

Rivas v Coney Is. Site 1824 Houses, Inc.

2025 NY Slip Op 31081(U)

March 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 520563/2019

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of March, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW
YORK COUNTY OF KINGS

-----X
RUBEN RIVAS,

Plaintiff,

-against-

Index No. 520563/2019

CONEY ISLAND SITE 1824 HOUSES, INC.,
GLARRETT HOLDING CORPORATION,
STARRETT CITY, INC., OCEANGATE L.P.,
STARRETT OCEANGATE, LLC AND
GRENADIER REALTY CORP.,

Defendants.

DECISION AND ORDER

-----X
CONEY ISLAND SITE 1824 HOUSES, INC.,
OCEANGATE L.P., AND GRENADIER REALTY
CORP.,

Third-Party Plaintiffs,

-against-

SATO CONSTRUCTION CO. INC. D/B/A FLAG
WATERPROOFING & RESTORATION
COMPANY, FALCO CONSTRUCTION CORP.,
TULLY CONSTRUCTION CO. INC., AND
STONE CITY ENTERPRISES INC.,

Third-Party Defendants.

-----X
SATO CONSTRUCTION CO. INC. D/B/A FLAG
WATERPROOFING & RESTORATION
COMPANY,

Second-Third-Party Plaintiffs,

-against-

STONE CITY ENTERPRISES INC.,

Second Third-Party Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

123-125, 169-170,

Affidavits (Affirmations) Annexed _____

171-172, 184, 200-202, 216-217

157-159, 160-161,

Opposing Affidavits (Affirmations) _____

187-188, 190-191, 220-221, 231

Affidavits/ Affirmations in Reply _____

164, 165, 196, 198, 234

Upon the foregoing papers, plaintiff Ruben Rivas (plaintiff) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1) as against defendants Coney Island Site 1824 Houses Inc., Oceangate L.P. and Grenadier Realty Corp., (collectively the Coney Island Defendants) (motion sequence number 5).¹

The Coney Island Defendants cross-move for an order, pursuant to CPLR 3212, granting summary judgment: (i) dismissing plaintiff's common law and Labor Law §§ 200, 240 (1) and 241 (6) causes of action; (ii) in their favor on their contractual indemnification and common-law indemnification claims against third-party defendant Sato Construction Co. Inc., d/b/a Flag Waterproofing & Restoration Company (Flag Waterproofing); and (iii) declaring that they are entitled to coverage as additional insureds under the Sato/Flag Axis insurance policy (motion sequence number 7).

Flag Waterproofing cross-moves for an order, pursuant to CPLR 3212, (1) granting it summary judgment dismissing plaintiff's complaint, and (2) dismissing all other common law/contribution claims as asserted against it (motion sequence number 8).

In this action, plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on personal injuries he allegedly sustained on August 16, 2019, when he fell from a ladder to a balcony deck while painting a balcony of a 17-story building then undergoing façade repairs (the accident). Coney Island Site 1824 Houses Inc., and Ocean Gate L.P. were the owners of the building at issue, and Grenadier Realty Corp. served as its managing agent. Ocean Gate L.P. had contracted with Flag Waterproofing to perform façade repairs that included pointing and painting at the building. Flag Waterproofing, in turn, subcontracted the performance of the actual work to second third-party defendant Stone City Enterprises, Inc. (Stone City).² Plaintiff was employed by Stone City as a mechanic.³

At his deposition, plaintiff testified that Frank Banderas, and an on-site supervisor from Stone City whose name plaintiff could not recall, supervised his work. On the day of the accident, the on-site supervisor directed plaintiff, and two coworkers who acted as his assistants, to finish painting an area of the building that they accessed a suspended scaffold that they had used the previous day. Shortly before the accident,

¹ The claims against defendants Glarrett Holding Corporation, Starrett City, Inc., and Starrett Oceangate LLC were discontinued (see NYSCEF Doc No. 37). By an order dated May 16, 2022, this court granted the Coney Island Defendants' motion for a default judgment against second third-party defendant Stone City Enterprises Inc. (see NYSCEF Doc. No. 67).

² As previously noted, by order dated May 16, 2022, this court granted the Coney Island Defendants' motion for a default judgment against Stone City (see NYSCEF Doc. No. 67).

