SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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AMPARO LOPEZ,

Plaintiff,

- v -

GP-UHAB HOUSING DEVELOPEMENT FUND CORPORATION, MDG DESIGN & CONSTRUCTION LLC,

Defendants.

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INDEX NO. 154041/2019

MOTION DATE 12/11/2023, 12/11/2023, 12/11/2023

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

MDG DESIGN & CONSTRUCTION LLC

Plaintiff,

-against-

CHANEL CONSTRUCTION CORP.

Defendant.

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Third-Party
Index No. 595975/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 137, 139, 144, 147

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 138, 140, 145, 148, 158, 159, 160, 161, 164

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 141, 146, 149, 150, 151, 152, 153, 154, 155, 156, 157, 162, 163

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

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on March 8, 2019, when, while working at a construction site located at 640 Riverside Drive, New York, New York (the Premises), the closed A-frame ladder plaintiff was standing on shifted, causing her to fall to the floor.

In motion sequence 003, third-party defendant Chanel Construction Corp. (Chanel) moves, pursuant to CPLR § 3212, for summary judgment dismissing defendant/third-party plaintiff MDG Design & Construction, LLC's (MDG) contribution and common-law indemnification claims as against it.

In motion sequence 004, MDG moves, pursuant to CPLR § 3212, for summary judgment in its favor on its third-party contractual indemnification claim against Chanel.

In motion sequence 005, plaintiff Amparo Lopez (plaintiff) moves, pursuant to CPLR § 3212, for summary judgment in her favor on her Labor Law §§ 240(1) and 241(6) claims as against MDG and defendant GP-UHAB Housing Development Fund (GP) (together, defendants), and on her common-law negligence and Labor Law § 200 claims as against MDG only.

BACKGROUND

On the day of the accident, the Premises was owned by UHAB. UHAB hired MDG to perform general contracting services for a project at the Premises that entailed the renovation of several apartments. MDG subcontracted demolition work to Chanel. Plaintiff was employed by Chanel.

Plaintiff's 50-H Testimony (NYSCEF Doc. No. 116)

Plaintiff testified that on the day of the accident, she was employed by Chanel as a laborer (Lopez tr at 9). Her responsibilities included "everything from demolition to restoration" (*id.* at 9). Her foreman was a Chanel employee named Angel Salinas (*id.* at 10). Salinas hired her for the Project at the Premises.

On the day of the accident, Salinas directed plaintiff and another Chanel employee to install sheetrock on the ceiling of a closet (*id.* at 12). To do her work, plaintiff used an A-frame

ladder (the Ladder), which was owned by Chanel (*id.* at 13). She had to use the Ladder "[i]n the closed position because it did not fit in the closet if it was opened" (*id.* at 14).

The accident occurred around 4:00 p.m. Immediately before the accident, plaintiff propped the Ladder against a wall inside a closet. Plaintiff's coworker left the area to "cut another piece of sheetrock" (*id.* at 14). While her coworker was away, plaintiff climbed the closed Ladder to the fourth rung when "the ladder fell and [she] fell backwards with the ladder" (*id.* at 15). Plaintiff then testified that the Ladder "didn't fall – it did fall, but it fell backwards with [her]" (*id.* at 16). Plaintiff landed on the ground, on her back.

After the accident plaintiff stood up on her own. She called Salinas and told him about the accident, and he instructed her to finish the day by cleaning "the stairs of the building because [she] couldn't keep working" (*id.* at 17). At the end of the day, plaintiff took the train home and then went to the hospital.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 117 and 118)

Plaintiff's testimony is similar to the testimony she provided at her 50-H hearing. Plaintiff testified that she was hired at Chanel by Salinas (plaintiff's tr at 64). Only Salinas told her what to do on a day-to-day basis (*id.* at 101). She did not receive any training from Chanel (*id.* at 86). She was not familiar with MDG (*id.* at 101) or UHAB (*id.* at 102).

Initially, plaintiff performed demolition work. After a few weeks, Salinas directed her to install sheetrock (*id.* at 107). To install the sheetrock, she needed to use an A-frame ladder (*id.* at 116). Salinas informed her that she needed to open the ladder and make sure that it was locked in place before using it (*id.* at 120).

