

Sougstad v OLP Hauppauge, LLC
2024 NY Slip Op 35604(U)
June 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 616984/2018
Judge: Joseph Farneti
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INDEX No. 616984/2018
 CAL. No. 202301337OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
 Acting Justice of the Supreme Court

MOTION DATE 12/18/23 (001)
 MOTION DATE 1/5/24 (002)
 MOTION DATE 1/3/24 (003)
 MOTION DATE 1/4/24 (004)
 MOTION DATE 1/10/24 (005)
 ADJ. DATE 3/14/24
 Mot. Seq. # 001 MotD
 Mot. Seq. # 002 MotD
 Mot. Seq. # 003 MG
 Mot. Seq. # 004 MotD
 Mot. Seq. # 005 MD

ERIC SOUGSTAD,

Plaintiff,

- against -

OLP HAUPPAUGE, LLC, L-3
 COMMUNICATIONS CORPORATION, LMJ
 MANAGEMENT & CONSTRUCTION INC. and
 DAVE SANDEL CRANES, INC.,

Defendants.

KENNETH J. READY & ASSOCIATES.
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 & Construction, Inc.
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 Garden City, New York 11530

OLP HAUPPAUGE LLC and LMJ
 MANAGEMENT & CONSTRUCTION INC.,

Third-Party Plaintiff,

- against -

CYNICAL STEEL FABRICATORS, INC.,

Third-Party Defendant.

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 EDELMAN & DICKER, LLP
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 s/h/a L-3 Communications Corporation
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 White Plains, New York 10604

-----X
CYNICAL STEEL FABRICATORS, INC.,

Second Third-Party Plaintiff,

- against -

DAVE SANDEL CRANES, INC.,

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

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Upon the following papers read on these e-filed motions: for summary judgment: Notice of Motion and supporting papers by plaintiff, dated April 28, 2023; Notice of Motion and supporting papers by third-party defendant/second third-party plaintiff, Cynical Steel Fabricators, Inc. dated December 18, 2023, by second third-party defendant, Dave Sandel Cranes, Inc. dated January 5, 2024; by defendant L-3 Communications Corporation dated January 5, 2024; and by defendants/third-party plaintiffs, OLP Hauppauge, LLC, and LJM Management & Construction, Inc. dated January 4, 2024; Notice of Cross Motion and supporting papers by plaintiff dated January 5, 2024; Answering Affidavits and supporting papers by plaintiff dated February 29, 2024; by third-party defendant/second third-party plaintiff, Cynical Steel Fabricators, Inc. dated February 6, 2024; by defendants/third-party plaintiffs, OLP Hauppauge, LLC, and LJM Management & Construction, Inc. dated February 23, 2024; and by second third-party defendant, Dave Sandel Cranes, Inc., dated January 15, 2024; Replying Affidavits and supporting papers by third-party defendant/second third-party plaintiff, Cynical Steel Fabricators, Inc. dated March 12, 2024; by defendants/third-party plaintiffs, OLP Hauppauge, LLC, and LJM Management & Construction, Inc. dated March 8, 2024; by plaintiff dated March 14, 2024; Other Memoranda of Law; it is

ORDERED that the motion (001) third-party defendant/second third-party plaintiff Cynical Steel Fabricators, Inc., the motion (002) by second third-party defendant Dave Sandel Cranes, Inc., the motion (003) by defendant L-3 Communications Corporation, the motion (004) by defendants/third-party plaintiffs OLP Hauppauge, LLC, and LJM Management & Construction, Inc., and the motion (005) by plaintiff Eric Sougstad are consolidated for the purpose this determination; and it is further

ORDERED that the motion by third-party defendant/second third-party plaintiff, Cynical Steel Fabricators, Inc. for summary judgment dismissing the complaint as against defendants/third-party plaintiffs OLP Hauppauge, LLC, and LJM Management & Construction, Inc., is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by second third-party defendant, Dave Sandel Cranes, Inc. summary judgment dismissing the complaint, third-party complaint, and cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion by defendant L-3 Communications Corporation for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

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ORDERED that the motion by defendants/third-party plaintiffs, OLP Hauppauge, LLC, and LJM Management & Construction, Inc. for, inter alia, summary judgment dismissing the complaint against them is granted to the extent indicated herein and its otherwise denied; and it is

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of liability is denied.