³ Plaintiff did not recall the name of the entity which employed him. Plaintiff, however, believed that the company was owned by Frank Banderas. In an affidavit submitted by Flag Waterproofing, Jose David Gutama Alvarracin, a Stone City supervisor, stated he believed that Stone City was owned by Frank Lester, and that plaintiff was working for Stone City at the time of his accident (see NYSCEF Doc Nos. 159 and 216).

plaintiff climbed from the scaffold onto the deck of the 15th floor balcony and set up an A-frame ladder on the balcony deck to perform his work of painting the balcony ceiling beams above him. In order to access certain portions of the corner of the balcony, plaintiff had to place one foot on the ladder at approximately the fourth rung and his other foot on the wall of the balcony because he was unable to access that area by using the ladder alone (NYSCEF Doc No.133 at p. 379, lines 22-25, p. 380, lines 5-13, 24-25, p. 381, lines 2-3). As he was painting, plaintiff held the paintbrush in one hand and a paint can in his other hand. While he was painting in this manner, the ladder slipped and caused plaintiff to fall to the balcony deck with resulting injuries.

Although plaintiff was wearing a harness attached to a lifeline suspended from above, he had to move the lifeline rope to which the harness was attached over to the side to allow him to access the area he was painting, shortly before the accident. Doing so, however, caused the lifeline to become too loose to prevent him from striking the deck as the result of the accident. Plaintiff maintains that he and his coworkers had previously (but unsuccessfully) requested that a scaffold (which was more stable than an A frame ladder) be erected directly on the balconies so they could reach all of the areas that needed to be painted and because a scaffold is more stable. Nevertheless, plaintiff felt he had no alternative but to perform the assigned work with the ladder provided because he would have been sent home otherwise (NYSCEF Doc No. 131, at 77, lines 3-7). Although plaintiff conceded that there were paint rollers with extension poles on the jobsite, he asserted that he could not have used a roller to paint the metal beams (NYSCEF Doc No. 132 at p. 200, lines 20-25, at p. 201, lines 2-8).

Flag Weatherproofing, in opposition to plaintiff's motion and in support of its own cross-motion, submitted an affidavit from Jose David Gutama Alvarracin, a foreman with Stone City (NYSCEF Doc Nos. 159 and 216). Alvarracin states that he was working at another jobsite on the date of the accident, and was not present at the building on that day. When Alvarracin was at another jobsite, John Albuquerque acted as the foreman at the building. Alvarracin asserts that he had on many occasions instructed plaintiff, who he described as an older worker, not to climb up onto the ladder to do the work, and that he (plaintiff) should leave such work to his younger co-workers. In addition, Alvarracin states that plaintiff had been provided with all the safety equipment he needed to perform the work, including the ladder, harness, and a place to tie off the ladder. Nevertheless, Alvarracin only arrived at the jobsite after the accident, and everything he learned about the accident was from what plaintiff's coworkers told him after the fact.

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the

motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see CPLR 3212; Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). With respect to falls from ladders, the Appellate Division, Second Department has emphasized that “[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided” (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *see Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038-1039 [2021]; *Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 888 [2d Dept 2019]). A lack of proper protection is established by evidence “that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff’s injuries” (*Karanikolas*, 120 AD3d at 555 [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]).

Here, plaintiff’s deposition testimony that he fell to the balcony deck after the ladder moved under him shows that the ladder was inadequately secured and is sufficient to establish his prima facie entitlement to partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action (*see Paiba v 56-11 94th St. Co., LLC*, 228 AD3d 881, 882 [2d Dept 2024]; *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 677-678 [2d Dept 2021]; *Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 503 [1st Dept 2021]; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 745-747 [2d Dept 2016]). Based on plaintiff’s uncontested deposition testimony regarding the movement of the unsecured ladder, plaintiff was not required to show that the ladder was defective in order to make out his prima facie burden (*see Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 538 [1st Dept 2021]; *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 730 [2d Dept 2020]; *Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008]; *Whalen v ExxonMobile Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008], *lv denied* 53

AD3d 1124 [4th Dept 2008]). Plaintiff also had no obligation to explain why the ladder moved (*see Hoxhaj*, 195 AD3d at 504; *Salinas*, 170 AD3d at 1222 [ladder moved for no apparent reason]; *Cabrera*, 163 AD3d at 759-760 [same]).⁴

The Coney Island Defendants and Flag Waterproofing, however, assert that summary judgment should be denied because there are factual issues as to whether plaintiff's actions were the sole proximate cause of the accident and whether plaintiff was a recalcitrant worker. A plaintiff's negligence constitutes the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 [2d Dept 2014]). The recalcitrant worker defense is another way of showing that the injured worker's conduct was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). A worker may be found to be recalcitrant when the worker refuses to follow specific safety instructions to use a particular safety device, but the defense cannot be invoked where no adequate safety devices were provided at the job site in the first place (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Zong Wang Yang v City of New York*, 207 AD3d 791, 795 [2d Dept 2022]).