The accident occurred on the second day that she was installing sheetrock (*id.* at 108). Salinas directed plaintiff to hang sheetrock in the living room and closet of an apartment on the

12th floor (plaintiff's second tr at 26). There was a six-foot A-frame ladder in the apartment. Initially, plaintiff installed sheetrock in areas where she did not need to use the ladder (*id.* at 37-39). Then, towards the end of the day, Salinas directed plaintiff to "put sheetrock there inside the closet" (*id.* at 54). Plaintiff testified that she told Salinas that "the ladder couldn't fit inside the closet" which was "two to three feet wide. And six [feet] long, approximately" (*id.* at 54-55). Plaintiff then testified that Salinas told her to use the ladder in a closed position (*id.* at 60-61).

Plaintiff successfully installed sheetrock on the floor level, and then began using the ladder to install sheetrock near the ceiling. Specifically, she closed the ladder and "put it up against the wall" prior to climbing (*id.* at 61-62). The ladder was placed at an angle (*id.* at 66). She was able to use the ladder in the closed position successfully approximately four times (*id.* at 62). She would climb to the third or fourth rung and then take out her drill. She would then hold the sheetrock steady with one hand and install screws with the other hand (*id.* at 73-74). Only her feet were in contact with the ladder (*id.* at 74).

Immediately prior to the accident, plaintiff climbed to the third rung and worked for three or four minutes (*id.* at 70); then the ladder "moved and it fell backward on [her]" and that she "fell backward with [the ladder]" (*id.* at 71). She also testified that the moment she felt the ladder shift, she dropped her drill and "by instinct" grabbed onto the ladder (*id.* at 78). As plaintiff fell, she struck the opposite wall of the closet with her "neck" "shoulders" and "back" (*id.* at 79). Then she "fell to the right and then the ladder fell on top of [her] knees" (*id.* at 80).

At the time of the accident, plaintiff's coworker, "Rosa" was in the apartment's living room, cutting additional pieces of sheetrock (*id.* at 67). Plaintiff called out to Rosa and told her that she had fallen. Then plaintiff retrieved her cell phone and called Salinas, informing him of the accident. Salinas did not come to check on her (*id.* at 83). Instead, he told her to "go clean

the stairs" (*id.* at 84). Plaintiff left the ladder in the closet (*id.* at 107) and cleaned the stairs for a short while, but then left and went to the hospital. She did not notify anyone else of the accident.

Finally, plaintiff testified that she did not know of any other types of ladders at the Premises (*id.* at 61).

Deposition Testimony of Brent Sharman (UHAB's Consultant) (NYSCEF Doc. No. 120)

Brent Sharman testified that on the day of the accident, he was a "consultant" for UHAB (Sharman tr at 9). He described UHAB as a "not for profit organization" that takes "temporary ownership" of distressed/foreclosed buildings and "oversee[s] the rehabilitation of those buildings" (*id.* at 9). He was the consultant for the Project (*id.* at 11). His duties included acting as a liaison between UHAB and the resident association of the Premises (*id.* at 12). He was not involved in overseeing the construction, and he did not know if UHAB had the authority to stop work or direct or instruct workers (*id.* at 34).

Sharman testified that UHAB retained MDG as a general contractor for the Project (*id.* at 16). He did not know if MDG subcontracted any work (*id.* at 24-25), and he was unfamiliar with Chanel (*id.* at 47).

Sharman did not go to the Premises every day. He was unsure if he was there on the day of the accident (*id.* at 35). He did not witness the accident (*id.* at 36). Sharman also testified that he did not receive any complaints about the condition of ladders at the Project (*id.* at 47). Sharman also did not investigate or speak with anyone about the accident (*id.* at 36).

Deposition Testimony of Andre Riviere (MDG's Construction Superintendent) (NYSCEF Doc. No. 121)

Andre Riviere testified that on the day of the accident, he was the construction superintendent for MDG and was assigned to the Project (Riviere tr at 9, 13). MDG was the general contractor for the Project (*id.* at 16), which was an interior and exterior renovation (*id.* at 31). MDG hired all the subcontractors for the Project, including Chanel. Chanel was responsible for the "carpentry, painting, tiling, framing, cleaning," including installing sheetrock and demolition work (*id.* at 38-39). MDG did not provide any equipment to workers (*id.* at 57). Chanel provided their own equipment (*id.* at 58).

