SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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CRISTIAN DARINEL PENA,
Plaintiff,

- v -

144 BROADWAY ASSOCIATES LLC,
Defendant.

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INDEX NO. 161338/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION AND CROSS MOTION

144 BROADWAY ASSOCIATES LLC,
Third-Party Plaintiff,

-against-

PRECISE SERVICES CORP.,
Third-Party Defendant.

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Third-Party
Index No. 596052/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 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, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

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

This is an action to recover damages for personal injuries allegedly sustained by a construction worker on September 18, 2018, when, while working at a construction site located at 565 West 144th Street, New York, New York (the, "premises"), his A-frame ladder fell over after being struck by a falling piece of wood, causing him to fall to the ground.

Plaintiff Cristian Darinel Pena now moves, pursuant to CPLR 3212, for summary judgment as to liability on his Labor Law § 240(1) claim against defendant/third-party plaintiff 144 Broadway Associates, LLC ("144 Broadway"). In connection with plaintiff's motion, third-party defendant Precise Services Corp. ("Precise") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence, Labor Law §§ 240(1); 240(2); 240(3) and 241(6) claims against 144 Broadway, and for summary judgment dismissing the third-party complaint against it.

On the day of the accident, the premises was owned by defendant 144 Broadway. 144 Broadway hired non-party Casella Construction Corp. ("Casella") as construction manager for a project that entailed the gut demolition and renovation of the fire-damaged premises (the, "project"). 144 Broadway also hired Precise to perform demolition work on the project.

Plaintiff testified that on the day of the accident, he was employed by Precise as a laborer (NYSCEF Doc. No. 65, *plaintiff's tr at 46*). His duties included performing demolition work and clearing and removing debris. Plaintiff sometimes needed to use a ladder to perform his work (*id.* at 60). Specifically, he would use the ladder while "chipping . . . if [he]needed to go to a higher height" (*id.* at 61). Plaintiff described his work as "demolition" (*id.* at 61). Chipping involves removing "cement" from "a brick wall" to prepare the wall for renovation (*plaintiff's second tr at 66*).

Plaintiff's foreman was a man named Vincente (NYSCEF Doc. No. 66, *plaintiff's second tr at 22*) (hereinafter, "Randazzo").[1] Randazzo was employed by Precise and provided plaintiff with his tools and "work instructions" (*plaintiff's tr at 59*).

On the day of the accident, plaintiff worked on the fifth floor of the premises. He was assigned to "chip" the walls (*id.* at 69). To perform his work, he sometimes needed to use a ladder. The ladder he used was a "brand new" (*id.* at 70), at least ten-foot-tall A-frame ladder (*id.* at 65). Plaintiff used the ladder many times and "[t]here was never any problem with its stability" (*id.* at 72).

The accident location was an area consisting of cement and plaster covered brick walls that needed to be chipped down to the brick. The ceiling in the area had been removed. All that remained of the ceiling was "[w]ood, and beams made out of wood" (plaintiff's second tr at 80). Plaintiff did not do any work on the ceiling. That work was done by other Precise employees on "another day" (*id.* at 80).

The accident occurred "10, 15 minutes before" the end of the workday (plaintiff's tr at 101). At the time of the accident, plaintiff was the only worker on the fifth floor (*id.* at 74). He demolished the lower portion of a wall from the ground (*id.* at 89), then he needed to use the ladder to reach the top of the wall. He was on the "second or third step" of the ladder (*id.* at 87), using a "drill" to "chip" the wall (*id.* at 88). He later explained that he was on the second or third rung from the top (*id.* at 93). Plaintiff confirmed that he used the drill to "demolish a portion of the wall" (*id.* at 91). When asked the question again, plaintiff stated that he "wasn't demolishing the wall" (*id.* at 91).

After several minutes on the ladder, plaintiff was "knocked down" when "part of the ceiling . . . hit the ladder and it hit [plaintiff], and both of [them] fell together" (*id.* at 90). At his second deposition, plaintiff reiterated that "something hit the ladder, then it hit [him], the ladder fell and [he] fell with the ladder" (*plaintiff's second tr at 17).* He explained that the object was a wooden "pole" (*id.* at 22). He did not know exactly where it came from, except that it was "upstairs" and fell and hit the ladder (*id.* at 22, *plaintiff's second tr at 92* ["It came from the ceiling"]). The "pole" was approximately four inches thick and over six feet long (*id.* at 23).