Contrary to the contentions of the Coney Island Defendants and Flag Waterproofing, they have failed to raise a triable issue of fact as to whether plaintiff's decision to stand with one foot on the ladder and the other on the wall of the balcony was the sole proximate cause of the accident. Plaintiff specifically testified that standing in this manner was the only way he could reach the ceiling beams in that area. It should be noted that "[a]daptions in work that a plaintiff is forced to make at a work site cannot be used as a defense to a [Labor Law §] 240 (1) claim where the plaintiff's actions are a consequence of the defendant's failure to provide proper safety devices in the first instance" (*Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 443-444 [1st Dept 2022]; *see Nieto v CLDN NY LLC*, 170 AD3d 431, 432 [1st Dept 2019]; *see also Guaman-Sanango v 57 E. 72nd Corp.*, 227 AD3d 677, 679-680 [2d Dept 2024], *affirming* 2021 WL 11728464 [Sup Ct, Queens County 2021]; *Zholanji v 52 Woosler Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008]). In the face of plaintiff's testimony regarding the work that he was performing at the time of the accident, the

⁴ Here, there is no dispute that Coney Island Site 1824 Houses Inc., and Ocean Gate L.P., as owners of the building (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]), and Grenadier Realty Corp., as the managing agent of the property (*see Merino v Continental Towers Condominium*, 159 AD3d 471, 472 [1st Dept 2018]; *Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564-565 [1st Dept 2017]; *Corona v Metropolitan 298-308 Assoc*, 281 AD2d 447, 447-448 [2d Dept 2001]) may be held liable under Labor Law § 240 (1). Additionally, plaintiff's painting and pointing work at the time of the accident is expressly covered under section 240 (1).

conclusory assertion of the Coney Island Defendants' engineer that plaintiff could have safely performed his work while standing solely on the ladder was insufficient to raise an issue of fact (*see Orellana*, 173 AD3d at 888; *see also Vitucci*, 205 AD3d at 442-443; *Hoxhaj*, 195 AD3d at 504).

On the other hand, Flag Waterproofing has demonstrated the existence of a factual issue as to whether plaintiff was the sole proximate cause of the accident and/or a recalcitrant worker based on Alvarracin's sworn affidavit that prior to the accident (albeit not on the day thereof), he (Alvarracin) instructed plaintiff not to perform work while standing on the ladders and that all ladder-related work should have been performed by his younger coworkers. This court finds that Alvarracin's instruction in this respect is akin to the instruction at issue in *Benavidez-Portillo v G.B. Constr. & Dev., Inc.* (149 AD3d 681 [2d Dept 2017]), where the plaintiff was not authorized or instructed to work at the accident location (*id.* at 682-683) and other appellate cases involving similar facts (*see Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646, 647-648 [2d Dept 2013]; *Serrano v Popovic*, 91 AD3d 626, 627 [2d Dept 2012; *see also Orellana v Mo-Hak Assoc., LLC*, 183 AD3d 451, 452 [1st Dept 2020] [plaintiff instructed not to work on ladder]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013] [plaintiff was instructed only to do clean-up work on ground]; *cf. Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]; *Stolt*, 81 NY2d at 920).⁵ The fact that the last time the instruction at issue was given to plaintiff before the accident does not lessen his alleged recalcitrance because viewing the evidence in a light most favorable to the cross-movants and accepting the truth of Alvarracin's affidavit (as the court must at this stage of the litigation), plaintiff has been instructed multiple times before the accident not to work on any ladders (*see Cahill*, 4 NY3d at 39). Accordingly, Flag Waterproofing has demonstrated the existence of a factual issue requiring denial of plaintiff's motion for partial summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action. These factual issues also require denial of the portions of the Coney Island Defendants' and Flag Waterproofing's respective cross-motions for dismissal of plaintiff's section 240 (1) cause of action.

Under Labor Law § 241 (6), an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Lopez v Kamco Servs, LLC*, 231 AD3d 1142, 1144 [2d Dept 2024]). "In order to establish prima facie entitlement to summary judgment, a defendant must show that the plaintiff failed to identify a section of the Industrial Code that was allegedly violated, that any such section is insufficiently specific to support liability or is inapplicable to the facts of

⁵ However, Alvarracin's description of the circumstances surrounding the accident cannot raise triable issues of fact because it is not based on first-hand knowledge (*see Mora v Bush Term. Owner, L.P.*, 214 AD3d 785, 787 [2d Dept 2023]; *South v Metropolitan Transp. Auth.*, 176 AD3d 447, 448 [1st Dept 2019]; *Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 873 [2d Dept 2016]). As stated before, Alvarracin was not on the job site on the day of the accident.

the case, or that the defendant complied with the requirements of the identified provision” (*Lopez*, 231 AD3d at 1144 [internal quotation marks omitted]; see *Gonzalez v City of New York*, 227 AD3d 958, 960 [2d Dept 2024]).

