At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 31st day of March 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

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MELVIN R. PARRALES,

Plaintiff,

-against-

TISHMAN CONSTRUCTION CORP. and PRATT INSTITUTE,

Defendants.

----------X

TISHMAN CONSTRUCTION CORP. and PRATT INSTITUTE,

Third-Party Plaintiffs,

- against –

AM ARCHITECTURAL METAL & GLASS INC.,

First Third-Party Defendant.

----------X

AM ARCHITECTURAL METAL & GLASS INC.,

Second Third-Party Plaintiff,

- against –

CONSOLIDATED SCAFFOLD CO. and VALLEY FINISH, INC.

Second Third-Party Defendants.

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MAR 31 2025

DECISION and ORDER

Index No.: 519669/2019
Mot. Seq. No.: 6-10

2025 APR -1 A 8:37 KINGS COUNTY CLERK

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

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MONTELIONE, RICHARD J., J.

Procedural History

This action was commenced by filing the summons and complaint on September 6, 2019, alleging a work site accident which caused personal injury to plaintiff that occurred on April 20, 2019. The accident allegedly occurred on the premises of Pratt Institute (Pratt) at 135 Emerson Place, Brooklyn, NY. The direct defendants are Pratt and the general contractor Tishman Construction Corp. (Tishman). The complaint alleges negligence, violations under Labor Law §200, Labor Law § 240(1), and Labor Law § 241(6). Issue was joined by defendant Pratt by the filing of an answer on November 15, 2019, and by defendant Tishman by filing an answer on November 21, 2019, each of which included crossclaims for contribution and common law indemnity.

The following continued procedural history is not disputed and taken from the Second Third-Party Defendant Valley Finish' Statement of Material Facts (NY St Ct Elec Filing [NYSCEF] Doc. No. 130):

> On July 30, 2020, the Defendant Tishman Construction Corp., filed a Third-Party Complaint impleading AM Architectural Metal & Glass, Inc., (the glazing contractor) as a defendant seeking contribution, common law indemnification and contractual indemnification and breach of contract to procure insurance coverage in connection with Mr. Parrales' claims.
>
> On November 17, 2020, the Defendant AM Architectural Metal & Glass, Inc. filed the Second Third-Party Complaint impleading as defendants, Consolidated Scaffolding, Inc., (the scaffolding contractor) and Mr. Parrales' alleged employer, Valley Finish Inc. That pleading seeks contribution, common law indemnification, contractual indemnification and breach of contract to procure insurance coverage in connection with Mr. Parrales claims as to both defendants.
>
> On December 15, 2020, Plaintiff filed a Verified Amended Complaint asserting the same causes of action contained in the first pleading but adds as direct party defendants Consolidated Scaffolding Inc., AM Architectural Metal & Glass Inc., and the entity Valley Finishing of New York, Inc.
>
> No Affidavit of Service was ever filed regarding service upon the

> entity Valley Finishing of New York, Inc. and this entity has never appeared in this litigation.
>
> The Second Third-Party Defendant Valley Finish, Inc. filed an Answer to the Second Third-Party Complaint on August 3, 2021.
>
> The Second Third-Party Defendant Consolidated Scaffolding Co. filed an Answer to the Second Third-Party Complaint on February 16, 2021.

Second Third-Party Defendant, VALLEY FINISH, INC.'s Motion pursuant to CPLR 3212 for Summary Judgment in its favor Dismissing the Second Third-Party Complaint, all Crossclaims and other Claims as against it, with prejudice (MS#6)

The court notes the plaintiff takes no position regarding this motion.

The Second Third-Party Complaint of AM Architectural Metal & Glass Inc. (AM Architectural), as its first cause of action against Valley Finish, Inc. (Valley Finish), seeks common law indemnification, the second cause of action seeks contractual indemnification, and its third cause of action seeks contribution.

Valley Finish argues that plaintiff is a former employee, and this employee was provided to Defendant/Second Third-Party Plaintiff AM Architectural as a laborer.[2] There is a contract between AM Architectural (listed as "contractor") and Valley Finish (listed as "subcontractor") dated February 5, 2019 (Agreement #1, NYSCEF Doc. No. 146). The agreement contains the following language:

> Subcontractor shall defend, indemnify, hold harmless, and insure Contractor from any and all damages, expenses or liability resulting from or arising out of any negligence or misconduct on Subcontractor's part or from any breach or default of this Agreement which is caused or occasioned by the acts of Subcontractor. … Subcontractor shall name Contractor as an additional insured on all related insurance policies including workers compensation and general liability.

Page 6 of Agreement #1 is a second indemnification clause which provides in pertinent part:

> To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Owner and Contractor as well as all parties listed below as additional insureds, … (hereafter

[2] Valley Finish of New York, Inc. (which is different than Valley Finish Inc.) argues that it has no written contract with any of the parties to this litigation and did not direct or supervise, in any manner, the work performed by plaintiff.

> collectively "indemnitees'') from any and all claims, suits, damages, liabilities, … related to death, personal injuries … brought against any of the Indemnitees by any person or entity, arising out of or in connection with or result or consequence of the performance of the Work of the Subcontractor, … whether or not caused in whole or in part by the Subcontractor or any person or entity employed, either directly or indirectly by the Subcontractor …. The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against the indemnitees without negligence; and 2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim which negligence is expressly accepted from the Subcontractor's obligation to indemnify. … indemnification under this Agreement shall operate whether or not Contractor has placed and maintained the insurance required under this agreement.

Valley Finish argues that the two provisions are "mutually repugnant." The first provision imposes indemnification "arising out of any negligence or misconduct on subcontractor's part," and the second provision provides for indemnification "to the fullest extent permitted by law, the Subcontractor agrees to indemnify…Owner and Contractor…from any and all claims, arising out of…the performance of the Work…whether or not caused in whole or in part by the Subcontractor." These two provisions are not inconsistent but rather provide separate instances where indemnification applies. The court finds that the provision involving Valley Finish's negligence triggers the first indemnification provision which overlaps with the second provision. The second provision, to the "fullest extent allowed by law," mandates subcontractor (Valley Finish) to partially indemnify the indemnitee but this indemnification is reduced by the indemnitee's own negligence.