Plaintiff Eric Sougstad commenced this action to recover damages for personal injuries he allegedly sustained on August 24, 2017, while working on a project to renovate and expand a building located at 354 Moreland Road, Hauppauge, New York. The accident allegedly occurred when a steel beam that was being guided by plaintiff and his co-worker swung out of control while it was being lowered to the ground by a crane operator. The building was owned by defendant/third-party plaintiff, OLP Hauppauge, LLC ("OLP"), which hired defendant/third-party plaintiff, LJM Management & Construction, Inc., ("LJM") to serve as the general contractor for the project. LJM hired various subcontractors to perform the construction work, including plaintiff's employer, third-party defendant/second third-party plaintiff, Cyncal Steel Fabricators, Inc. ("Cyncal Steel"), to install the structural steel required for the addition to the building. Second third-party defendant, Dave Sandel Cranes, Inc. ("DSC"), was hired to unload steel beams deliveries and move them into place in preparation for framing. Defendant L-3 Communications Corporation ("L-3"), the proposed tenant for the new addition to the premises, also was named as a defendant to the action. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§ 240 (1), 200, and 241(6).

Defendants joined issue, denying plaintiff's allegations and asserting cross claims against each other. On November 29, 2018, OLP and LJM commenced a third-party action against Cyncal Steel. Cyncal Steel joined the third-party action and asserted cross claims against OLP, LJM, L3 and DSC. Thereafter, Cyncal Steel commenced a second third-party action against DSC. DSC joined the second-third party action against it and asserted counterclaims against Cyncal.

Cyncal Steel now moves for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241(6) claims against OLP and LJM. Cyncal argues that Labor Law § 240 (1) is inapplicable under the circumstances of this case, as plaintiff's alleged injuries were caused by the lateral movement of a steel beam rather than the force of gravity generated by the type of elevation-related risk the statute was meant to address. Cyncal Steel further asserts that plaintiff's Labor Law § 241 (6) action should be dismissed because he failed to allege specific applicable sections of the Industrial Code in support of his claim.

DSC moves for summary judgment in its favor dismissing the complaint, third-party complaint, and cross claims against it on the ground it cannot be held liable pursuant to either Labor Law §§ 240 (1) or 241 (6), as it was neither an owner nor agent for the purposes of the statute, and it did not possess the

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authority to supervise or control the means and manner of plaintiff's work. DSC further asserts it should be granted summary judgment dismissing the common law negligence and Labor Law § 200 claims against it, as no evidence exists its crane malfunctioned, or that there was any negligent act or omission on its part that caused or contributed to the accident. Alternatively, DSC incorporates the legal and factual arguments made by Cynical regarding the inapplicability of Labor Law §§ 240 (1) and 241(6) in support of its motion to dismiss the complaint against it.

L3 also moves for summary judgment dismissing the complaint and cross claims against it, arguing that it was not an owner, contractor, or agent at the time of the accident, as it was merely the proposed tenant for the new addition to the premises and had not taken possession of the property prior to the accident. L3 further avers that it did not possess the authority to control the means and manner of plaintiff's work, and that it did not supply any equipment or direct and coordinate the construction work.