No one witnessed the accident besides plaintiff. After the accident, plaintiff "called downstairs" for help (*plaintiff's tr at 97*). His foreman, Randazzo, and a coworker named "Jairo" (*id.* at 101) arrived a few minutes later. By that time, plaintiff had already stood up. He told

[1] "Vincente" is identified in depositions and documents as "Vincent Randazzo," Precise's foreman. Accordingly, for simplicity and clarity, the court will refer to "Vincente" as Randazzo.

them about the accident, then went home. He did not prepare an accident report, but he did verbally report the accident to Randazzo (*id.* at 114). Plaintiff did not report his accident to anyone except Jairo and Randazzo (*plaintiff's second tr at 77*). The next day, plaintiff was heavily bruised. He went to work and showed Randazzo the bruises (*plaintiff's tr at 105*). He continued to work for a few days, but "the pain became heavier" and he went to the emergency room (*id.* at 108). He also texted Randazzo regarding the accident and his injuries (*plaintiff's second tr at 95-96*). Plaintiff was shown several photographs and testified that they depicted the accident location (*id.* at 68). He further testified that he took the photographs. He also confirmed that one of the photographs depicted the piece of wood that struck plaintiff and the ladder (*id.* at 75).

Darin Goldstein ("Goldstein") testified that on the day of the accident he was the "managing member" of 144 Broadway (*Goldstein tr at 18*). His duties included handling business tax matters, selecting property managers, and signing checks (*id.* at 18). On the day of the accident, the building was unoccupied due to a fire that destroyed most of the premises (*id.* at 21). Goldstein was not involved in the construction project. 144 Broadway hired Casella to oversee the construction project (*id.* at 25). Goldstein testified that he did not witness the accident or investigate it (*id.* at 13-14). Prior to the lawsuit, he was unaware of the accident (*id.* at 32).

Ryan Palmadessa ("Palmadessa") testified that on the day of the accident, he was the safety director for Precise (*Palmadessa tr at 11*). Precise was "an interior demolition company" (*id.* at 15). Palmadessa's duties included overseeing the work site and "making sure that it was a safe environment for everybody" (*id.* at 12). He was also responsible for preparing incident reports. When he was present at a work site, he would walk the site and make sure that safety guidelines were being followed and safety risks mitigated. His visits to projects would "typically range from 20 minutes to an hour" (*id.* at 25). Vincent Randazzo was the Precise foreman on site (*id.* at 19). Randazzo oversaw and directed all of Precise's work at the Premises (*id.* at 25). Palmadessa testified that he did not learn of the accident until "the week after" it occurred (*id.* at 28), when Randazzo informed him that plaintiff "didn't show up for a couple of days" (*id.* at 28). According to Palmadessa, Randazzo reached out to plaintiff and had only learned of the accident on that day (*id.* at 29). Randazzo then reported the accident to Palmadessa.

Once he learned of the accident, Palmadessa investigated the accident (*id.* at 30). Palmadessa directed Randazzo to reach out to plaintiff to ask him to come into the office to discuss the accident, but plaintiff "wouldn't come in" (*id.* at 30). So, instead, Palmadessa spoke with Randazzo and another Precise worker "Juan Carlos" to discuss what happened (*id.* at 30). Palmadessa did not speak to anyone else regarding the accident (*id.* at 31). Palmadessa learned that there were no witnesses to the accident. Juan Carlos informed Palmadessa that plaintiff informed him that "a piece of wood had hit [plaintiff], knocking him to the ground" (*id.* at 30). Juan Carlos also stated that the piece of wood "didn't knock anyone over" (*id.* at 30). Palmadessa also learned that plaintiff continued working for several days after his accident, based on Precise's time sheets (*id.* at 44). Palmadessa also noted that Juan Carlos doesn't speak English (*id.* at 49), and that Randazzo acted as a translator for him. Based on his discussion with Randazzo and Juan Carlos, Palmadessa prepared an accident report (*id.* at 34). He was shown a copy of an accident report and confirmed that it was the report that he prepared (*id.* at 35). He

acknowledged that the accident report was undated. He also acknowledged that neither Randazzo nor Juan Carlos signed a witness statement (*id.* at 49). Palmadessa testified that Precise had a written accident protocol (*id.* at 38). That protocol required that "any incident . . . had to have been called in immediately" (*id.* at 38-39).