Defendant AM Architectural opposes the motion only to the extent that the motion seeks dismissal of the Third-Party claims against Valley Finish for contractual indemnity and breach of contract for failure to procure insurance. Defendant AM Architectural cites *Pope v Supreme-K.R.W. Const. Corp.*, 261 AD2d 523, 525 [2d Dept. 1999] to argue that the contract requires an insurance policy that covers AM Architectural because the subcontractor agreed to indemnify it for "any claims arising out of or resulting from the performance of the subcontractor's work."

Is AM Architectural contractually obligated to indemnify Tishman Construction Corp. and Pratt Institute and/or other parties and did it breach any contract by failing to procure insurance?

AM Architectural entered into a written agreement with Tishman to perform metal panel and glass installation on October 1, 2018 (Agreement #2, NYSCEF Doc. No.185). The pertinent provisions of the contract follow (*id.*, p. 3):

> The Contractor shall defend, indemnify and hold the Owner and Construction Manager harmless from all claims, damages or losses, including reasonable attorneys fees, arising out of or related

to any errors or omissions in design, or to any claim for infringement or misappropriation of any other person's intellectual property arising out of such design, in addition to any other claims for which indemnification is required hereunder.

Agreement #2, NYSCEF Doc. No. 185, p. 5:

INDEMNITY 7. To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager…from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of Contractor or anyone for whose acts Contractor may be liable in connection with the Contract Documents, the performance of, or failure to perform, the Work…To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether or not caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee…

Agreement #2, NYSCEF Doc. No. 185, p. 5:

INSURANCE 8. Prior to commencement of any Work under this Agreement, and until completion and final acceptance of the Work, the Contractor and each of Contractor's subcontractors shall, at its own expense, maintain the insurance coverage and limits of liability stated in the attached Insurance Rider. In the event of a conflict between the Insurance Rider and this Agreement, the provision that imposes the greater obligation on the Contractor shall apply. Such insurance shall include: (a) Commercial General Liability insurance, including, without limitation, products and completed operations and containing no "X", "C", or "U" exclusions if excavation and/or demolition is to be provided; (b) Statutory Worker's Compensation and Disability Insurance; AND (c) Business Automobile Liability Insurance.

All such coverage shall have limits in accordance with the attached insurance Rider (which may be satisfied in part by umbrella insurance in the following form) and shall be provided and maintained by insurance companies with AM Best ratings of not less than A-VIII.

Is there an obligation on the part of Consolidated Scaffold Co. (Consolidated) to contractually (or by common law) indemnify any party?

Consolidated has a contract with AM Architectural and the following provision involves indemnification (Agreement #3, NYSCEF Doc. No. 266, p. 2):

> 3. "To the fullest extent permitted by law, Customer/Contractor (AM Architectural), for itself, its principals, agents...hereby agrees to defend, indemnify, pay, save, and hold Indemnitees (as hereinafter defined) harmless, from, for and against any claims, injuries, damages, actions, proceedings, judgments,....(including reasonable attorneys fees and costs), incurred by or asserted against Indemnitees, that arise out of the presence, use, non-use, or misuse of any shed, scaffold...EXCEPT THAT, Consolidated Scaffolding Inc. hereby agrees to defend, indemnify, pay, save, and hold Customer/Contractor harmless, from, for and against any claim, injuries, damages...(including reasonable attorneys fees and costs), incurred by or asserted against Customer/Contractor, but only if and to the extent (a) such claim, injury or damage occurs during Consolidated Scaffolding Inc's erection, modification or dismantling of the shed, scaffold or structure in question (b) such claim, injury or damage arise from Consolidated Scaffolding Inc's erection, modification or dismantling of a shed, scaffold or structure, AND (c) Consolidated Scaffolding Inc is negligent in the erection, modification, or dismantling of such shed, scaffold or structure.

Applicable Law: Indemnification

The applicable standard in determining contractual indemnification, can be found in *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 462-463 [2d Dept 2022]:

> 'The right to contractual indemnification depends upon the specific language of the contract' (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]; *see Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). 'The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances' (*George v Marshalls of MA, Inc.*, 61 AD3d at 930; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). In addition, a party seeking contractual indemnification pursuant to a contract relative to the construction of a building must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*see* General Obligations Law § 5-322.1; *Chuqui v Amna, LLC*, 203 AD3d 1018, 1023 [2022]).

The court in *Mogrovejo* considered an indemnification agreement which tracks very similar language as found in the agreement between the Valley Finish and AM Architectural—indemnification "(t)o the fullest extent permitted by law," and "arising out of…performance of the work of the subcontractor." Agreement #1 (NYSCEF Doc. No. 146), provides for "…(indemnification)… whether or not caused in whole or in part by the Subcontractor or any person or entity employed…" and "contemplates 1) full indemnity in the event of liability imposed against the indemnitees without negligence; and 2) partial indemnity in the event of any actual negligence on the part of the indemnitees either causing or contributing to the underlying claim which negligence is expressly accepted from the Subcontractor's obligation to indemnify." (*Id.* at p. 6.)

Legal Analysis

The court finds no issue of fact that movant Valley Finish provided the employees for the project but did not direct their work notwithstanding that on the very first day a principal with Valley Finish was present to acclimate the workers to the job site. Although the harness lanyards, and safety equipment, were provided by Valley Finish (Exhibit R, p. 69), this safety equipment is not implicated in the accident and in fact the harness appears to have worked properly in limiting a fall if not preventing the accident itself. Valley Finish did not install or maintain the scaffolding which allegedly contained a loose wire causing the fall. However, "arising out of" the work triggers the indemnification provision in the contract between Valley Finish and obligates it to indemnify AM Architectural. *See Mogrovejo*, 207 AD3d 461. Also, under the contract, Valley Finish was obligated to procure insurance. Therefore, the first and second causes of action for contractual indemnification and to recover damages for breach of a contract to procure insurance, respectively, are not barred (*see*, Workers' Compensation Law § 11); *see also Bardouille v Structure-Tone, Inc.*, 282 AD2d 635, 637 [2d Dept 2001]). The court further finds that Valley Finish did not direct, supervise or control the work giving rise to the injury and therefore cannot be liable for common law contribution or common law indemnification. *See Holness v 421 Kent Dev., LLC*, 84 Misc 3d 1262(A), 224 NYS3d 895, 2025 NY Slip Op 50022(U), 2025 WL 209834, at *11 [Sup Ct 2025]:

> Common-law indemnification and contribution are predicated on a finding of negligence of the proposed indemnitor or contributor. (*See Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004] ["[C]ommon-law indemni[fication] ... requires proof of some negligence that contributed to causing plaintiff's accident on the party of ... the proposed indemnitor."].) Thus, a party moving for summary judgment dismissing common-law indemnification and contribution claims must demonstrate as a matter of law that it was not negligent or that it did not have authority to direct, supervise, or control the work giving rise to the injury. (*See Keller v Rippowam Cisqua Sch.*, 208 AD3d 654, 655 [2d Dept 2022].)

