SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

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VLADIMIR GAITAN,

Plaintiff,

- v -

18 EAST 18TH STREET TENANTS CORP., EVEREST SCAFFOLDING, INC.,DEFALCO CONSTRUCTION INC.,

Defendant.

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INDEX NO. 153982/2020

MOTION DATE 09/06/2024, 09/06/2024, 10/10/2024

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

18 EAST 18TH STREET TENANTS CORP.

Third-Party Plaintiff,

- v -

EVEREST SCAFFOLDING, INC.

Third-Party Defendant.

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EVEREST SCAFFOLDING, INC.

Second Third-Party Plaintiff,

- v -

DEFALCO CONSTRUCTION INC. and RHG CONSTRUCTION INC.,

Second Third-Party Defendants.

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Third-Party
Index No. 595661/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 172, 202, 203, 204, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 239, 267, 268, 273, 278

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 173, 205, 206, 207, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237,

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 241, 265, 266, 271, 272, 274, 279

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

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained on March 24, 2020, as a result of a fall from a ladder at 18 East 18th Street New York, New York ("premises") while building a scaffold bridge. Plaintiff asserts causes of action sounding in negligence and for violations of Labor Law §§ 200, 240(1), and 241(6).

Defendant/third-party plaintiff 18 East 18th Street Tenants Corp. ("18 East") is the owner of the premises. Defendant/second third-party plaintiff Everest Scaffolding ("Everest") was the general contractor of the construction project ("project"). Second third-party defendants Defalco Construction Inc. ("Defalco") and RHG Construction Inc. ("RHG") were sub-contractors on the project, and RHG was plaintiff's employer.

By decision and order dated March 21, 2024, the court granted Everest's motion for a default as against RHG.

On July 1, 2024, Plaintiff filed his note of issue and certificate of readiness.

PENDING MOTIONS

On August 20, 2024, Plaintiff moved pursuant to CPLR § 3212 for partial summary judgment on liability as to his Labor Law §§ 240(1) and 241(6) causes of action. (mot. seq. 4).

On August 30, 2024, Everest moved for an order pursuant to CPLR § 3212, dismissing plaintiff's complaint as to it, granting it summary judgment against Defalco on its claim for

contractual indemnification, and dismissing all cross claims and counterclaims against it. (mot. seq. 5).

On October 18, 2024, 18 East cross-moved for an order pursuant to CPLR § 3212 granting it summary judgment against Everest on its cross claim for common law indemnification, and against Defalco on its cross claim for contractual indemnification.

On September 27, 2024, Defalco moved for an order pursuant to CPLR § 3212 dismissing Plaintiff's Labor Law §§ 240(1), 241(6), (200) and common law negligence claims against it, and dismissing all third-party claims, cross claims and counter claims asserted against it. (mot. seq. 6).

The motions are consolidated herein for disposition and determined as set forth below.

ALLEGED FACTS

Plaintiff testified that at the time of the accident he was employed by RHG setting up scaffolding and brick pointing. His supervisor was Jesus Nunez ("Nunez"), whom Plaintiff believed was also employed by RHG. Nunez was on site on the date of the accident and gave instructions to Plaintiff. It was Plaintiff's understanding that a foreman of Everest was present to supervise the work, and that all of the jobs that Plaintiff worked at while employed by RHG also involved Everest. When Nunez was not on the jobsite, Plaintiff would be supervised by Jose who worked for RHG.

The scaffolding Plaintiff was setting up belonged to RHG. Nunez would pay Plaintiff weekly in cash. On the date of the accident, Plaintiff was building a scaffolding bridge. At the time of the accident, Plaintiff was climbing down an extension ladder which was leaning against the rear of the building to assist his supervisor in bringing up a beam that they were going to install in a wall. As Plaintiff was climbing, approximately two steps from the top of the ladder, it

moved, causing him to fall approximately 12 feet. He was wearing a harness, helmet and boots at the time of the accident, all of which were his own. There was no place to secure his harness as he was descending the ladder, and the ladder was not secured. Plaintiff requested that one of his coworkers hold the ladder, but no one did. Plaintiff did not notice anything wrong with the ladder and was unaware if it was broken or defective in anyway prior to his accident.