Precise provides a copy of its undated accident report ("Accident Report"). (NYSCEF Doc. No. 116, *Precise's aff in opposition, exhibit G*). It consists of two pages. The first page, which Palmadessa testified to preparing, states the following:

> "Statement: Juan Carlos told Vincent Randazzo that [plaintiff] neither fell off the ladder while he was working . . . nor had anything strike [sic] him. Juan says that while [plaintiff] was working on the ladder, a piece of wood fell from the ceiling but it fell far away from [plaintiff]" (*id.* at 2).

The second page contains a "Description of Incident" typed and signed by Palmadessa. It states, as relevant, the following:

> "Safety Director: I spoke with Vincent Ranzaddo, Precise Foreman, and he says that [plaintiff] was removing plaster from a brick wall with a small chipping gun at [the premises]. [Plaintiff] finished his shift that day and also worked the next 4 shifts . . . without mentioning an injury to the company, which was against protocol . . . Vincent then says he then noticed [plaintiff] stopped showing up to work. Vincent called [plaintiff] and [plaintiff] told Vincent of the alleged incident . . . . [Plaintiff] claims to have been knocked off a ladder by a piece of wood that fell" (*id.* at 3).

Precise submits Palmadessa's affidavit, dated May 18, 2021 (NYSCEF Doc. No. 112, *Precise's aff in opposition, exhibit K*). It principally repeats his testimony, discussed above, and submits copies of plaintiff's work log, showing his presence at the premises for several days after the accident. Palmadessa also states that all Precise ladders are inspected daily, and none were defective (*id.* ¶ 13). Finally, Palmadessa states that plaintiff never advised him of the accident (*id.*, ¶ 16).

"'[T]he 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [emphasis omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks and citation omitted]). "If there is any doubt as to the existence of a triable issue, the motion [for

summary judgment] should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; citing *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

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 within 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]; see *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]). Therefore, 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" (*Yi Jiang Pai v Nelson Senior Hous. Dev. Fund Corp.*, 232 AD3d 822, 825 [2d Dept 2024] [internal quotation marks and citation omitted]).

Here, plaintiff has established *prima facie* entitlement to summary judgment on the Labor Law § 240(1) claim against 144 Broadway, because he has sufficiently set forth that the ladder failed to support plaintiff when it shifted and fell over after being struck by an object, causing

plaintiff to fall to the ground (see *Paz Avila v St. David's School*, 187 AD3d 460, 460 [1st Dept 2020]; *Guaman v Ansley & Co. LLC,* 135 AD3d 492, 492 [1st Dept 2016]).

In opposition, 144 Broadway and Precise raise several challenges to plaintiff's *prima facie* proof. None give rise to a question of fact sufficient to overturn plaintiff's entitlement to summary judgment. Initially, 144 Broadway and Precise argue that the piece of wood falling from above and striking the ladder constitutes an independent intervening act that would remove any liability they might have towards plaintiff for the accident. "An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them" *(Williams v 520 Madison Partnership*, 38 AD3d 464, 466 [1st Dept 2007]).

Here, contrary to the authority defendants rely upon for its argument regarding an intervening cause (*compare Morera v New York City Tr. Auth.,* 182 AD3d 509 [1st Dept 2020]), the work at issue was the gut demolition of the premises. Such work included the demolition of the ceiling and the walls. Even though there was no active demolition work being done on the ceiling, it had been demolished as a part of the project. Accordingly, it cannot be said that a piece of damaged wood falling from (or from above) a demolished ceiling is so attenuated from Precise's demolition work on the ceiling – which was a part of the active project – such that liability could not attach.

Next, 144 Broadway and Precise argue that plaintiff is not entitled to summary judgment because he has not established that the ladder was defective. This argument is unavailing. A plaintiff "[is] not required to demonstrate that the [safety device] was defective" (*Cuomo v Port Auth. of N.Y. & N.J.*, 228 AD3d 402, 402 [1st Dept 2024], citing *Williams v 520 Madison Partnership*, 38 AD3d 464, 465 [1st Dept 2007]); *Martinez v Ghorta*, 190 AD3d 615, 615 [1st Dept 2021]).

