiff and MAYA contend that the scaffold had been installed as instructed by the engineer, but it was installed upon a structurally deficient building. As the actual defect has not been determined, this court cannot determine defendants' liability under Labor Law §200. Although the court finds that defendants exercised mere general supervisory control and authority to enforce general safety standards, there are issues of fact as to whether defendants had notice of a dangerous condition. Such determination cannot be made as there are issues of fact as to the nature of the defect. As such defendants' motion for summary judgment as to Labor Law §200 is denied.

Plaintiff's Labor Law §241(6) claim

With respect to plaintiff's Labor Law §241(6) claims against defendants. Pursuant to Labor Law §241(6), all contractors, owners, and their agents are required to keep all areas in which construction work is being performed to be 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 duty to comply with the commissioner's regulations under Labor Law §241(6) is nondelegable. (*see, Long v Forest-Fehlhaber*, 55 NY2d 154, 159 (1982); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978].)

Here, defendants fail to challenge the applicability of any Industrial Code regulation alleged to have been violated, rather defendants contend that they are not liable under Labor Law §241(6) on the grounds that they did not direct or control how the work on the job site was performed. However, such contention is unavailing as the duty to comply with the commissioner's regulations under Labor Law §241(6) is nondelegable. As such, defendants' motion for an order to dismiss plaintiff's Labor Law §241(6) cause of action is denied.

Defendants' Indemnification Motion

Defendants herein contend that they are entitled to contractual indemnification from DNA and MAYA pursuant to DNA and MAYA's contractual obligations.

The General Contractor agreement executed between Riverview East Owners Inc c/o Milford Management and DNA

Article 9, §9.15

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees. Arising out of or resulting from performance of the work provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the contractor, a subcontractor, or anyone indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Whereas the Subcontract Agreement executed by DNA and MAYA executed on September 7, 2018, for the property project read in part as follows:

§4.6

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architects consultants, and agents, servants, assigns, officers, directors, members, shareholders, and employees of any of them from and against claims, damages, losses and expenses, including but not limited to reasonable attorney's fees(of Contractor's choosing), arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors,

anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

It is well settled that 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. (*Barnes v New York City Hous. Auth.*, 43 AD3d 842, [2d Dept 2007], quoting *Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774 [1987]). The party seeking contractual indemnity need only establish that it was free from any negligence and would be held liable solely by virtue of statutory or vicarious liability. (*Rainer v Gray-Line Dev. Co., LLC*, 117 AD3d 634, 635-636 [1st Dept 2014]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011]).

Here, both indemnity clauses provide that Milford and Riverview Inc shall be entitled to indemnity from DNA and MAYA only for those claims caused by the acts or omissions of the contractor/subcontractor. As there are issues of facts as to what caused the coping stone to be dislodged from the parapet wall it cannot be readily determined what act or omission caused the accident. However, defendants branch of cross-motion for contractual and common-law indemnification is granted to the extent that DNA and/or MAYA are found liable under Labor Law §§200 and/or 241(6) and that Milford and Riverview Inc are not found liable under Labor Law §200.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order pursuant to CPLR §3212 granting plaintiff partial summary judgment as against defendants Riverview East Owners, Inc., Milford Management Corp., and DNA Contracting & Waterproofing, LLC. on the issue of liability pursuant to Labor Law §240(1) is granted, it is further

ORDERED, that defendants Riverview East Owners, Inc. and Milford Management Corp. and DNA Contracting & Waterproofing LLC's cross-motion for an order pursuant to CPLR §3212 dismissing plaintiff's Labor Law §§200 and 241(6) and common law negligence is denied without prejudice, and it is further

ORDERED, that defendants Riverview East Owners, Inc. and Milford Management Corp.'s cross-motion for an order pursuant to CPLR §3212 for contractual and common-law indemnification as against DNA Contracting & Waterproof LLC is granted to the extent that DNA Contracting & Waterproof LLC is not found liable under Labor Law §§200 and/or 241(6) and that Milford and Riverview Inc are not found liable under Labor Law §200, and it is further

ORDERED, that defendants Riverview East Owners, Inc. and Milford Management Corp.'s cross-motion for an order pursuant to CPLR §3212 for contractual and common-law indemnification as against Maya Contracting Inc is granted to the extent that Maya Contracting Inc is not found liable under Labor Law §§200 and/or 241(6) and that Milford and Riverview Inc are not found liable under Labor Law §200, and it is further

ORDERED, that plaintiff shall serve a copy of this order, with notice of entry, upon all parties to this action within thirty days of the date of entry.

This constitutes the decision and order of the Court.

Dated: February 2, 2024





KARINA E. ALOMAR, J.S.C.