Riviere's duties included briefing subcontractors on how to handle tenants that remained at the Premises during renovation, general safety (*id.* at 15). He would also "check all subs, the electricians, plumbers, carpenters, painters, window guys, floor guys" (*id.* at 15). Riviere had the authority to stop work (*id.* at 60). He was on site daily (*id.* at 28).

Riviere testified that he held a weekly general safety meeting that was attended by all workers (*id.* at 56). At those meetings, he showed Chanel workers "how to do the framing, how to install my sheet work, what codes, what tool needs a safety guide" and made sure that "everybody . . . [had] their hard hats on, safety boots, gloves, glasses and so on" (*id.* at 62). He also instructed workers at the weekly safety meetings to not "stand on the top step of the ladder," "don't walk the ladder" and "don't sit on the ladder" (*id.* at 63). Riviere also testified that he "would explain everything to the workers [about] the right way to use the ladder" (*id.* at 135).

Riviere further testified that the standard way to reach the ceiling inside a closet was to "use a regular 6-foot ladder" (*id.* at 117). He also testified that it would be unsafe for workers to use a ladder in the closed position (*id.* at 117 ["all workers have to have the ladder open . . . Because if it slides, its an accident. So that's unsafe to me"]). He never saw any worker using a closed ladder (*id.* at 118).

Riviere did not witness the accident and he first heard about it well after it happened (*id.* at 105-106). He did not prepare an accident report because he did not know that the accident occurred or what happened (*id.* at 103). He also was unaware of any complaints regarding the working conditions or equipment on site (*id.* at 116-117).

At his deposition, Riviere reviewed a contract between UHAB and MDG and confirmed that it was the contract for the Project (*id.* at 19). He also reviewed a contract between MDG and Chanel and confirmed that it was a subcontract for the Project (*id.* at 40).

Deposition Testimony of Julio Dijol (Chanel's Vice President) (NYSCEF Doc. No. 122)

Julio Dijol testified that on the day of the accident, he was Chanel's vice president as well as a work supervisor. Chanel is an interior construction company, specializing in demolition and carpentry (Dijol tr at 13). Dijol's duties included providing estimates, obtaining contracts, and hiring employees. He would also visit job sites "almost every day" (*id.* at 18) to make sure that "everything is running well" (*id.* at 19).

Dijol was shown a copy of a contract between MDG and Chanel. He confirmed that it was the contract for the Project and that he had signed it on behalf of Chanel (*id.* at 27). Chanel's scope of work included demolition and carpentry. Chanel provided ladders for its workers (*id.* at 113).

Besides Dijol, Chanel had two supervisors for the Project, Freddie Quiroga and Angel Salinas (*id.* at 42). Both Quiroga and Salinas were at the Premises daily. Dijol, Quiroga and Salinas would direct and instruct the Chanel workers (*id.* at 54-55).

Dijol testified that Riviere, MDG's supervisor, would inform Dijol, Quiroga and Salinas on "what was required for the day to be done" (*id.* at 47). Riviere would not speak to or direct

any Chanel workers (*id.* at 47; 55 ["he did not have to instruct the workers"]). MDG did not instruct Chanel's workers, or direct how the work was to be performed (*id.* at 118).

Dijol also testified that Salinas had recommended plaintiff for the job, and he then hired her (*id.* at 71). Plaintiff's role was "laborer" (*id.* at 81), responsible for demolition and cleaning (*id.* at 82). After hiring plaintiff, Dijol gave plaintiff some initial training with ladders, including "where to set it up, where to open it, where to set the ladders" (*id.* at 79).

Dijol did not know about the accident until Chanel was served with the instant action (*id.* at 87). Normally, if an accident occurs, Chanel workers were instructed to "report it to the supervisor" (*id.* at 88). His supervisors – Quiroga and Salinas – never informed him that an accident occurred (*id.* at 88-89). He did not know if anyone witnessed the accident (*id.* at 148).

Dijol was shown a copy of an attendance log for the day of the accident and confirmed that, even though plaintiff's name did not appear on it, that did not mean she was not present that day, as workers sometimes forgot to sign in or out (*id.* at 145).