144 Broadway and Precise also argue that, separate from plaintiff's testimony of how the accident occurred, there is sufficient evidence to establish the existence of a second version of the accident that would not give rise to liability. 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 *Romano v One City Block LLC*, 187 AD3d 653, 654 [1st Dept 2020]). This argument is unpersuasive. The documents and testimony 144 Broadway and Precise rely on to establish a different version of the accident consist entirely of inadmissible testimony.

The portion of the Accident Report that purports to create a second version of the accident is hearsay (NYSCEF Doc. No. 116, *Accident Report at 2* [Palmadessa writing that "Juan Carlos told Vincent Randazzo that [plaintiff] neither fell off the ladder while he was working . . . nor had anything strike him" and that "a piece of wood fell from the ceiling but it fell far away from [plaintiff]"]). Neither Juan Carlos nor Randazzo witnessed the accident. While Juan Carlos purportedly spoke with plaintiff about the accident, Juan Carlos did not prepare a witness statement, sign any document, or otherwise aver to the accuracy of the

information provided in the Accident Report. Similarly, Palmadessa's testimony regarding how the accident occurred (*Palmadessa tr at 30* [stating that Juan Carlos, through translation by Randazzo, stated that the wood "didn't knock anyone over"]) is based on hearsay. Palmadessa has no personal knowledge of how the accident occurred, and neither did Juan Carlos or Randazzo. Finally, Palmadessa's statement that Randazzo told Palmadessa that he did not learn of the accident until a week after it occurred (as opposed to plaintiff's testimony that he told Randazzo of the accident on the day of the accident) is also hearsay. Randazzo did not prepare a witness statement (contemporaneous or otherwise), sign any document, or otherwise aver to the accuracy of any statement before the court.

The court notes that 144 Broadway and Precise are correct that hearsay may be considered in opposition to a motion for summary judgment. However, "[w]hile hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment 'where it is the only evidence upon which the opposition to summary judgment is predicated'" (*Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018], quoting *Narvaez v NYRAC*, 290 AD2d 400, 401 [1st Dept. 2002]). Here, the evidence creating a second version of the accident is based entirely on hearsay statements compiled by Palmadessa. Accordingly, such evidence is insufficient to raise a question of fact to overcome plaintiff's *prima facie* entitlement to summary judgment in his favor on this claim.

Further, the evidence showing that plaintiff continued to work several days after the accident does not raise a question of fact as to whether or when the accident occurred. Plaintiff explicitly testified that he continued working for a few days after the accident until the pain became too much (*plaintiff's tr at 108*). Accordingly, such evidence is in line with plaintiff's testimony and does not raise a question of credibility.

Furthermore, Palmadessa's testimony that Precise had written and verbal requirements that workers were required to contact him "the moment that any incident had occurred" (*Palmadessa tr at 38*) is unsupported by any written document or proof that such requirement was verbally communicated to plaintiff at any time. Therefore, plaintiff's purported failure to properly report the accident is unsubstantiated and, in any event, would not give rise a question of fact as to whether the accident occurred.

Precise's reliance on loss of balance cases (see *Hugo v Sarantakos*, 108 AD3d 744 [2d Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d 1073 [2d Dept 2012]; *Chin-Sue v City of New York*, 83 AD3d 643 [2d Dept 2011]) is misplaced. Plaintiff does not allege that he merely lost his balance and there is no testimony supporting such a theory of the accident. Accordingly, the aforementioned cases, each of which dismissed the section 240(1) claim, are inapposite to the facts of this case. Given the foregoing, plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim against 144 Broadway and Precise are not entitled to summary judgment dismissing same.

Precise cross-moves for summary judgment dismissing the Labor Law § 241(6) claims against 144 Broadway. Labor Law § 241(6) provides, in pertinent part, as follows:

> "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:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

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 L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; see also *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501–502). To sustain a Labor Law § 241(6) claim, it must be established that the defendant violated a specific, "concrete specification" of the Industrial Code, rather than a provision that considers only general worker safety requirements (*Messina v City of New York,* 300 AD2d 121, 122 [1st Dept 2002]). Such violation must be a proximate cause of the plaintiff's injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017]; see also *Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159, 161 [1st Dept 2022]). "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York,* 88 AD3d 951, 953 [2d Dept 2011]).