By way of separate motion, OLP and LMJ move for summary judgment dismissing the complaint and cross claims against them, and granting judgment on their third-party indemnification and breach of contract claims against Cynical and DSC. OLP and LMJ argue, among other things, that Labor Law § 240 (1) is inapplicable under the circumstances of this case, because, as plaintiff and the steel beam were on the same level at the time of the accident, his injuries resulted from the horizontal swing of the beam rather than the vertical force of gravity. OLP and LMJ further contend that plaintiff failed to allege specific applicable sections of the Industrial Code in support of his Labor Law § 241 (6) claim, and that they cannot be held liable pursuant to Labor Law § 200 or the common law, because they neither possessed the authority to supervise or control plaintiff's work nor had any notice of the alleged dangerous condition that caused the accident. As to Cynical's cross claims against them based on indemnification, contribution, and the failure to procure insurance naming it as an additional insured, OLP and LMJ assert that they were not contractually required to indemnify or insure Cynical and, in any event, they are free of any negligence in causing or contributing to plaintiff's accident. Conversely, OLP and LMJ contend that they are entitled to judgment on their indemnification claims against Cynical and DSC, as they are free from negligence and the subcontractors' respective agreements require indemnification in favor of the owner and general contractor for any claims arising out of the work caused by the negligent acts or omissions of the subcontractors or anyone for whose acts they may be held liable. Additionally, OLP and LMJ argue that Cynical and DSC failed, as required by their respective subcontractor agreements, to procure general liability insurance naming them as additional insureds for the project.

Plaintiff opposes the motions seeking dismissal of his complaint and cross-moves for leave to amend the complaint to include the purported violation of NYCRR 23-8.2 (c) (3), and for summary judgment on his Labor Law claims. Plaintiff argues that OLP, LMJ, and DSC violated Labor Law § 240 (1) when they failed to ensure that tag lines or a similar device were in place to enable plaintiff, who was injured when he attempted to utilize his arm rather than an appropriate safety device to prevent the steel beam from swinging horizontally before it suddenly descended and struck a stack of beams on the ground beneath it. In addition, plaintiff avers that his failure to include the alleged violation of 12 NYCRR 23-8.2 (c) (3) was based on a typographical error, that the proposed amendment is meritorious, and that no prejudice would result since the complaint already appraised defendants of the purported

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violation. As to his Labor Law § 200 claim, plaintiff contends that LMJ had actual and constructive notice of the dangerous condition created by the failure to utilize tag lines or similar devices when moving steel beams and failed to remedy the condition. Additionally, plaintiff asserts that DSC's crane operator was actively negligent in moving the steel beams despite knowing that the appropriate safety devices to prevent it from swinging were absent, and that his negligence in moving the beam when the boom was not centered over it caused the beam to swing in such a way that caused the accident.

Initially, the court grants the unopposed branch of plaintiff's motion seeking leave to amend his pleadings to correct the address of the premises where the accident occurred, and to include the purported violation of 12 NYCRR 23-8.2(c) (3) in support of his Labor Law § 241 (6) claim. Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Yong Soon Oh v Hua Jin*, 124 AD3d 639, 641, 1 NYS3d 207; *Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 537 [2d Dept 2013]). Here, as there is no dispute that the subject premises where the accident occurred is located at 435 Moreland Road, rather than 354 Moreland Road, in Hauppauge, New York, plaintiff's request to amend his pleadings accordingly is granted. Similarly, as the parties were all questioned about the absence of tag lines during their respective depositions, there is no prejudice or surprise to permitting the bill of particulars to be amended to include the purported violation of 12 NYCRR 23-8.2(c) (3), which requires the provision of tag lines during hoisting operations.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The court grants the unopposed branches of the motions by DSC and L3 seeking dismissal of plaintiff's Labor Law § 240 (1) and 241 (6) claims against them, as they were neither owners, agents, nor contracted for the work giving rise to plaintiff's alleged injuries (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879 [2009]; *Thomas v Benton*, 112 AD3d 812, 977 NYS2d 336 [2d Dept 2013]; *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]). Further, inasmuch as plaintiff failed to oppose all but the branches of the motions seeking dismissal of his Labor Law § 241 (6) claim predicated on the alleged violations of 12 NYCRR 23-8.2 (c) (3), and 12 NYCRR 23-8.1 (f) (1) (iii) and 2 (ii), plaintiff is deemed to have abandoned the remainder of the claim

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alleging various other code violations (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). In any event, a review of those code violations reveal that they are either inapplicable or too general to support a viable Labor Law § 241 (6) claim (*see Forschner v Jucca Co.*, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). As such, the branches of the motions by OLP and LMJ seeking dismissal of the Labor Law § 241(6) claims against them predicated on those alleged code violations are granted.