Christopher Downes, owner and president of Everest testified that Everest subcontracted with Defalco to perform installation and removal of scaffolding and sidewalk bridges for the project. He testified that Nunez was employed by Everest as a foreman and project manager. He stated that his contact at Defalco was Gil Menashe ("Menashe"), and that he believed Menashe to be the owner of both RHG and Defalco, and that Menashe represented himself as such.

Michael Falco, owner of Defalco, testified that he had no knowledge of the project, contract or work Defalco performed related to the subject premises. He acknowledged that Defalco was identified as the subcontractor in the subcontract with Everest dated June 25, 2019, but also testified that Defalco never had a subcontract with Everest. He stated that the signatory, Menashe, was not an employee of Defalco, but rather was the owner of a labor subcontractor for concrete work that he had worked with, which he believed was RHG. Falco testified that he was aware that Menashe entered into other contracts on Defalco's behalf as its purported president, and that he was aware of ongoing litigation in reference to same but did not know the details.

Oka Usi, an apartment owner in the building and treasurer and Board member of 18 East, testified that 18 East hired Everest Scaffolding to do the scaffolding work on the project, the ultimate purpose of which was to repoint the building. Usi stated the Board only hired Everest and was unaware of any subcontractor on the project until the commencement of this suit. Usi

testified that she would meet with an Everest field agent periodically to discuss the project, and that it was the Boards' view that the contractor would be responsible for site safety.

DISCUSSION

Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Everest's Status as a Special or Joint Employer

Everest seeks dismissal of Plaintiff's claims against it, contending Plaintiff's claims are barred by Worker's Compensation Law § 11 because Everest was a special employer and/or joint employer of Plaintiff. It contends that the fact that plaintiff was supervised by Everest foremen, and that plaintiff testified that he only worked on projects involving Everest while employed by RHG support the existence of a special employer relationship. It argues that it is not relevant whether plaintiff knew he was working for Everest's benefit.

18 East argues there are triable issues of fact as to whether Everest was Plaintiff's special employer, citing evidence showing that RHG, not Everest, paid Plaintiff, had the ability to hire and fire him, and retained at least some supervision and control of Plaintiff on the jobsite, despite the close working relationship between Everest and RHG.

Plaintiff contends that there is no evidence that RHG lacked control over him, arguing that the fact that he was supervised by an Everest employee is insufficient. Plaintiff notes that he was not aware that his supervisor was an Everest employee as a factor mitigating against a special employer relationship.

An employer's liability for on-the-job injuries is generally limited to worker's compensation benefits unless the injured worker has suffered a grave injury as defined by Workers Compensation Law § 11. *Alulema v ZEV Electrical Corp.*, 168 AD3d 469 (2019). For the purposes of Worker's Compensation Law § 11, a special employee is described as "one who is transferred for a limited time of whatever duration to the service of another." *Gannon v JWP Forest Elec. Corp.*, 275 AD2d 231 (1st Dept 2000), quoting *Thompson v Grumman Aerospace Corp.*, 8 NY2d 553, 557 (1991). "General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general

employer and assumption of control by the special employer." *Thompson*, 78 NY2d at 557. "[A] general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits." *Id*. "a person's categorization as a special employee is usually a question of fact" *Id*. The employee's knowledge and consent to the special employment relationship is a factor that the courts consider. *See Short v Durez Division-Hooker Chemicals & Plastic Corp.*, 280 AD2d 972 (4th Dept 2001); *Abramson v Long Beach Memorial Hosp.*, 103 AD2d 866 (3d Dept 1984).

Here, the factors weighing in favor of a special employment relationship are that plaintiff worked exclusively on Everest projects, was directly supervised by Nunez, an Everest employee, was paid weekly by his Everest supervisor in cash. Weighing against a special employment relationship is the fact that plaintiff testified that he did not know Nunez was an Everest employee, the scaffolding belonged to RHG, and that plaintiff would be supervised by an RHG employee when Nunez was not on the jobsite. While it is clear that Everest had significant control over plaintiff, the above factors make clear that RHG maintained at least some control over plaintiff. Thus, absent a complete, knowing transfer of control, plaintiff was not a special employee of Everest as a matter of law.

Defalco's Alleged Involvement

Defalco contends that it is not a proper defendant in this action, arguing that it did not perform work at the premises, and had no involvement in the project or in Plaintiff's accident. Defalco asserts it is a concrete subcontractor and does not perform any scaffolding work. It contends that there is no valid contract between it and Everest, as Menashe had no authority to sign on its behalf. It annexes the affidavit of its office manager Eran Elad, who states that the

defalcoconstructionl@gmail.com address purportedly used by Menashe was never used or maintained by Defalco or any of its employees or officers.

Everest, 18 East, and plaintiff contend that at minimum there are questions of fact as to whether Menashe had apparent or implied authority to execute the contract on Defalco's behalf as Menashe had a history of entering into contracts on behalf of Defalco, used an email address of Defalco, worked with Defalco as its subcontractor on previous projects.

There is no evidence or allegation that Defalco had any actual involvement in this case beyond the disputed contract. Nor is there any evidence or allegation that Menashe had actual authority to enter into a contract on its behalf. Thus, the sole potential basis to hold Defalco liable rests on whether Menashe had apparent or implied authority to bind Defalco.[1]

> Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. "Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent." (*Ford v. Unity Hosp.*, 32 N.Y.2d 464, 473, 346 N.Y.S.2d 238, 299 N.E.2d 659; *see, also*, Restatement, Agency 2d, § 27.) Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable (*see Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co.*, 260 N.Y. 84, 92–93, 183 N.E. 73; Restatement, Agency 2d, § 8, Comment c; Conant, Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership, 47 Neb.L.Rev. 678, 681).

Hallock v State, 64 AD2d 224, 231 (1984). Implied actual authority must be based on a showing that the principal "performed verbal or other acts that gave [the agent] the reasonable impression that he had authority to enter into the [transaction]."

Here, while it is clear that Menashe held himself out as having authority to enter into a contract on Defalco's behalf, there is no evidence that anyone at Defalco made any representation by words or conduct that Menashe had authority to enter into a contract on his

[1] It should be noted that RHG has defaulted in this action and Menashe has not responded to the parties' subpoenas.

behalf. That Menashe or his companies worked with Defalco on previous instances is clearly insufficient to establish the appearance of such authority.

Absent proper authority for Menashe to enter into the contract on behalf of Defalco, the contract is not binding as to them. And absent any contractual obligation, there is no basis to find any liability as to them. Thus, Defalco's motion is granted, and all claims against it are dismissed.

Plaintiff's Labor Law § 240(1) Claim

Plaintiff seeks summary judgment on his Labor Law § 240(1) claim, arguing that as it is uncontroverted that Plaintiff fell from an unsecured ladder, defendants clearly violated the statute.

In opposition, 18 East contends that, at minimum, there is an issue of fact as to whether plaintiff was the sole proximate cause of his accident, as plaintiff testified that he was aware that the ladder was not being held or tied down when he descended and failed to ask for help.

In separate opposition, Everest argues that plaintiff has failed to show any defect in the ladder.

In relevant part, Labor Law § 240(1) provides that contractors and owners, and their agents who erect a building or structure shall furnish or erect "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." It is well settled that "[t]he 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.' " *Nieves v Five Boro Air Conditioning & Refrig.*

Corp., 93 NY2d 914, 915-916 (1999), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see Misseritti v Mark IV Constr. Co. Inc.*, 86 NY2d 487, 491 (1995).

"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 Associates*, 96 NY2d 259, 267 (2001). Moreover, Labor Law § 240(1) only applies to "exceptionally dangerous conditions posed by elevation differentials at work site" rather than the usual and ordinary hazards of construction. *See Misseritti*, 86 NY2d at 491.

Here, it is uncontroverted that when the unsecured ladder moved, Plaintiff fell from a height that would fall under the ambit of Labor Law § 240(1), , and that Plaintiff was not provided any safety devices except for the unsecured ladder. Thus, Plaintiff meets his *prima facie* burden for summary judgment on this claim. In opposition, defendants fail to raise a triable issue of fact by contending that plaintiff was the sole proximate cause of his accident, as even if plaintiff's co-workers were supposed to hold the ladder, "people are not safety devices within the meaning of Labor Law § 240(1)." *Jara-Salazar v 250 Park, L.L.C.*, 231 AD3d 674 (1st Dept 2024), quoting *Iuculano v City of New York*, 214 AD3d 535, 536 (1st Dept. 2023).

Thus, Plaintiff's motion for summary judgment is granted on his Labor Law § 240(1) as to the remaining defendants.

Plaintiff's Labor Law § 241(6) Claim

Plaintiff seeks summary judgment on his Labor Law § 241(6) cause of action, based on defendants' violation 12 NYCRR 23-1.21(b)(4)(iv), contending that the evidence is clear that plaintiff was descending from an unsecured ladder that was not being held in place by anyone, while plaintiff was at a height of over 10 feet off the ground.

In opposition, 18 East argues that plaintiff was the sole proximate cause of his accident.

In separate opposition, Everest argues that the cited Industrial Code provision is inapplicable, as plaintiff testified that he was not performing work from the ladder, but as a means of access and egress.

Labor Law §241 sets forth in relevant part that:

> All contractors and owners and their agents… when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements… [subsection] (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

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." *Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 348 (1998); *see also, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 (1978). The owners and contractors' duty under Labor Law § 241(6) is nondelegable, "regardless of their control or supervision of the jobsite." *Whalen v City of New York*, 270 AD2d 340, 342 (2d Dept 2000); *see also Allen*, 44 NY2d at 300.

To support a cause of action pursuant to Labor Law §241(6), a plaintiff must demonstrate that a specific, applicable Industrial Code was violated, and the violation was the proximate cause of his or her injuries. *Cappabianca v Skanska USA Building Inc.*, 99 AD3d 139 (1st Dept 2012); *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 (2d Dept 2006).

Industrial Code § 23-1.21(b)(4)(iv), which plaintiff clarifies is the sole provision relied upon, sets forth:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Here, plaintiff testified that he was using the ladder as a means of egress into and out of the building where he was working, not performing work from the ladder itself. The cited industrial code provision has been found to only be applicable where a plaintiff is using the ladder as a work platform. *See Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460 (2d Dept 2008); *Cordova v 653 Eleventh Ave. LLC*, 2020 N.Y. Slip Op. 30873(U) (Supr Ct, Bronx County 2020).

Thus absent an applicable Industrial Code provision, plaintiff's Labor Law § 241(6) claim is dismissed.

18 East's Claims against Everest

18 East argues that it is entitled to summary judgment on its common law indemnity and contribution, contending that it is free of negligence and had no supervision or control of Plaintiff's work, and as Everest, not it, was responsible for supervising the jobsite.

Everest opposes and moves for summary judgment dismissing these claims solely on the basis that 18 East's claims are barred based on Workers Compensation Law § 11 as Plaintiff did not suffer a grave injury.

As the Court held *supra* that Plaintiff was not a special employee of Everest, Workers Compensation Law § 11 does not bar the assertion of common law claims against it.

However, as Plaintiff's Labor Law § 200 and common law negligence claims against 18 East remain intact, there remain issues of fact as to 18 East's negligence, necessitating denial of its motion. See *Miano v Battery Place Green LLC*, 117 AD3d 489 (1st Dept 2014)

CONCLUSION

Accordingly, it is hereby:

ORDERED that Plaintiff's motion for partial summary judgment (mot. seq. 4) is granted, to the extent that Plaintiff is granted summary judgment as to liability on his Labor Law § 240(1) claim against Everest and 18 East, and is otherwise denied; and it is further

ORDERED that Everest's motion for summary judgment (mot. seq. 5) is denied; and it is further

ORDERED that 18 East's cross-motion for summary judgment is denied; and it is further

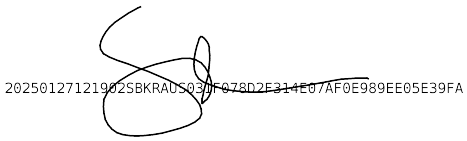
ORDERED that Defalco's motion for summary judgment (mot. seq. 6) is granted and all causes of action against it are dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website)].

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

This constitutes the decision and order of this court.



1/27/2025
DATE

SABRINA KRAUS, J.S.C.

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