As an initial matter, plaintiff lists multiple violations of the Industrial Code in his complaint and bill of particulars. Except for sections 23-3.3(b) and (c), plaintiff does not contest their dismissal. As such, these uncontested provisions are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

Industrial Code 12 NYCRR 23-3.3 governs demolition by hand. Subsection (b) and (c) govern demolition of walls and inspections, respectively. Subsections 23-3.3(b) and (c) are sufficiently specific to support a Labor Law § 241(6) claim (see e.g., *Garcia v 225 East 57th Street Owners, Inc.*, 96 AD3d 88, 92 [1st Dept 2012]).

In its motion, Precise only argues that section 3.3, "is inapplicable to Plaintiff's work because it did not concern the demolition of walls" (NYSCEF Doc. No. 95, *Precise's memorandum of law, p 16*). This argument is unsupported by the record. The record establishes that Precise was a demolition contractor (*Palmadessa tr at 15*) who was performing demolition work at the premises. Plaintiff testified that he was "chipping," i.e. removing concrete from a wall with a drill (*plaintiff's second tr at 66*). This work was part of the demolition.

That plaintiff testified in one instance that he "wasn't demolishing the wall" (*plaintiff's tr at 91*) – i.e., not knocking the wall down – does not remove his work from the scope of section 3.3. Notably, demolition is defined in the Industrial Code as "[t]he work incidental to or associated with the total or partial dismantling or razing or a building or other structure" (Industrial Code 12 NYCRR 1.4[b][16]). Chipping concrete from brick walls as a part of the gut demolition of the premises is incidental to and associated with the partial dismantling of the wall.

There being no other argument set forth in the cross-motion, Precise has failed to establish prima facie entitlement to dismissal of those parts of the Labor Law § 241(6) claim predicated upon violations of 12 NYCRR 23-3.3(b) and (c). Accordingly, Precise is entitled to summary judgment dismissing those parts of the Labor Law § 241(6) claim predicated upon violations of the abandoned Industrial Code Provisions but is not entitled to summary judgment dismissing those claims predicated upon violations of section 23-3.3(b) and (c).

Precise also moves for summary judgment dismissing the common-law negligence and Labor Law §§ 240(2) and (3) claims against 144 Broadway.

With respect to sections 240(2) and (3), Precise argues that they do not apply to this accident. Specifically, section 240(2) applies to "scaffolding or staging more than twenty feet from the ground" and section 240(3) applies solely to scaffolding construction. As plaintiff's accident did not involve a scaffold, these sections do not apply. Accordingly, Precise is entitled to summary judgment dismissing these claims.

As to the common-law negligence claim, while Precise lists such a claim in its notice of cross-motion (NYSCEF Doc. No. 71), it fails to address the claim in its memorandum of law or affirmation in support. Accordingly, Precise has not met its prima facie burden and is not entitled to summary judgment dismissing this claim.

Precise moves for summary judgment dismissing 144 Broadway's contribution and common-law indemnification claims against it. Notably, Precise is plaintiff's employer. It argues that Worker's Compensation § 11 bars these claims against it, as plaintiff has not alleged a grave injury.[2] Notably, 144 Broadway does not oppose the dismissal of these claims. Further, plaintiff does not oppose the characterization of his injuries as not falling within the statute's definition of "grave injury." Accordingly, Precise is entitled to summary judgment dismissing the third-party contribution and common-law indemnification claims against it.

Precise cross-moves for summary judgment seeking dismissal of 144 Broadway's contractual indemnification claims. Notably, Precise does not seek a determination as to the validity of the indemnification provision or its applicability to this accident.[3] Rather, Precise argues that 144 Broadway's contractual indemnification claim is barred by the anti-subrogation rule because Precise's insurer, non-party Accredited Surety & Casualty Company, Inc. ("ASSC"), insures both Precise as the primary insured and 144 Broadway as an additional insured.

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[2] Worker's Compensation § 11 provides, as relevant, that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting with the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'"

[3] In its opposition to Precise's cross-motion, 144 Broadway argues that it is affirmatively entitled to contractual indemnification from Precise based on the language of the indemnification provision in the contract between the two parties. 144 Broadway, however, has not moved this court for any relief.