Additionally, L3 having adduced uncontroverted evidence that it was an out-of-possession tenant which neither contracted for nor controlled the work, and that it had no authority to exercise any control over the specific work area that gave rise to plaintiff's injuries, it established, *prima facie*, its entitlement to summary judgment dismissing plaintiff's remaining Labor Law § 200 and common law negligence claims against it (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Ritter v Fort Schuyler Mgt. Corp.*, 169 AD3d 1419, 92 NYS3d 796 [4th Dept 2019]). Moreover, to the extent the Labor Law and common law negligence claims have been dismissed as against L3, thereby establishing that it played no part in causing or augmenting plaintiff's alleged injuries, the branch of its motion seeking dismissal of the cross claims against it based on contribution and indemnification also is granted (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]).

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure 'to provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7, 935 NYS2d 551 [2011]). The statute "was designed to prevent those types of accidents in which a scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). Liability under the statute does not depend on the existence of a height differential between the injured party and the object but whether "the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 139, 936 NYS2d 624 [2011]; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604, 895 NYS2d 279 [2009]). Moreover, the Court has rejected the "same level" rule, holding "that [a] plaintiff is not precluded from recovery under section 240 (1) simply because he and the [object] that struck him were on the same level" (*Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 10, 935 NYS2d 551). Rather, the Court explained that the single decisive question is whether 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 (*Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 10, 935 NYS2d 551, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 895 NYS2d 279). Further, in determining whether an elevation differential is physically significant or de minimis, the Court instructed that "the weight of the [falling] object and the amount of force it was

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capable of generating, even over the course of a relatively short descent” must be taken into account (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605, 895 NYS2d 279; *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10, 935 NYS2d 551; *Christiansen v Bonacio Constr., Inc.*, 129 AD3d 1156, 1158, 10 NYS3d 683 [3d Dept 2015]).

Nevertheless, to prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Thus, where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see Beesimer v Albany Ave/Rte. 9 Realty*, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), and while contributory negligence on the part of the worker is not a defense to a Labor Law §240 (1) claim where none or inadequate safety devices are provided (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]), liability does not attach where a plaintiff’s conduct is the sole proximate cause of his or her own injuries, such as where adequate safety devices are available at the worksite, but the worker for no good reason either does not use or misuses them (*see Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; *Montgomery v Fed. Express Corp.*, 4 NY3d 805, 795 NYS2d 490 [2005]).

Here, Cyncal, OLP, and LMJ each failed to establish, prima facie, that Labor Law § 240 (1) is inapplicable under the circumstances of this case, or that its alleged violation was not a proximate cause of plaintiff’s injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Fundus v Scarola*, 214 AD3d 479, 185 NYS3d 104 [1st Dept 2023]; *Flores v Metropolitan Transp. Auth.*, 164 AD3d 418, 84 NYS3d 434 [1st Dept 2018]). Notably, as discussed above, the “same level rule” has been rejected by the Court and where, as in this case, the heavy steel beam was capable of generating great force over the course of a relatively short descent, the accident can be said to have arisen from a significant elevation differential (*see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 895 NYS2d 279; *Flores v Metropolitan Transp. Auth.*, 164 AD3d 418, 419, 84 NYS3d 434 [1st Dept 2018]). Moreover, Cyncal, OLP, and LMJ failed to eliminate triable issues from the case as to whether the steel beam in question merely moved horizontally, or whether it swung like a pendulum and dropped approximately two feet before striking a pile of beams already lying on the ground, thereby forcefully jerking plaintiff’s arm as he attempted to manually control its movement (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, 814 NYS2d 589; *Fundus v Scarola*, 214 AD3d 479, 185 NYS3d 104 [1st Dept 2023]). Significantly, plaintiff testified that the steel beam in question began swinging like a pendulum when it was lifted by the crane operator; that tag-lines, which would have better enabled he and his co-worker to control the beam, were unavailable; and that the spreader hooks on which the beam was suspended at the time proved inadequate, as his co-worker lost control of the beam and it began swinging with greater velocity. According to plaintiff, he was attempting to regain control of the beam when the crane operator let the cable down and caused the beam to drop two or more feet and strike a stack of beams lying on the ground. Plaintiff testified that the sudden drop and the weight of the beam jerked his arm violently forward and injured it.