Here, the Coney Island Defendants and Flag Waterproofing have failed to demonstrate their prima facie entitlement to summary judgment dismissing the Labor Law § 241 (6) cause of action with respect to Industrial Code § 23-1.16. Section 23-1.16 sets requirements for safety belts and harnesses for use at a jobsite and specifically provides that the attachments to a lifeline must be such that “if the user should fall such fall shall not exceed five feet” (Industrial Code § 23-1.16 [b]). Section 23-1.16 sets forth a specific standard and defendants have failed to establish that it was not violated here (see *King v Villette*, 155 AD3d 619, 623 [2d Dept 2017]). This court declines to consider the belated arguments of Coney Island Defendants and Flag Waterproofing, made for the first time in their reply papers, that section 23-1.16 is inapplicable to the facts of this case because plaintiff did not fall more than five feet to the floor or deck of the balcony (see *Deutsche Bank Natl. Trust Co. v Ezagui*, 221 AD3d 964, 966-967 [2d Dept 2023]). Accordingly, the branches of the respective cross-motions by the Coney Island Defendants and Flag Waterproofing are denied regardless of the sufficiency of plaintiff’s opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

On the other hand, the Coney Island Defendants and Flag Waterproofing have demonstrated, prima facie, that Industrial Code §§ 23-1.5; 23-1.7 (a), (b), (d), (e), and (f); 23-1.8 (c); 23-1.11; 23-1.15; 23-1.22 (c); 23-1.28; 23-1.30; 23-2.1 (a) (1) and (2); 23-3.3 (b), (c) (1); 23-6.1 (j) (2); 23-5.1; and 23-5.3 (d), (e) are insufficiently specific, inapplicable to the facts here, or were not violated. Plaintiff, by failing to address those provisions in his opposition papers, has failed to demonstrate a factual issue warranting denial of those branches of the respective cross-motions of the Coney Island Defendants and Flag Waterproofing (see *Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]).

With respect to plaintiff’s common-law negligence and Labor Law § 200 causes of action, the Coney Island Defendants and Flag Waterproofing have demonstrated, their prima facie entitlement to dismissing those causes of action by showing that the accident arose from the means and methods of plaintiff’s work (see *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 672-673 [2d Dept 2018]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 652-653 [2d Dept 2014]; see also *Breslin v Macy’s, Inc.*, 211 AD3d 569, 569-570 [1st Dept 2022]) and that the Coney Island Defendants did not supervise or control the injury producing work (see *Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]). Inasmuch as plaintiff failed to oppose these branches of the cross-motions, the Coney Island Defendants and Flag Waterproofing are each entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 causes of action.

Turning to the Coney Island Defendants' contractual indemnification claim against Flag Waterproofing, the court notes that the broadly worded indemnification provision contained in Oceangate L.P.'s contract with Flag Waterproofing required Flag Waterproofing to indemnify Oceangate L.P. and the other Coney Island Defendants from all "claims . . . arising from, in connection with or relating to: (i) the performance (or non-performance) of the Work . . . [and] (vi) means, methods, procedures, techniques, or sequences of execution or performance of the Work . . . " (Oceangate-Flag Contract § 13.02 [a]).⁶ Here, the Coney Island Defendants have demonstrated that they were not negligent, that plaintiff was injured while performing the façade work which Flag Waterproofing had contracted to perform, and that the indemnification provision was triggered. Accordingly, the Coney Island Defendants have demonstrated their prima facie entitlement to summary judgment on their contractual indemnification claim against Flag Waterproofing (*see Cedillo v Nautilus Realty Ltd. Partnership*, 219 AD3d 1300, 1301-1302 [2d Dept 2023]; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 605-606 [2d Dept 2017]; *Scott v 122 East 42 St., LLC*, 34 Misc 3d 1233 [A], 2012 NY Slip Op 50358[U], *10-11 [Sup Ct, Queens County 2012]; *see also Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). Since Flag Waterproofing has failed to demonstrate a factual issue in its opposition papers, the Coney Island Defendants are entitled to summary judgment in their favor on their third-party claim for contractual indemnification against Flag Waterproofing.