In support, Precise submitted a copy of its insurance policy, including the additional insured endorsement, bearing a $2 million per occurrence limit (NYSCEF Doc. No. 88; 89, *notice of cross-motion, exhibit N [certificate of insurance] and O [policy]*). 144 Broadway submits a copy of ASSC's coverage letter, where ASSC agreed to defend 144 Broadway under a reservation of rights (NYSCEF Doc. No. 124, *aff in opposition to cross-motion, exhibit B*).

The anti-subrogation rule provides that

> "an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. . . . In effect, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor – if that third party also qualifies as an insured under the same policy – for damages arising from the same risk covered by the policy"

(*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016] [internal quotation marks and citations omitted]). However, the anti-subrogation rule bars indemnification claims only until the "limit of liability on the [] policy is exhausted" (*New York City Dept. of Transp. v Petric & Assoc., Inc.*, 132 AD3d 614, 615 [1st Dept 2015]; see also *Bruno v Price Enters., Inc.*, 299 AD2d 846, 848 [4th Dept 2002]; *Yong Ju Kim v Herbert Constr Co.*, 275 AD2d 709, 713 [2d Dept 2000]).

Importantly, ASSC's reservation of rights on whether it will ultimately indemnify 144 Broadway does not block the applicability of the anti-subrogation rule (*Pastorino v City of New York*, 191 AD3d 440 [1st Dept 2021]). Therefore, as Precise has established that its insurer is defending 144 Broadway in this action, the anti-subrogation rule would apply to any damages awarded to plaintiff, up to the relevant policy maximum. That said, the anti-subrogation rule does not bar contractual indemnification claims for damages exceeding any common policy limits (*New York City Dept. of Transp.*, 132 AD3d at 615). Precise has not presented evidence establishing that the damages sought in this action are less than the ASSC policy's limits. Therefore, it is entitled only to summary judgment dismissing 144 Broadway's contractual indemnification claim against it for that portion of any monetary award to plaintiff that falls within the ASSC's policy limits.

Precise moves for summary judgment dismissing 144 Broadway's breach of contract for the failure to procure insurance claim. Precise provides a copy of its policy (NYSCEF Doc. No. 88) and a certificate of insurance relating to that policy (NYSCEF Doc. No. 89) that comports with the contractual requirements found in its agreement with 144 Broadway. 144 Broadway notes that Precise's insurer is providing a defense to 144 Broadway in this matter, but that it has not yet agreed to provide indemnification (NYSCEF Doc. No. 132, *144 Broadway's aff in partial opposition*, ¶ 20).

A party will not be liable to another for breach of contract for the failure to procure insurance when that party "fulfilled its contractual obligation to procure proper insurance on

behalf of" the indemnified party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996]). This is so even where the insurer reserves the right to disclaim indemnification in the future (see *Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; see also *Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dept 2023]). Accordingly, Precise is entitled to summary judgment dismissing 144 Broadway's breach of contract for the failure to procure insurance claim. The parties remaining arguments have been considered and were unavailing. For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Cristian Darinel Pena (Mot. Seq. No. 002), pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240(1) claim against defendant/third-party plaintiff 144 Broadway is granted; and it is further

ORDERED that that branch of the cross-motion of third-party defendant Precise Services Corp.'s cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence, Labor Law §§ 240(1), 240(2), 240(3) and 241(6) claims against 144 Broadway is granted to the extent that the Labor Law §§ 240(2), 240(3) and all Labor Law § 241(6) claims predicated upon violations of the Industrial Code other than 12 NYCRR 23-3.3(b) and (c) are dismissed; and that branch of the cross-motion is otherwise denied; and it is further

ORDERED that the branch of Precise's cross-motion, pursuant to CPLR 3212, for summary judgment dismissing 144 Broadway's third-party complaint is granted to the extent of dismissing the contribution, common-law indemnification, breach of contract for the failure to procure insurance claims and, as limited by the decision, that part of the contractual indemnification claim that is barred by the anti-subrogation rule; and the cross-motion is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as, upon the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of the court.

March 3, 2025

HON. VERNA L. SAUNDERS, JSC

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**