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Plaintiff further testified that he believed that the use of tag lines would have made the task of moving the steel safer. However, he also testified that he did not believe that the absence of any equipment caused his accident, that he probably could have prevented the accident himself, and his attempt to manually regain control of the beam may have been “sketchy.” DSC’s crane operator, Adam Flood, acknowledged that the steel beam swung away from the crane and spun when he lifted it vertically, and admitted that he observed plaintiff hurt himself when he attempted to bring the swinging steel beam under control. Flood testified that plaintiff, who appeared to pinch his arm while trying to bring the beam under control, indicated that he was hurt and took a short break following the incident. Additionally, Flood, who conceded that no tag lines were in use at the time of the accident, testified that he did not believe tag lines were required because plaintiff and his co-worker were merely stacking or “shaking” the beams. Flood averred that from his experience, workers like plaintiff should never wrap their arms around heavy steel beams to control them. Such testimony, concerning whether tag lines were needed to perform the task safely, or whether the available spreader hook was adequate and, if so, whether plaintiff’s unilateral decision to attempt to manually control the beam instead of relying on the spreader hook, raises a triable issue as to whether plaintiff’s conduct was the sole proximate cause of his injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Fundus v Scarola*, 214 AD3d 479, 185 NYS3d 104). Therefore, the branches of the motions by Cyncal, OLP, and LMJ seeking summary judgment dismissing plaintiff’s Labor Law § 240 (1) claims against OLP and LMJ are denied.

Having determined triable issues exist as to whether the accident could have been avoided by the use of tag lines, or whether plaintiff’s unilateral decision to attempt to manually control the beam instead of relying on the spreader hook was the sole proximate cause of the accident, the branch of plaintiff’s motion seeking summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim is denied (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316; *McLean v Tishman Constr. Corp.*, 144 AD3d 534, 40 NYS3d 771 [1st Dept 2016]). For the same reason, the branch of the motion by plaintiff for summary judgment on the issue of liability with respect to his Labor Law § 241 (6) claim predicated on the alleged violations of 12 NYCRR 23-8.2 (c) (3) (requiring the use of tag lines during the hoisting of loads) and 12 NYCRR 23-8.1 (f) (1) (iii) and 2 (ii) (requiring pre-hoisting inspections and proscribing a load’s contact with obstructions) is denied (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Fundus v Scarola*, 214 AD3d 479, 185 NYS3d 104). Correspondingly, the branch of the motions by Cyncal, OLP, and LMJ seeking dismissal the Labor Law § 241 (6) claim against them predicated on those alleged violations of the Industrial Code also are denied (*see Fundus v Scarola*, 214 AD3d 479, 185 NYS3d 104; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 811 NYS2d 673 [2d Dept 2006]; *Cammon v City of New York*, 21 AD3d 196, 799 NYS2d 455 [1st Dept 2005]).