Valley Finish argues in its reply that workers compensation paid to plaintiff was through

Valley Finishing of New York, Inc. and not Valley Finishing, Inc. and therefore Valley Finishing, Inc. has no liability regarding this accident. There is no issue of fact that Valley Finishing, Inc. signed a contract with AM Architectural and is bound by the terms of the agreement. Valley Finish's motion is granted to the extent that the first cause of action found within the Second Third-Party complaint for common law indemnification and the second cause of action for common law contribution are dismissed.

The court finds that under the contract (Agreement #2, NYSCEF Doc. No. 185) between Tishman and AM Architectural, AM Architectural is contractually obligated to indemnify Tishman and Pratt, including reasonable attorneys' fees. *See Mogrovejo,* 207 AD3d 461.

The court finds that under the contract between AM Architectural and Consolidated, (Agreement #3, NYSCEF Doc. No. 266), there is no issue of fact that under the contract if there was a problem with the scaffold that AM Architectural was to contact Consolidated and AM Architectural did not contact Consolidated. There is no negligence on the part of Consolidated and AM Architectural is contractually obligated to indemnify Consolidated, including reasonable attorneys' fees. *See Mogrovejo,* 207 AD3d 461.

Can liability for the plaintiff's accident be established as a matter of law?

Plaintiff claims violations of Labor Law §§ 240(1), 240(2) and 241(6). Plaintiff's motion for summary judgment under Labor Law § 240(2) is denied as this was not pleaded. The court will only consider plaintiff's claims under Labor Law §§ 240(1), and 241(6). Plaintiff limits his claims under Labor Law § 241(6) to violation of four sections of the Industrial Code Regulations: §§ 23-1.7(e)(1), 23-1.7(b)(1)(i), 23-5.3(e), and 23-5.1(j). (NYSCEF Doc. No. 157, ¶¶ 76-85).

The Accident

Tishman was hired by Pratt to be the general contractor/construction manager for the project. Tishman retained AM Architectural as a subcontractor to install Metal Panels to the façade of the building. Consolidated was retained by AM Architectural to install the scaffold. Tishman retained Construction Realty Safety Group to act as the site safety director.

The scaffolding system in place at the premises was installed by the Second Third-Party Defendant Consolidated. Plaintiff was on the exterior scaffolding of the 6th floor (Tr. at 73-74, 82, 84-85, 86-87, 173), working on installing brackets on frames for the eventual installation of metal panels when he stopped work in order to retrieve screws to install the brackets. The description of the accident can be found in plaintiff Melvin Parrales' (Parrales) deposition of January 27, 2022, Transcript ("Tr.") at 98:11-99:8 (NYSCEF Doc. No. 161):

> A. I was using the drill, drilling the screws. I ran out of screws; I went to the bucket to bring more screws. And when I turned to continue screwing the -- to continue, that is when the accident occurred.

> Q. And what occurred?
>
> A. In the scaffold, the platforms are being hold by some cables, some type of wires. I tripped over the wire that were holding the boards. When I tripped, I fell between the wall and the angle--
>
> -- INTERPRETER: I have to ask him to repeat that last part.
>
> A. So I tripped over the wire that holds the board, so I lost my balance. So I fell towards my back, pulling the level with me; so I pulled the level with me. So I fell on top of the board that I was standing, between the scaffold and the wall, and I hit myself, and I landed on the board where I was standing, and I ended up hanging; I ended up hanging from my harness.

Parrales Deposition of May 20, 2022 at Tr. at 46:5-15 (NYSCEF Doc. No.161):

> Q. Now, can you please describe for us what happened when the accident occurred?
>
> A. The accident, when I fell, I hit my elbow on the OSHA plank, because I fell in between the OSHA planks and the wall at a space about, it was approximately at a space of two to three feet more or less. After I hit my elbow on the planks, I ended up hanging with the harness. At the moment, I felt a little bit of pain on my whole arm, shoulder, and neck, and a little bit numb.

Plaintiff further described the gap as between two and three feet and "(m)y whole body went down between the planks and the wall." (NYSCEF Doc. No.192, Tr. at 157:7-8,12-13). When hanging in his harness the scaffolding plank was approximately between plaintiff's waist and his shoulders. (NYSCEF Doc. No.192, Tr. at 199:6-14). After being helped out of the gap, about 10 minutes later, plaintiff went down the scaffolding stairs but his shoulder and neck hurt him. (NYSCEF Doc. No. 192 Tr. at 200:6-21). The plaintiff called Martin with Valley Finish on the same day of the accident to tell him work was completed and also told him and three coworkers about the accident, but did not report the accident to anybody else at the project. (NYSCEF Doc. No. 192, Tr. at 204:7-12). The plaintiff noticed the wire he tripped over was loose after his fall (NYSCEF Doc. No. 192, Tr. at 219:20-21). The day of the accident, Salvator, plaintiff's coworker, was on a ledge four feet below the height of the plank where plaintiff fell. (NYSCEF Doc. No. 161, Tr. at 183:4-6, 186:17-23).

Plaintiff argues that he received all his instructions from a Valley Finish supervisor and another individual who did not work for Valley Finish, but it appears that the Valley Finish supervisor only gave instructions on the first day and otherwise plaintiff was exclusively directed by Walter Kiely (Kiely), a foreman who worked for AM Architectural.

Plaintiff argues, and it is undisputed, there were no safety rails between the scaffolding and the façade. Plaintiff claims there was a 2–3-foot gap between the edge of the scaffolding and the building façade. Salvador Maldonado was plaintiff's co-worker who alleges he witnessed plaintiff's accident of April 30, 2019. He was employed by Valley Finish. Mr. Maldonado indicates that the gap between the scaffold and the façade was 2-3 feet. (NYSCEF Doc. No. 283).