Conversely, the Coney Island Defendants have failed to demonstrate, prima facie, that Flag Waterproofing breached the contractual insurance procurement terms of its contract with Oceangate L.P. As a threshold matter, a copy of the Oceangate L.P./Flag Waterproofing contract submitted by defendants to the court (NYSCEF Doc No. 178) is missing Exhibit B, which sets forth the insurance procurement terms (*see* Oceangate-Flag Contract § 13.01 [a]). In any event, a copy of the Flag Waterproofing's insurance policy submitted by the Coney Island Defendants includes a blanket additional insured endorsement, which generally satisfies the additional insured requirements of a construction contract (*see Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept 2020]; *Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]). Thus, if the policy language here complies with the contract's insurance procurement requirements, Flag Waterproofing would have complied with its contractual obligations (*see Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 620 [2d Dept 2024]). Assuming that to be the case, any issue relating to a denial of coverage by Flag Waterproofing's insurer would not show that Flag Waterproofing failed to obtain the requisite insurance (*id.*) and, instead would have to be separately resolved by the Coney Island Defendants bringing a

⁶ The body of the Oceangate/Flag contract specifically identifies Oceangate L.P. as the owner, which is one of the entities expressly entitled to indemnification (Oceangate/Flag Contract § 13.02 [a]). Further Coney Island Site 1824 Houses, Inc., and Grenadier Realty Corp. are specifically listed as indemnitees in the indemnification provision contained in the contract.

declaratory judgment action directly against Flag Waterproofing's insurer (see *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]; see also *Holler v Dominion Energy Transmission, Inc.*, 221 AD3d 1491, 1493 [4th Dept 2023]). Accordingly, the branch of the Coney Island Defendants' motion is denied regardless of the sufficiency of Flag Waterproofing's opposition papers (see *Winegrad*, 64 NY2d at 853).

Regarding the Coney Island Defendants' contribution and common-law indemnification third-party claims, Flag Weatherproofing, through plaintiff's deposition testimony and the deposition testimony of its own witness, has demonstrated its prima facie entitlement to dismissal of those claims based on the undisputed evidence that it was not negligent and that it did not exercise any actual supervision of or control over the injury-producing work (see *Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Debenedetto*, 190 AD3d at 938; *Gonsalves v 35 W. 54 Realty Corp. Corp.*, 147 AD3d 815, 817 [2d Dept 2017]; see also *McCarthy Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2023]). The evidence submitted by the Coney Island Defendants showing that Flag Waterproofing had general contractual authority to supervise the work is, in and of itself, insufficient to demonstrate a factual issue in the face of the evidence showing that Flag Waterproofing did not exercise such authority with respect to plaintiff's work (see *McCarthy*, 17 NY3d at 378). Flag Waterproofing is thus entitled to summary judgment dismissing the Coney Island Defendants' contribution and common-law indemnification claims as asserted against it. For these same reasons, the portion of the Coney Island Defendants' cross-motion seeking summary judgment on their common-law indemnification claim against Flag Waterproofing is denied (see *Chapa*, 221 AD3d at 857).

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion (motion sequence 5) is denied, and it is further,

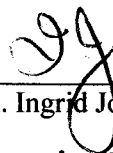
ORDERED, that The Coney Island Defendants' cross-motion (motion sequence number 7) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed; (2) plaintiff's Labor Law § 241 (6) cause of action insofar as premised on the alleged violation of Industrial Code (12 NYCRR) §§ 23-1.5; 23-1.7 (a), (b), (d), (e), and (f); 23-1.8 (c); 23-1.11; 23-1.15; 23-1.22 (c); 23-1.28; 23-1.30; 23-2.1 (a) (1) and (2); 23-3.3 (b), (c) (1); 23-6.1 (j) (2); 23-5.1; and 23-5.3 (d), (e), is dismissed; and (3) the Coney Island Defendants' are entitled to summary judgment in their favor on their contractual indemnification claim against Flag Waterproofing. The remainder of the Coney Island Defendants' cross-motion is otherwise denied, and it is further,

ORDERED, that Flag Waterproofing's cross-motion (motion sequence number 8) is granted to the extent that (1) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed; (2) plaintiff's Labor Law § 241 (6) cause of action, insofar as predicated on the alleged violation of Industrial Code (12 NYCRR) §§ 23-1.5; 23-1.7 (a), (b), (d), (e), and (f); 23-1.8 (c); 23-1.11; 23-1.15; 23-1.22 (c); 23-

1.28; 23-1.30; 23-2.1 (a) (1) and (2); 23-3.3 (b), (c) (1); 23-6.1 (j) (2); 23-5.1; and 23-5.3 (d), (e), is dismissed; and (3) the Coney Island Defendants' third-party claims for contribution and common-law indemnification against Flag Waterproofing are dismissed. The remainder of Flag Waterproofing's cross-motion is denied.

Any issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**