Nevertheless, OLP and LMJ established, *prima facie*, their entitlement to summary judgment dismissing plaintiff’s common law negligence and Labor Law § 200 claims against them by demonstrating that the accident arose out of the means and manner of plaintiff’s work rather the existence of a dangerous or defective premises condition, and that they lacked the authority to control or supervise such work (*see Zherka v Hudson Meridian Constr. Group LLC*, 206 AD3d 445, 167 NYS3d 790 [1st Dept 2022]; *Mendriski v New York City Hous. Auth.*, 189 AD3d 410, 136 NYS3d 272 [1st

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Dept 2020]). Significantly, plaintiff testified that his employer Cyncal Steel, particularly its worksite supervisor, Bill Paine, possessed sole authority to direct and supervise his work, and that he never heard of L3, OLP, or LMJ while he was at the worksite. Bill Paine testified that he while OLP and LMJ possessed general supervisory authority, Cyncal Steel was responsible for the provision of equipment and the implementation and enforcement of safety guidelines. LMJ's project superintendent, Steve Weiner, testified that he had mere general supervisory oversight of the project, and that his responsibilities in that regard were limited to conferring with the foreman of each trade as to their implementation of safety practices. 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 *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]). Where a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise and control the plaintiff's work (see *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 262 NYS2d 476 [1965]). "[T]he right to generally supervise the work, stop [it] if a safety violation is noted, or to ensure compliance with safety regulations . . . is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Gasques v State of New York*, 59 AD3d 666, 668, 873 NYS2d 717 [2d Dept 2009], *aff'd* 15 NY3d 869, 910 NYS2d 415 [2010]; see *Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 186 NYS3d 321 [2d Dept 2023]).

In opposition, plaintiff failed to raise any triable issues sufficient to defeat OLP, LMJ, and DSC's prima facie showing (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Notably, plaintiff failed to identify any dangerous condition on the premises that caused his accident, or assert any negligence by OLP and LMJ beyond the alleged statutory violations noted above. Further, plaintiff failed to adduce any evidence sufficient to defeat defendants' prima facie showing that Cyncal possessed sole authority to control the work and the implementation of his safety practices, or that OLP and LMJ possessed anything more than mere general supervisory authority over plaintiff's work. Accordingly, the branch of the motion by OLP and LMJ seeking summary judgment dismissing plaintiff's common law negligence and Labor Law §200 claims against them is granted.

DSC also established, prima facie, its entitlement to summary judgment dismissing the Labor Law § 200 claim against it, as the uncontroverted evidence demonstrates that the accident arose out of the means and manner of plaintiff's work rather the existence of a dangerous or defective premises condition, and that plaintiff's employer, Cyncal, possessed the sole authority to control the means and manner of his work and provide his safety equipment (see *Zherka v Hudson Meridian Constr. Group LLC*, 206 AD3d 445, 167 NYS3d 790; *Mendriski v New York City Hous. Auth.*, 189 AD3d 410, 136 NYS3d 272). Accordingly, the branch of the motion by DSC seeking summary judgment dismissing plaintiff's Labor Law § 200 claims against it is granted. However, DSC may be held liable for plaintiff's injuries as a subcontractor, pursuant to the theory of common law negligence, where the work it performed created the condition that allegedly caused the accident (see *Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 979 NYS2d 638 [2d Dept 2014]; *Ortiz I.B.K. Enters., Inc.*, 85 AD3d 1139, 1140, 927 NYS2d 114 [2d Dept 2011]). Thus, as triable issues remain as to whether the work of

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DSC's crane operator created the condition that caused plaintiff's accident, the branch of DSC's motion for summary judgment dismissing the common law negligence claim against it is denied.

Turning to the branch of the motion by OLP and LMJ seeking summary judgment dismissing the cross and counterclaims against them, and for judgment on their third-party claim against Cyncal, item 9 of the agreement between LMJ and Cyncal, entitled "Contractor Insurance and Indemnity Agreement," states, in pertinent part, as follows:

The contractor shall, to the fullest extent permitted by law, defend and hold harmless Owner, its partners . . . employees . . . and agents harmless from and against any and all claims, loss, (including attorneys' fees . . .) damages, expense and liability (including statutory liability), resulting from injury and/or death of any person or damage to or loss of any property arising out of any negligent or wrongful act, error, omission . . . in connection with the operations of the contractor, its subcontractors and sub-subcontractors. The foregoing indemnity shall include injury or death of any employee of the contractor or subcontractors.