Defendants agree that a gap existed but assert that the gap was less than 14" and such gap was necessary to do the work involving installation of metal panels onto the façade. Consolidated claims that the gap was no more then 8-inches. (NYCEF Doc. No. 197, Tr. at 44:16). Miguel Padin, a safety director hired by Tishman at the time, testified that if the gap between the edge of the scaffold and the exterior of the building exceeded 14-inches this would constitute a fall hazard. However, he was not able to give an opinion as to the measurement of the gap using photographs and he did not know about this accident until after the project was completed. There is a checklist prepared on the date of the accident that indicates the gap was not in excess of 14 inches (NYSCEF Doc. No. 172), and testimony from Kiely who did not observe any gaps greater than 14-inches. Kiely testified that people checked to make sure the distance between the scaffolding and façade was less than 14-inches, but he did not know if that was documented anywhere. (NYSCEF #194, Tr. at 68:4-12).

Tishman's safety expert, Padin, testified "So, um, if there's a gap, usually the gap is there so that they could perform the work. Um, and you can't install a rail, so that's when you would have a different type of fall protection." (NYSCEF 193, Tr. at 108:4-9). A retractable lanyard would not allow free fall of more than two feet, but Padin did not know whether plaintiff was wearing a retractable lanyard that would lock at 2 feet (NYSCEF 193, Tr. at 179:10-15) or a regular lanyard which would allow free fall to 6'. (NYSCEF 193, Tr. at 116:9).

Oscar Hernandez, a general foreman of Consolidated, testified that he did not work on the project but did visit the project. (NYCEF Doc. No. 197, Tr. at 20:18). There is no need for a guardrail between the bicycle scaffolding and the façade if the distance is no more than 10 inches (*id.*, Tr. at 44:4-5). "The max that we do it is for 8 inches" (*id.*, Tr. at 44:16). There were no gaps greater than 8 inches between the bicycle plank scaffold and the building wall at the project. (*id.*, Tr. at 123:10-15). Oscar Hernandez, general foreman for Consolidated testified that the planks used to form the bicycle were 9.5" wide, 2" thick, and 10' long (*id.*, Tr. at 58-59). The planks are secured together and secured to the scaffolding by wire and nails (*id.*, Tr. at 63). He testified the space between the bicycle and the building was approximately 2" to 3". (*id.*, Tr. at 101, 117-118). Testimony from a Consolidated representative indicates that once the scaffolding is installed, they will not return to the site in less than six months unless the contracting parties brings to their attention a problem with the scaffolding.

Martin R. Bruno, CHST, (Bruno) is a construction site safety expert with Tishman. According to Bruno, OSHA § 1926.451(b)(3) requires that the front edge of all platforms shall not be more than 14 inches (36 cm) from the façade, unless guardrail systems are erected along the front edge or a personal fall arrest system (PFAS) is used to protect employees from falling. (Aff of Martin R. Bruno, NYSCEF Doc. No. 177 at p. 6, ¶14). According to Bruno, there was no

need for a guardrail because the distance between the façade and the scaffolding edge was less than 14 inches and guardrails would have interfered with the installation of the metal panels. (*id.* at ¶ 16). Further, according to Bruno the accident was not caused by the absence or inadequacy of a safety device enumerated in Labor Law § 240(1). (*id.* at ¶17). Bruno did not opine as to whether other safety devices, if any, could be employed to avoid accidents or mitigate injury, involving the gap between the edge of the scaffold and the façade i.e., retractable lanyard that locks at two feet.

Plaintiff's Legal Arguments

Plaintiff cites *Arias v 139 E. 56th St. Landlord, LLC*, 212 AD3d 517 [1st Dept 2023] as dispositive on the issue of liability. In *Arias*, the plaintiff was cutting wood beams with a chainsaw on the roof when his chainsaw got stuck causing him to fall 10-15 feet. Although Arias' harness and lanyard protected him from falling to the ground, it was inadequate to prevent injuries received. The *Arias* court held:

> [harness and lanyard] 'proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity.' The fact that plaintiff sustained injuries to his right shoulder and back when his body was caused to be pulled back up abruptly by his safety harness and lanyard demonstrates lack of adequate protection. (internal citations omitted)

"[W]hether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials." *Melchor v. Singh*, 90 AD3d 866, 868 [2d Dept 2011].

Plaintiff cites a number of cases where the inadequacy of the safety device triggers Labor Law § 240(1), including *Lazo v New York State Thruway Auth.*, 204 AD3d 774 [2d Dept 2022] ["Lazo's deposition testimony also established, prima facie, that his second safety line was attached to an anchorage point but was nevertheless insufficient to prevent him from falling"], and *Kyle v City of New York*, 268 AD2d 192 [1st Dept 2000] [defendant's argument, "which equates plaintiff's survival with an adequate safety device," lacked merit because the device proved inadequate to shield plaintiff from the harm which flowed directly from the application of the force of gravity to an object or person]. (NYSCEF Doc. No. 157, p. 22-23, ¶ 67).

Plaintiff also argues that the scaffold platform in question was "indisputably a 'passageway'" citing *Tompkins v Turner Constr. Co.*, 221 AD3d 745 [2d Dept 2023]. However, in *Tompkins* the trip and fall was within a walkway and not on scaffolding. " 'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case.' " *Zaino v Rogers*, 153 AD3d 763, 764 [2d Dept 2017].

Plaintiff's argument that *Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016] and *Sanchez v Bet Eli Company Delaware LLC*, 177 AD3d 478 [1st Dept 2019], mandates a per se violation of the statute requiring guardrails is misplaced. These cases involved specific instances where the

scaffolding lacked guardrails unlike the present case where all sides of the scaffolding did have guardrails except the side facing the building which required brackets and the installation of metal panels which may be integral to the work.

Defendant Tishman and Pratt's Opposition to Plaintiff's Motion for Summary Judgment and, In Support of its Motion for Summary Judgment

Defendant Tishman argues that plaintiff's motion must be denied because Tishman Construction Corp. is not a proper Labor Law defendant and has no connection to the subject project. Notwithstanding the production of the agreement for construction management services between defendant Pratt and non-party Tishman Construction Corporation of New York d/b/a AECOM Tishman, plaintiff never amended the caption.

Further, defendant Tishman argues the distance between the edge of the scaffold and the façade was less than 14 inches and therefore did not require a guardrail as this was not the type of elevation related danger that would trigger the Labor Law. And, with respect to the Labor Law § 241(6) cause of action, Plaintiff has also failed to demonstrate that any Industrial Code provision was violated, and that the violation was a proximate cause of his alleged incident.

Defendants Tishman and Pratt both argue that Labor Law § 240(1) does not apply because the accident is not directly related to gravity. *See Nieves v. Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 915-916 [1999] (*citing Ross v Curtis-Palmer Hydro-Elec.*, 81 NY2d 494, 50 [1993]). Further, the statute is only violated when a defendant fails to provide a safety device adequate to protect against the elevation-related risk of the activity or provides an inadequate one. *See Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681. An opening such as the less than 14-inch gap in the instant case is not large enough for an entire body to fall through and therefore was not sufficient to confer liability under Labor Law § 240(1). *See Rice v Bd. Of Educ.*, 302 AD2d 578, 578-79 [2d Dept 2003]. Plaintiff was 5'8" and 215 pounds at the time of the alleged incident (*see* Defendants/Third-Party Plaintiffs' Counterstatement of Material Facts (CSOMF) NYSCEF Doc. No. 289, p. 14, ¶ 25) and testified that only the lower portion of his body fell into the space between the bicycle and the face of the work. He did not fall through. (*id.* at p. 17, ¶ 35). Defendants Tishman and Pratt argue that *Arias v 139 East 56th Street Landlord, LLC*, 212 AD3d 517 [1st Dept 2023] is distinguishable in that the accident in *Arias* did not occur on scaffolding and the injury was caused by the pullback of a worker's lanyard but here plaintiff was injured when his body hit the scaffold.

Defendants Tishman and Pratt further argue that all industrial codes are inapplicable. Regarding Industrial Code § 23-1.7(e)(1), the scaffold is not a passageway, *citing Quigley v. Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]. Regarding Industrial Code § 23-1.7(b)(1)(i), the gap does not constitute a "hazardous opening" *(see Rice v Bd. Of Educ.*, 302 AD2d 578, 578-79 [2d Dept 2003]. Regarding Industrial Code § 23-5.3[e]) and OSHA § 1926.451(b)(3), these provisions do not require a guardrail because the bicycle was less than 14

inches from the façade of the building and plaintiff was properly anchored to the scaffold.[3] Finally, regarding Industrial Code § 23-5.1(j), requiring safety railings, defendants Tishman and Pratt use the same rationale as under Industrial Code § 23-5.3[e].

First Third-Party Defendant AM Architectural's Opposition to Plaintiff's and Defendant Tishman and Pratt's motions for summary judgment and in support of its motion

Defendant AM Architectural argues that the distance between the scaffolding and the wall of the building was less than 14 inches and did not require a railing, that the scaffolding did not move and that the safety devices worked as designed. AM Architectural argues through its expert, Ali Sadegh, that Industrial Code Section 23-1.7(e) is not applicable because the scaffolding was not a passageway, floor or platform. Even if this section was applied, it was not violated because the wire "allegedly tripped over was not dirt, scattered tools or materials, or a sharp projection, but rather part of the scaffolding safety system. The wiring was an integral part of the scaffolding system in that it secured the boards so they would not slide or move."

Although defendant argues that the object on which plaintiff tripped was an integral part of the work he was performing, the court rejects this argument as the scaffolding itself is a safety device that allowed the work to be done but was not integral to the work itself of affixing brackets with the eventual installation of metal panels. The defendant AM Architectural cites *Krzyzanowski v City of New York*, 179 AD3d 479[1st Dept 2020] but the facts in that case involved Masonite, *a material that was used in the construction.*

The defendant AM Architectural's expert opined that Industrial Code Section 23-17(b) is not applicable because if the bicycle planks were placed too close to the wall the workers could not perform the metal panel installation on the building, and any guardrail in such an area would have obstructed the work to be performed by the workers. Moreover, there is a dispute as to the gap between the edge of the scaffold and the façade of the building. Plaintiff never pled a Labor Law § 240(2) claim at any point during the course of this litigation and therefore the court should not entertain it now.

Third-party Defendant AM Architectural argues that in the absence of any impermissible gap, plaintiff cannot establish that he was exposed to an elevation-related hazard citing *Johnson v Lendlease Constr. LMB, Inc.*, 164 AD3d 1222, 1222 [2d Dept. 2018]; *see also Avila v Plaza Constr. Corp.*, 73 AD3d 670, 671 [2d Dept. 2018]; *see also Rice v Bd. of Educ.*, 302 AD2d 578, 578-579 [2d Dept 2003]. Although *Johnson v Landlease* involved an opening in a rebar grid which was large enough to fit a foot but not large enough for an entire body, it is instructive that the Court found this was not an elevation-related hazard to which protective devices are designed to apply. *Id.* at 1222-23 [2d Dept 2018]. The *Johnson* court held:

> The defendants established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 240 (1)

[3] OSHA 1926.451(g)(1)(vii): "for all scaffolds not otherwise specified... each employee shall be protected by the use of a personal fall arrest system or guardrail system meeting the requirements of paragraph (g)(4) of this section."

cause of action. The defendants submitted evidence that, although the plaintiff's foot slipped through openings in the rebar grid, the openings were too small for a person's body to fall through. The plaintiff testified at his deposition that his foot could fit through the openings, but not his entire body. The defendants, therefore, established that the openings of the grid did " 'not present an elevation-related hazard to which the protective devices enumerated [in Labor Law § 240 (1)] are designed to apply' " (*Avila v Plaza Constr. Corp.*, 73 AD3d 670, 671 [2010], quoting *Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 580 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The defendants also established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action, which was premised upon alleged violations of 12 NYCRR 23-1.7 (b) (1) and (d), (e), and (f). The provision pertaining to "hazardous openings" (12 NYCRR 23-1.7 [b] [1]) does not apply to openings that are too small for a worker to completely fall through (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983 [2016]; *DeLiso v State of New York*, 69 AD3d 786, 787 [2010]). The defendants also established that 12 NYCRR 23-1.7 (d), (e), and (f) are inapplicable to the facts of this case (*see Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 868 [2017]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984 [2014]; *Francescon v Gucci Am., Inc.*, 105 AD3d 503, 504 [2013]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Consolidated's Opposition

Consolidated argues that plaintiff has failed to demonstrate that the alleged accident was the result of a failure of a safety device under Labor Law § 240(1) and failed to demonstrate that any Industrial Code provision was violated and that such violation was a proximate cause of his accident.

Plaintiff's Reply

Plaintiff incorporates all of his prior arguments.

Summary Judgment Standard

The well-known standards to be applied by the trial courts regarding motions for summary judgment are found in *Ayers v City of Mount Vernon*, 176 AD3d 766, 769, 110 NYS3d 43, 46, 2019 NY Slip Op 07230, 2019 WL 5057893 [2d Dept 2019]:

> '[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' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). 'Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). 'Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *see Zuckerman v. City of New York*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

The Labor Law

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

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure shall furnish or erect, or cause to be 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 § 241(6), in pertinent part provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, 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.