Witness Statement of Angel Salinas (NYSCEF Doc. No. 174)

Through discovery, defendants provided a notarized, sworn witness statement by Angel Salinas, notarized on November 14, 2022 (plaintiff's notice of motion, exhibit O; NYSCEF Doc. 124) (the 2022 Statement). Attached to the statement is an interpreter's affidavit, which is also signed and sworn to on November 14, 2022 (*id.* at 3)

In the 2022 Statement, Salinas stated that he was a Chanel employee working at the Project. He did not witness the incident. He states that on a Sunday in March (he could not recall the date), he "was notified by [plaintiff] via text message that she had been injured at the job site . . . two days prior" (*id.* at 1). Specifically, plaintiff told him that "a sheetrock panel fell on her back" (*id.* at 1).

Salinas also stated that he "kn[e]w that [plaintiff] was working installing sheetrock in a closet" on the day of the accident, and that he "did not see or hear about any incident that day" (*id.* at 1). Salinas further stated that he recalled giving plaintiff her pay envelope on the day of the accident, and that plaintiff never mentioned the accident to him (*id.* at 1).

Expert Affidavit of John P. Coniglio (NYSCEF Doc. No. 131)

Finally, plaintiff offers the expert affidavit of John P. Coniglio, "a practicing safety professional with over 40 years of experience in construction, heavy industry, process (chemical) and commercial areas," as evidence (NYSCEF Doc. 131 ¶ 2). Coniglio states that "[t]he cause of this accident as suffered by Lopez was the lack of a proper safety device to perform her task when elevated" because a scaffold should be used "to perform drywall installation," rather than an A-frame ladder which "is not appropriate and is unsafe" for such work (*id.* ¶ 11).

DISCUSSION

"It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Plaintiff's Labor Law § 240(1) Claim as Against Defendants (Motion Sequence 006)

Plaintiff moves for summary judgment in her favor as to liability on her Labor Law § 240(1) claim.

Labor Law § 240(1), known as the Scaffold Law, provides as relevant:

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

Labor Law § 240(1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found in section 240 "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" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240(1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). In order to prevail on a Labor Law § 240(1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials" (*Pai v Nelson Senior Hous. Dev. Fund Corp.*, 232 AD3d 822, 825 [2d Dept 2024] [internal quotation marks and citation omitted]).

Here, plaintiff has testified that she was required to use an A-frame ladder in the closed position, while using both her hands for her work, meaning that only her feet were in contact with the ladder (plaintiff's tr at 74-75). Plaintiff further testified that she fell when the ladder she

was standing on moved for no reason, causing her to lose her balance and fall backwards off it. These facts demonstrate a prima facie violation of section 240(1) by defendants (*Montalvo,* 8 AD3d at 174).

Defendants argue Coniglio's affidavit is inadmissible because "Coniglio was not identified as an expert witness . . . prior to filing note of issue" (NYSCEF Doc. No. 155). However, as plaintiff notes, "CPLR 3212 (b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR 3101 (d) was not furnished prior to the affidavit's submission" (*Brown v 43-25 Hunter, LLC,* 178 AD3d 493, 494 n.1 [1st Dept 2019]). Defendants further argue that Coniglio's affidavit is speculative as to the cause of plaintiff's accident, noting that "Coniglio did not visit the location of the alleged accident location [and] address the size of the closet [and whether] a rolling scaffold would have fit" (NYSCEF Doc. No. 155). Coniglio does make conclusory statements in his affidavit (NYSCEF Doc No 131 ¶ 11 ["The cause of this accident [] was the lack of a proper device to perform her task when elevated"]). However, plaintiff's own testimony is sufficient to state a prima facie violation of section 240(1).

Notably there were no witnesses to the accident. However, an accident being unwitnessed does not bar summary judgment in a plaintiff's favor, except where there is an issue of fact contradicting the plaintiff's version of the accident or a question regarding the plaintiff's credibility (*see Gutierrez v Turner Towers Tenants Corp.,* 202 AD3d 437, 438 [1st Dept 2022]).

"Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441,

442 [1st Dept 2012]; *see also Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]).

Here, there are issues that contradict plaintiff's version of the accident. Plaintiff submitted Salinas's affidavit, without caveat or objection (plaintiff's notice of motion, exhibit O; NYSCEF Doc. No. 124). In that affidavit, Salinas stated that plaintiff, via text message, told him that the accident happened not when she fell from a ladder, but when "a sheetrock panel fell on her back" (Salinas tr at 1). Salinas makes no mention of a ladder in his statement. Notably, in her motion in chief, plaintiff does not discuss Salinas's statement, despite annexing it to her motion.

Initially, a review of Salinas's statement establishes the existence of a second version of the accident. Specifically, Salinas's version of the accident raises a separate theory of the accident – one not of a falling worker, but of a falling object.[1] Falling object accidents involve several different issues that are entirely unaddressed by plaintiff's initial submission. Further, it does not appear that a falling object theory was raised in plaintiff's bill of particulars.

Therefore, there are two versions of the accident, operating under two different theories of injury. In her reply papers, plaintiff acknowledges that there may be two competing theories of the accident, but argues that under either version, plaintiff would still prevail on her section 240(1) claim and, therefore, summary judgment in her favor would still be warranted (*see e.g. Lin v 100 Wall Street Property LLC,* 193 AD3d 650, 650 [1st Dept 2021]). This argument is

[1] In order to recover damages for a violation of Labor Law §240(1) under a falling objects theory, a plaintiff must demonstrate that the object that fell was in the process of being hoisted or secured at the time of the accident, or that it "was a load that required securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]

unpersuasive, as plaintiff did not address this second theory of the accident until her reply papers.

Importantly, with respect to the falling object theory, the record does not contain any evidence as to whether the sheetrock described in Salinas's statement was installed by plaintiff (and needed no securing as the undertaking was complete), was slated for demolition (and may have needed securing during the demolition), or was merely part of a preexisting structure (*see e.g. Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [dismissing section 240(1) claim because glass that fell from above "was part of the pre-existing building structure as it appeared before work began" and was not a part of the construction]).

In the absence of such information, questions of fact remain as to whether plaintiff would prevail on her Labor Law § 240(1) claim under the version of the accident presented in Salinas's statement. Such issues, which implicate the credibility of the statements and testimony surrounding the cause of the accident, cannot be resolved on a motion for summary judgment as a matter of law (*see e.g. Martin v Citibank, N.A.*, 64 AD3d 477, 478 [1st Dept 2009] ["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"]).

Accordingly, the part of plaintiff's motion seeking summary judgment on her Labor Law § 240(1) claim will be denied.

Plaintiff's Labor Law § 241(6) Claim as Against Defendants (Motion Sequence Number 005)

Plaintiff also moves for summary judgment on her Labor Law § 241(6) claim based upon a violation of Industrial Code 12 NYCRR 23-1.21(e)(2).

"Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety" (*Toussaint v Port Auth. of New York and New*

Jersey, 38 NY3d 89, 93 [2022] [internal citations omitted]) "to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Ochoa v JEM Real Estate Co., LLC*, 223 AD3d 747, 749 [2nd Dept 2024]). "To sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*id.*). "[A]n owner or general contractor is vicariously liable without regard to their fault, and even in the absence of control or supervision of the worksite, where a plaintiff establishes a violation of a specific and applicable Industrial Code regulation" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024] [internal quotation marks and citations omitted]). "The Code regulation must constitute a specific, positive command, not one that merely reiterate[s] the common-law standard of negligence" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

Industrial Code 23-1.21 governs "Ladders and Ladderways." Subsection (e) governs "Stepladders." Section 23-1.21(e)(2) provides that "[w]hen in use every stepladder shall be opened to its full position and the spreader shall be locked."

Section 23-1.21(e)(2) is not sufficiently specific to support a Labor Law § 241(6) claim (*Lopez v La Fonda Boricua, Inc.*, 136 AD3d 588, 589 [1st Dept 2016] ["The remaining provision (12 NYCRR 23-1.21 [e][2]) is not sufficiently specific to support a Labor Law § 241(6) claim"]).

Plaintiff argues that the First Department has implicitly abrogated the *Lopez* decision in a 2021 decision captioned *Martinez v St-Dil LLC* (192 AD3d 511 [1st Dept 2021]). In *Martinez*, the court held that section 12 NYCRR 23-1.21(e)(2) was "inapplicable" to the facts presented, rather than insufficiently specific to support a claim as a matter of law (*id.* at 513 ["Industrial Code § 23-1.21 (e) (2) which pertains to a "stepladder . . . opened to its full position," is

inapplicable"]). However, the accident in *Martinez* was caused by an unsecured scaffold that moved (*id.* at 512), and not by a ladder. Accordingly, section 23-1.21(e)(2) – which governs stepladders – was, indeed, inapplicable to the facts in *Martinez*.

Such a fact specific determination of applicability does not serve to overturn the First Department's earlier holding in *Lopez* that section 23-1.21(e)(2) is insufficiently specific to support a Labor Law § 241(6) claim stemming from the movement of a ladder that was not "opened to its full position." Therefore, plaintiff's Labor Law § 241(6) claim cannot be predicated upon a violation of Industrial Code 12 NYCRR 23-1.21(e)(2).

Accordingly, the part of plaintiff's motion seeking summary judgment on her Labor Law § 241(6) claim will be denied and upon review of the record and caselaw presented, defendants are entitled to summary judgment dismissing this claim notwithstanding there is no cross-motion (CPLR § 3212 [b]).

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims as Against MDG (Motion Sequence Number 005)

Plaintiff moves for summary judgment in her favor on her common-law negligence and Labor Law § 200 claims against MDG.

"Labor Law § 200(1) codifies the common-law duty [of an owner or general contractor] to maintain a safe workplace" (*Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022]). "Claims under Labor Law § 200 and the common law fall under two categories: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Jackson v Hunter Roberts Constr., L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or

constructive notice of it" (*id.*). On the other hand, "where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.* [internal citations omitted]).

Here, the accident was caused by a ladder that moved, implicating the means and methods of the work.

Plaintiff argues that MDG's superintendent, Riviere, established through his own testimony that he actually controlled Chanel's (and therefore plaintiff's) work. In support of this position, plaintiff relies on Riviere's testimony that he showed Chanel's workers "how to do the framing, how to install my sheet work, what codes, what tool needs a safety guide" and made sure that "everybody . . . [had] their hard hats on, safety boots, gloves, glasses and so on" (Riviere tr at 62), as well as his testimony that "every Monday" he instructed workers to not "stand on the top step of the ladder," "don't walk the ladder" and "don't sit on the ladder" (*id.* at 63).

This testimony does not establish, as a matter of law, that Riviere actually controlled the injury producing work as it is contradicted by both plaintiff's and Dijol's testimony. Specifically, while Riviere did state that that he instructed Chanel workers regarding framing and "sheet work," plaintiff testified that she only received direction and supervision from Salinas (plaintiff's tr at 101) and Dijol testified that Riviere would not speak to or direct any Chanel workers (Dijol tr at 47; 55 ["he did not have to instruct the workers"]) and that MDG did not instruct Chanel's workers, or direct how Chanel's work was to be performed (*id.* at 118).[2]

[2] Plaintiff's counsel's question to Riviere as to whether he "ha[d] the authority to control the manner or method in which the Chanel Construction workers did their work" (Riviere tr at 61-62; NYSCEF Doc. No. 171) is overbroad and calls for a legal conclusion. As such, Riviere's

Riviere's remaining testimony about ladder safety evidences only general safety instruction, which is insufficient to establish actual supervisory control over the injury producing work (see e.g. *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] ["even where an entity "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200"]).

Accordingly, the part of plaintiff's motion seeking summary judgment on her common-law negligence and Labor Law § 200 claims as against MDG will be denied.

MDG's Third-Party Common-Law Indemnification and Contribution Claims as Against Chanel (Motion Sequence Number 003)

Chanel moves for summary judgment dismissing MDG's third-party common-law indemnification and contribution claims against it. Chanel argues that, as plaintiff's employer, Workers' Compensation Law § 11 bars such claims.

Workers' Compensation Law § 11 shields an employer from liability for contribution and common-law indemnification for injuries "sustained by an employee acting within the scope of his or her employment" except where the worker has established that he or she "sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (*id.*)

Here, plaintiff has not alleged a grave injury. Importantly, MDG does not oppose dismissal of these claims.

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affirmative response does not establish, as a matter of law, that MDG had the actual authority to direct and control the means and methods of the Project's demolition work.

Accordingly, Chanel is entitled to summary judgment dismissing MDG's third-party common-law indemnification and contribution claims as against it.

MDG's Third-Party Contractual Indemnification Claims as Against Chanel (Motion Sequence Number 004)

MDG moves for summary judgment in its favor on its its third-party contractual indemnification claim as against Chanel.[3]

"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" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). In contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021], quoting *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

[3] MDG appears to seek indemnification for both itself and UHAB. UHAB, however, is not a third-party plaintiff, and has no active claim for indemnification against Chanel. Therefore, to the extent that MDG seeks relief on behalf of UHAB, that part of MDG's motion will be denied.

In addition, contractual indemnification claims are not barred by Workers' Compensation § 11 where the parties entered into a written indemnification agreement prior to the date of the accident (*Portelli v Trump Empire State Partners*, 12 AD3d 280, 281 [1st Dept 2004]).

Additional facts relevant to this claim

MDG and Chanel entered into a subcontract agreement for the Project, dated February 1, 2019 (the Agreement) (defendants' notice of motion, exhibit P; NYSCEF Doc. No. 137). It is undisputed that the Agreement was entered into prior to plaintiff's accident. Therefore, Workers Compensation Law § 11 does not bar this claim.

The Agreement contains an indemnification provision that provides, as relevant:

> To the fullest extent permitted by law, [Chanel] hereby agrees to indemnify, defend, and hold [UHAB] . . . and [MDG] . . . harmless from and against any and all . . . claims . . . that arise from, relate to or may be attributable to (or are claimed to arise from relate to or be attributable to), either directly or indirectly: . . . (vii) caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by [Chanel], its subcontractors and suppliers, their agents, servants and/or employees including claims by the employees of [Chanel]

(*id.* at 29; Art. 12.03).

Here, the indemnification provision applies to plaintiff's accident, as the accident directly arose from Chanel's sheetrock work at the Premises pursuant to the Agreement. The indemnification provision does not require a finding of negligence.

In opposition, Chanel argues that its insurer is already providing a defense and has agreed to provide indemnification in this action; but provides no evidence establishing this, such as an acceptance letter.

Next, Chanel argues that a question of fact remains as to whether the accident occurred. Specifically, it relies on Chanel's sign-in sheet for the day of the accident (aff in opposition,

exhibit 1; NYSCEF Doc. No. 159), which does not include plaintiff's name or signature. From this, Chanel argues that a reasonable jury could find that plaintiff was not at work on the day of the accident and that, therefore, the accident never happened.

Chanel's argument is unpersuasive. Chanel's vice president, Dijol, stated that workers did not always sign in (Dijol tr at 145). More importantly, Chanel's foreman, Salinas, stated that he "kn[e]w that [plaintiff] was working installing sheetrock in a closet" on the day of the accident (Salinas aff, at 1), and that he recalled giving plaintiff her pay envelope that day (*id.*).

Nevertheless, to succeed on its contractual indemnification claim MDG must establish its freedom from negligence (*Pena*, 194 AD3d at 578) and it has not done so. There remains a question of fact as to Riviere's involvement in directing and controlling Chanel's workers at the Premises (Riviere tr 62-63 [stating that he showed workers "how to do the framing, how to install [the] sheet work"]; *contrast* Dijol tr at 47 [stating that MDG employees "did not have to instruct (Chanel) workers"]). Importantly, Riviere's testimony makes specific reference to framing and sheet rock installation – the very work plaintiff was performing at the time of the accident. Therefore, whether Riviere actually supervised and controlled the work has not been resolved on this motion. Consequently, the scope of MDG's direction and control over the injury producing work – and whether it may be negligent with respect to plaintiff's accident – has not been established as a matter of law.

Accordingly, MDG has not established its freedom from negligence, and therefore, it is not entitled to summary judgment in its favor on its contractual indemnification claim as against Chanel.

The parties remaining arguments were considered and found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of Chanel Construction Corp. (Chanel) (motion sequence number 003), pursuant to CPLR § 3212, for summary judgment dismissing defendant/third-party plaintiff MDG Design & Construction, LLC's (MDG) contribution and common-law indemnification claims as against it is granted, and those claims are dismissed; and it is further

ORDERED that the motion of MDG and GP-UHAB Housing Development Fund (UHAB) (together, defendants) (motion sequence number 004), pursuant to CPLR § 3212, for summary judgment in MDG's favor on its third-party contractual indemnification claims as against Chanel is denied; and it is further

ORDERED that the motion of plaintiff Amparo Lopez (motion sequence number 005), pursuant to CPLR § 3212, for summary judgment in her favor as to liability on her common-law negligence and Labor Law §§ 200 and 240(1) claims as against defendants is denied; and it is further

ORDERED that plaintiff's Labor Law § 241(6) claim against defendants based on a violation of Industrial Code 23-1.21(e)(2) is dismissed; and it is further

ORDERED that the remainder of the action shall continue.

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2/25/2025
DATE

PAUL A. GOETZ, 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**