In addition, items 3 of the agreement includes a requirement that Cyncal obtain and maintain a commercial general liability insurance naming OLP and its agents as additional insureds for the duration and three additional years after the completion of the project. Item 7 of the agreement further requires that OLP and LJM be identified as additional insureds, and that the policy provide coverage for the additional insured on a primary and non-contributory basis.

The subcontractor agreement between Cyncal and DSC contains a corresponding indemnification provision in item 1 of the agreement. It states, in relevant part, as follows:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless [Cyncal] and . . . owner, . . . General Contractor & any of its subsidiaries, agents, & employees . . . from and against all claims, damages, losses and expenses, including but limited to attorneys' fees, arising out of or in any way incidental to or resulting from their performance of the Subcontractor's work . . . provided that any such claim, damage, loss or expense is attributable to bodily injury . . . to the extent caused in whole or in part by any negligence act or omission of the Subcontractor or anyone directly or indirectly employed him or anyone for whose acts may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Paragraph 2 of the Cyncal and DSC agreement also requires that DSC obtain general liability insurance naming Cyncal, OLP, and LJM, and any of their agents, subsidiaries, and employees as additional insureds.

As a review of the agreement between LMJ and Cyncal reveals no provisions requiring either LMJ or OLP to procure insurance in favor of Cyncal naming it as an additional insured, the unopposed branch of the motion by OLP and LJM seeking dismissal of Cyncal's counterclaim based on such failure

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is granted. Notably, “[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated” (*Trapani v 10 Arial Way Assocs.*, 301 AD2d 644, 647, 755 NYS2d 396 [2d Dept 2003]; *see Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 942 NYS2d 593 [2d Dept 2012]). Further, as OLP and LJM demonstrated that they neither supervised or directed plaintiff’s work, nor played a role in causing or augmenting his alleged injuries, they met their prima facie entitlement to summary judgment dismissing the cross claims by Cyncal, DSC, and L-3 for common law indemnification and contribution (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]; *Torres v LPE Land Dev. & Constr.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Delahaye v Saint Anns School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]). As Cyncal, L-3, and DSC failed to adduce any evidence in opposition raising a triable issue as to whether OLP and LJM were actively negligent or played a role in causing or augmenting plaintiff’s alleged injuries, the branch of the motion by OLP and LJM seeking dismissal of the cross claims against them for common law indemnification and contribution is granted.

Turning to the branch of the motion by OLP and LJM seeking summary judgment on their cross and third-party claims against Cyncal and DSC for indemnification, New York’s Worker’s Compensation Law § 11 permits third-party indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the accident by which the employer expressly agreed to indemnification (*see Rodrigues v N & S Bldg. Contrs. Inc.*, 5 NY3d 427, 805 NYS2d 299 [2005]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1998]). Furthermore, General Obligations Law § 5-322.1 does not prohibit contractual indemnification where the parties’ agreement requires indemnification “[t]o the fullest extent of the law” (*see Brooks v Judlau Contr. Inc.*, 11 NY3d 204, 869 NYS2d 366 [2008]; *Beharovic v 18 E. 41st St. Partners, Inc.*, 123 AD3d 953, 1 NYS3d 158 [2d Dept 2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]). “A court may render a conditional judgment on the issue of contractual indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee’s active negligence” (*George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *see O’Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, “the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]).