Industrial Code 23-1.7(e)(1), Protections from general hazards, states in pertinent part:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Industrial Code 23-1.7(b)(1)(i)[4], Protection from general hazards, states in pertinent part:

> (b) Falling hazards.
>
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Industrial Code 23-5.3(e) states:

> (e) Safety railings. Safety railings constructed and installed in compliance with this Part (rule) shall be provided for every metal scaffold.

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[4] "...Industrial Code § 23–1.7(b)(1)(i) only applies to openings large enough for a person to fall completely through, which was not the case here (*see Favaloro v. Port Auth. of N.Y. & N.J.*, 191 A.D.3d 524, 525, 143 N.Y.S.3d 4 [1st Dept. 2021]; *Johnson v. Lend Lease Constr. LMB, Inc.*, 164 A.D.3d 1222, 1223, 83 N.Y.S.3d 215 [2d Dept. 2018]; *Messina v. City of New York*, 300 A.D.2d 121, 123, 752 N.Y.S.2d 608 [1st Dept. 2002]), *see Marte v Tishman Constr. Corp.*, 223 AD3d 527, 529, 204 NYS3d 12, 17-18, 2024 NY Slip Op 00231, 2024 WL 187070 [1st Dept 2024].

12 NYCRR 23-5.1, states in pertinent part:

> (j) Safety railings.
>
> (1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule). Exceptions: Any scaffold platform with an elevation of not more than seven feet; the platforms of needle beam scaffolds; floats and rivet heater platforms in use by structural ironworkers; ladder jack scaffold platforms; and trestle and extension trestle ladder scaffold platforms.

To prevail under Labor Law § 240(1), the plaintiff has the burden of showing that a violation of the Industrial Code was the proximate cause of his injuries. *See Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494 (1993); *see also Rivera v Santos*, 35 AD3d 700, 702 [2d Dept. 2006].

> 'To succeed on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident' (*Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 1364 [2020]). The plaintiff here relies upon 12 NYCRR 23-1.7 (e) (1), which provides, in pertinent part, that '[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.'

Tompkins v Turner Constr. Co., 221 AD3d 745, 746 [2d Dept 2023].

Although defendant AM Architectural cites *Fernicola v Benenson Capital Co.*, 252 AD2d 567 [2d Dept 1998], for the proposition that a Labor Law § 240(1) case must be dismissed where an accident is not the result of the failure of a safety device, that case involved a fall to the ground from grease, not a trip and fall where the harness and lanyard actually were engaged. Also, *Bonaparte v Niagara Mohawk Power Corp.*, 188 AD2d 853, 591 NYS2d 576 [3d Dept 1992], relied upon by AM Architectural, only involved a fall to the scaffolding itself and not from the scaffolding below. Although defendant argues that its expert, Ali Sadeh, P.E., found "(i)f plaintiff fell as he testified, the safety devices worked and the fall arrest system protected plaintiff," this is belied by the evidence that plaintiff suffered injuries as a result of this accident.

The following cases provide further guidance:

Valdez v City of New York, 189 AD3d 425, 132 NYS3d 777 [1st Dept 2020]:

> Even if plaintiff were the only witness to his accident – which the record shows he was not – he would still be entitled to summary judgment, 'since nothing in the record controverts his account of the accident or calls his credibility into question' (*Rroku v. West Rac Contr. Corp.*, 164 A.D.3d 1176, 1177, 82 N.Y.S.3d 709 [1st Dept. 2018]; *see e.g. McCann v. Central Synagogue*, 280 A.D.2d 298, 298–299, 720 N.Y.S.2d 459 [1st Dept. 2001]).

Gramigna v Morse Diesel, Inc., 210 AD2d 115, 115-116 [1st Dept 1994]:

> Clearly, Labor Law § 240(1), which addresses the need for proper protective scaffolding, is applicable to a situation where the scaffolding 'prove[s] inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person* (emphasis in original).' (*Ross v. Curtis–Palmer*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82.) The two-foot height differential between the two levels of the scaffolding and further distance that plaintiff's left foot was caused to fall after the planking cracked entails an elevation risk. As for the argument that plaintiff did not fall but merely became stuck between the scaffold and wall, that argument was rejected in *Pietsch v. Moog, Inc.*, 156 A.D.2d 1019, 549 N.Y.S.2d 301, a factually similar case where a workman was injured when, stepping across a cross wall from one scaffold to another, he fell two or three feet into a gap between the wall and the second scaffold. Those unrefuted allegations were held sufficient to establish a statutory violation and that the violation was a proximate cause of the injuries. (*Id.* at 1020, 549 N.Y.S.2d 301.) In the circumstances, the fact that plaintiff was not caused to fall to the ground is not a bar to the application of section 240(1) of the Labor Law, which, like its predecessor statute, "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed * * *." (*Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596.)

Pietsch v Moog, Inc., 156 AD2d 1019 [4th Dept 1989], "A fall between scaffolding and a wall and a fall from scaffolding are indistinguishable for purposes of applying Section 240(1) of the Labor Law."

Amaro v New York City School Constr. Auth., 229 AD3d 746, 747 [2d Dept 2024]:

> "Labor Law § 240(1) requires contractors to provide appropriate safety devices for the protection of workers engaging in labor that involves elevation-related risks" (*Santiago v. Hanley Group, Inc.*, 216 A.D.3d 833, 833–834, 188 N.Y.S.3d 203). "To prevail on a cause of action alleging a violation of Labor Law § 240(1), a

> plaintiff must show, prima facie, that the defendant violated the statute and that such violation was a proximate cause of his or her injuries" (*Lochan v. H & H Sons Home Improvement, Inc.*, 216 A.D.3d 630, 632, 187 N.Y.S.3d 780).

Hensel v Aviator FSC, Inc., 198 AD3d 884 [2d Dept 2021]:

> "[L]iability 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 Assoc.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085; *see Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902, 904, 861 N.Y.S.2d 607, 891 N.E.2d 723). "Labor Law § 240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (*Bland v. Manocherian*, 66 N.Y.2d 452, 459, 497 N.Y.S.2d 880, 488 N.E.2d 810).

Villa v E. 85th Realty, LLC, 189 AD3d 1661, 1662-63 [2d Dept 2020]:

> The purpose of the statute is to "protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" (*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865; *see Simmons v. City of New York*, 165 A.D.3d 725, 726, 85 N.Y.S.3d 462).

Honeyman v Curiosity Works, Inc., 154 AD3d 820, 821-822 [2d Dept 2017]:

> Upon renewal, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against it. The defendant's evidence established the absence of a causal nexus between the injured plaintiff's injury and a lack or failure of a device prescribed by Labor Law § 240(1) (*see Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 663, 985 N.Y.S.2d 416, 8 N.E.3d 791; *Carrasco v. Weissman*, 120 A.D.3d 531, 533, 992 N.Y.S.2d 36; *Mendez v. Jackson Dev. Group., Ltd.*, 99 A.D.3d 677, 678, 951 N.Y.S.2d 736). In opposition, the plaintiffs failed to raise a triable issue of fact. The device identified by the plaintiffs—a pin and bracket system—was not meant to function as a safety device in the same manner as those devices enumerated in Labor Law § 240(1), but, rather, served to support the exhibition booths once fully constructed (*see Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d at 663, 985 N.Y.S.2d 416, 8

> N.E.3d 791). ...
>
> Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Keener v. Cinalta Constr. Corp.*, 146 A.D.3d 867, 45 N.Y.S.3d 179).

Britez v Madison Park Owner, LLC, 36 Misc 3d 1233(A), 960 NYS2d 49 [Sup Ct 2012], *affd*, 106 AD3d 531, 966 NYS2d 7 [1st Dept 2013]:

> A job site incident report dated January 15, 2008, prepared by Louis Chiaffarano ("Chiaffarano"), states that "Paul Britez was working on a bakers scaffold. The platform of the scaffold was set at 6' above the floor. Mr. Britez attempted to move forward on the scaffold with the wheels in the unlocked position. As he attempted to move forward he lost his balance and stepped off the scaffold and fell between the scaffold and the wall...

The *Britez* court found liability for the fall in the gap between the scaffolding and the façade because the scaffolding, the very device meant to ensure the safety of the worker, failed because the wheels were not locked and not because of the mere fact that the worker fell in the gap. The reason for the fall was found to be irrelevant when there is no dispute that his injuries were caused by his fall from the scaffold. *Id.*

Legal Analysis

There is no question of fact that the scaffolding was fixed, contained appropriate guardrails on each side, except for the side closest to the façade, and that plaintiff was provided with a hard hat, gloves, a harness[5] and lanyards that were properly connected to a safety bar. These safety devices were effective in preventing a fall to the ground but not effective in preventing the accident where part of plaintiff's body was wedged between the edge of the scaffold and the façade. There is no issue of fact, and plaintiff testified as much, that some gap between the scaffold and the façade was necessary for the installation of the metal panels to the façade. Therefore, the gap itself was integral to the work. (*See Lourenco v City of New York*, 228 AD3d 577, 580, [1st Dept 2024] citing *Bazdaric v Almah Partners LLC*, 41 NY3d at 320, 209 NYS3d 310, 232 NE3d 1244 [integral to the work defense "'applies only when the dangerous condition is inherent to the task at hand'"]). The mere fact of the gap is not a violation of the Labor Law.

[5] "(T)he affixing of harnesses and safety lines attached to a safe structure are the type of safety devices envisioned by [section] 240(1) to prevent a worker from falling" off a scaffold, defendants' failure to provide plaintiffs with such constitutes a violation of the statute. (*Ciaurella*, 228 AD3d at 556-557 [internal quotation marks omitted], *see Holness v 421 Kent Dev., LLC*, 84 Misc 3d 1262(A), 224 NYS3d 895, 2025 NY Slip Op 50022(U), 2025 WL 209834, at *6 [Sup Ct 2025].

However, there is an issue of fact as to the size of the gap. Oscar Hernandez, general foreman for Consolidated testified that the space between the bicycle and the building was approximately 2" to 3". (NYSCEF No. 197, Tr. at 101, 117 – 118). Plaintiff described the gap as between two and three feet. (NYSCEF Doc. No. 192, Tr. 157:7-8,12-13). Other witnesses testified to the size of the gap as lengths in-between this distance. Martin Bruno, Tishman's safety expert, cites OSHA §1926.451(b)(3) as requiring that "the front edge of all platforms shall not be more than 14 inches (36 cm) from the face of work, unless guardrail systems are erected along the front edge or a personal fall arrest system (PFAS) is used to protect employees from falling." (NYSCEF Doc. No. 177, ¶14). But compliance with OSHA regulations does not insulate an owner or general construction manager from liability. There is no dispute that plaintiff utilized a harness and lanyards, but Labor Law 240(1) provides for an independent legal basis for liability. *See Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746-47, [AD 2d Dept 2014]:

> Labor Law § 240(1) is "a self-executing statute which, contain[s] its own specific safety measures," the violation of which provides an independent legal basis for liability, regardless of whether there was compliance with federal regulations or general industry standards (*Long v. Forest–Fehlhaber,* 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *see Miranda v. Norstar Bldg. Corp.*, 79 A.D.3d at 47, 909 N.Y.S.2d 802; *Dalaba v. City of Schenectady,* 61 A.D.3d 1151, 1153, 876 N.Y.S.2d 744).

There is an issue of fact that needs to be determined by the jury - that is whether the gap, integral to install the framing, brackets and metal panels, was greater than necessary for such installation, and if so, defendants are strictly liable under the labor law because the scaffold was insufficient as a matter of law. Labor Law § 240(1).

There is no issue of fact that Tishman and Pratt, respectively the building manager and out-of-possession owner, without any supervisory role involving plaintiff or the project or control of the means and methods, are not liable under Labor Law § 200 and common law negligence and these claims must be dismissed. *Ruisech v Structure Tone Inc.*, 42 NY3d 1061, [NY Ct. of Ap. 2024]; *Pereira v Hunt/Bovis Lend Lease All. II*, 193 AD3d 1085 [2d Dept 2021].

The court finds that none of the Industrial Code provisions under Labor Law § 241(6) apply.

Industrial Code § 23-1.7(e)(2) states the following:

> Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

The plaintiff testified that he tripped over a loose wire that was utilized to keep

scaffolding boards together. This does not constitute, "accumulations of dirt and debris and from scattered tools and materials and from sharp projections…".

The pertinent parts of Industrial Code § 23-1.7(b)(1)(i) state the following:

> (b) Falling hazards.
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
> (*a*) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
> (*b*) An approved life net installed not more than five feet beneath the opening; or
> (*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

This section only applies where the openings are large enough for a person to fall completely through, which did not happen in this accident, and there is no question of fact that a safety belt with attached lifeline was properly secured to a fixed anchorage. *See Marte v Tishman Constr. Corp.*, 223 AD3d 527 [1st Dept 2024].

Industrial Code § 23-5.3(e) states the following:

> (e) Safety railings. Safety railings constructed and installed in compliance with this Part (rule) shall be provided for every metal scaffold.

There is no evidence that the scaffold was a metal scaffold. There is no issue of fact that safety railings were installed except as to that part of the scaffold facing the building and that such installation would have interfered with the installation of the metal panels therefore making this section is inapplicable.

Industrial Code § 23-5.1(j) states the following:

> (j) Safety railings.
> (1) The open sides of all scaffold platforms, except those platforms listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part (rule).

There is no issue of fact that all the "open" sides did in fact have a safety rails. The only

side that did not was facing the façade. Therefore, this section does not apply.

Based on the foregoing, it is

ORDERED that Second Third-Party Defendant, VALLEY FINISH, INC.'s motion pursuant to CPLR 3212 for summary judgment in favor of the Second Third-Party Defendant, Valley Finish, Inc., dismissing the Second Third-Party Complaint, all crossclaims and other claims as against said party, with prejudice, granted to the following extent: any cause of action based on common law indemnification is DISMISSED with prejudice (MS#6); and it is further

ORDERED that plaintiff's motion for

1) summary judgment in his favor on the issue of liability against defendants TISHMAN CONSTRUCTION CORP., PRATT INSTITUTE, and AM ARCHITECTURAL METAL & GLASS INC., pursuant to Labor Law §240(1) is DENIED as there are issues of fact that need to be determined at trial, to wit, whether the gap between the scaffold and façade of the building, integral to install the framing, brackets and metal panels, was greater than necessary for such installation, and if so, defendants will be found strictly liable under the labor law because the scaffold without railings was insufficient under Labor Law § 240(1)(MS#7).

2) summary judgment in its favor against defendants TISHMAN CONSTRUCTION CORP., PRATT INSTITUTE, and AM ARCHITECTURAL METAL & GLASS INC., on the issue of a violation of Labor Law § 241(6) is DENIED as no viable grounds exists under this section (MS#7); and it is further,

ORDERED that Defendants/Third-Party plaintiffs TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE's motion:

1) dismissing the complaint is GRANTED TO THE EXTENT that any cause of action based on Labor Law §§ 200 and 241(6) are DISMISSED (MS#8);

2) granting summary judgment in favor of TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE against Defendant/First Third-Party Defendant/Second Third-Party Plaintiff AM ARCHITECTURAL METAL & GLASS INC. pursuant to the contractual indemnification and breach of contract for failure to procure insurance causes of action is GRANTED to the extent that Defendant/First Third-Party Defendant/Second Third-Party Plaintiff AM ARCHITECTURAL METAL & GLASS INC. is liable for failing to have its sub-contractors Consolidated Scaffold Co. and Valley Finish, Inc. obtain insurance in the amount of $2Million per occurrence and $5Million in the general aggregate naming as an additional insured TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE (Tishman 00088) (MS#8);

3) granting summary judgment in favor of TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE against Defendant/Second Third-Party Defendant CONSOLIDATED SCAFFOLD CO. pursuant to the contractual indemnification and breach of contract for failure to procure insurance is DENIED (MS#8);

4) setting this matter down for an inquest as to the attorneys' fees and costs owed by AM ARCHITECTURAL METAL & GLASS INC. is GRANTED TO THE EXTENT that an inquest shall occur at or after trial (MS#8);

5) dismissing all cross-claims and counterclaims against TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE is GRANTED and all cross-claims and counter-claims are DISMISSED (MS#8); and it is further

ORDERED that First Third-Party Defendant/Second Third-Party Plaintiff AM ARCHITECTURAL METAL & GLASS INC.'s motion for:

1) summary judgment dismissing plaintiff's claims, is DENIED as there are issues of fact (MS#9); and,

2) dismissing any and all cross-claims and/or Third-Party claims against movant is GRANTED to the extent that claims alleging that First Third-Party Defendant/Second Third-Party Plaintiff AM ARCHITECTURAL METAL & GLASS INC.'s breached its contract in failing to obtain insurance to indemnify Defendants/Third-Party plaintiffs TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN i/p/h as "TISHMAN CONSTRUCTION CORP." and PRATT INSTITUTE are DISMISSED (MS#9); and it is further

ORDERED that First Third-Party Defendant/Second Third-Party Plaintiff AM ARCHITECTURAL METAL & GLASS INC.'s motion for

1) summary judgment on its cross-claims and Third-Party claims for contractual indemnity, common law indemnity, and/or contribution against CONSOLIDATED SCAFFOLD CO. is DENIED (MS#9); and,

2) summary judgment on its cross-claims and Third-Party claims against VALLEY FINISH, INC. is GRANTED TO THE EXTENT that VALLEY FINISH, INC. is liable to AM ARCHITECTURAL METAL & GLASS INC.'s for contractual indemnity and breach of contract in failing to procure insurance (MS#9); and it is further

ORDERED that Defendant/Second Third-Party Defendant, CONSOLIDATED

SCAFFOLD INC., s/h/a CONSOLIDATED SCAFFOLD and CONSOLIDATED SCAFFOLD CO.'s motion for summary judgment in favor CONSOLIDATED SCAFFOLD INC., s/h/a CONSOLIDATED SCAFFOLD and CONSOLIDATED SCAFFOLD CO., dismissing the Complaint, Amended Complaint, and Second Third-Party Complaint, as well as any and all crossclaims and/or causes of action for common law negligence, common law indemnification and contribution, contractual indemnification and breach of contract as against said party, with prejudice, is GRANTED (MS#10); and it is further

ORDERED that either plaintiff MELVIN R. PARRALES shall stipulate with defendant TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN s/h/a as "TISHMAN CONSTRUCTION CORP" to amend the caption to reflect the legal name of the defendant, or move to amend the caption, within 30 days of the entry of this decision or order, or the complaint against defendant TISHMAN CONSTRUCTION CORP. shall be dismissed.

This constitutes the decision and order of the Court.

Hon. Richard J. Montelione

KINGS COUNTY CLERK
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