Here, OLP and LJM established their prima facie entitlement to summary judgment on their claims for contractual indemnification as against Cyncal by demonstrating that the subcontractor was contractually obligated to indemnify and defend them against plaintiff’s claims, that plaintiff’s injuries arose during the course of his work on the project, and that their alleged liability for his injuries was statutory or purely vicarious (*see Hastedt v Bovis Lend Lease Holdings, Inc.*, 152 AD3d 1159, 58 NYS3d 812 [4th Dept 2017]; *Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 979

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NYS2d 638 [2d Dept 2014]). Similarly, as the subcontractor agreement between Cyncal and DSC required DSC to indemnify the owner and general contractor for the project, OLP and LJM also established, *prima facie*, their entitlement to conditional summary judgment on their cross claim for contractual indemnification as against DSC. In opposition, Cyncal and DSC failed to raise any triable issues warranting denial of judgment on the contractual indemnification claims against them (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). As noted above, there is no evidence that either OLP or LJM were actively negligent, or that their liability would be anything other than statutory or vicarious. Additionally, Cyncal and DSC's duty to indemnify under the agreement was triggered by the fact that the accident arose from the performance of Cyncal's work (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 123 NYS3d 581 [1st Dept 2020]; *Ramirez v Almah, LLC*, 169 AD3d 508, 509, 94 NYS3d 38 [1st Dept 2019]).

However, as triable issues exist as to whether negligence on the part of Cyncal or DSC caused plaintiff's accident, or whether plaintiff's unilateral decision to attempt to manually control the steel beam rather than utilize the spreader hook was the sole proximate cause of his injuries, OLP and LJM are entitled to summary judgment on their contractual indemnification claims conditioned upon a finding as to the existence and extent of negligence on the part of Cyncal or DSC constituting a proximate cause of plaintiff's accident (*see Ramirez v Almah, LLC*, 169 AD3d 508, 94 NYS3d 38 [1st Dept 2019]; *Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 975 NYS2d 53 [1st Dept 2013]). Moreover, the branch of the motion by OLP and LJM seeking judgment on their claim that Cyncal and DSC breached their subcontractor agreements by failing to procure additional insurance in their favor is denied. Notably, OLP and LJM failed to submit evidence substantiating their claim that Cyncal and DSC failed to obtain the required insurance (*see Karanikolas v Elias Taverna, LLC*, 120 AD3d 522, 992 NYS2d 31 [2d Dept 2014]; *Mathey v Metropolitan Transp. Authority*, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2012]; *DiBuono v Abbey, LLC*, 83 AD3d 650, 922 NYS2d 101 [2d Dept 2011]). To the extent the claim is predicated on Cyncal or DSC's insurers' denial of coverage to OLP and LJM, the proper remedy for such a claim is a declaratory judgment action against Cyncal and DSC's insurer to determine coverage (*see Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 887 NYS2d 395 [4th Dept 2009]; *Callan v Structure Tone, Inc.*, 52 AD3d 334, 860 NYS2d 62 [1st Dept 2008]; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 647 NYS2d 2 [1st Dept 1996]).

Based on the foregoing, the branches of the motion by Cyncal and DSC seeking dismissal of the contractual indemnification claims against them are denied. In addition, as triable issues exist as to whether the work of DSC's crane operator created the condition that caused plaintiff's accident and, if so, whether it may be held liable pursuant to the common law negligence, the branch of its motion seeking dismissal of the contribution or common law indemnification claims against it is denied. However, the branch of Cyncal's motion seeking dismissal of the cross and third-party common law indemnification claims against it is granted, as it is undisputed that plaintiff did not suffer a grave injury as a result of the alleged accident (*see Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596, 7 NYS3d 35 [1st Dept 2015]; *Lue v Finkelstein & Partners, LLP*, 94 AD3d 1386, 943 NYS2d 636 [3d Dept 2012]). Claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (*see Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8 [2008]; *Ironshore*

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Indem., Inc. v W&W Glass, LLC, 151 AD3d 511, 58 NYS3d 10 [1st Dept 2017]; *Grech v HRC Corp.*, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]).

Dated: _____

6/18/2024


A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION