

Cucchiarella v Tishman Interiors Corp.

2025 NY Slip Op 31759(U)

May 13, 2025

Supreme Court, New York County

Docket Number: Index No. 152245/2021

Judge: Sabrina B. Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57M

Justice

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LUCIAN CUCCHIARELLA,

Plaintiff,

-against-

TISHMAN INTERIORS CORPORATION, OAC 550
OWNER, LLC, and ADCO ELECTRIC d/b/a ADCO
ELECTRICAL CORP.,

Defendants.

INDEX NO.	152245/2021
MOTION DATE	03/10/2025, 03/10/2025
MOTION SEQ. NO.	002 003
DECISION + ORDER ON MOTION	

-----X

TISHMAN INTERIORS CORPORATION and OAC 550
OWNER, LLC,

Third-Party
Index No. 595581/2022

Third-Party Plaintiffs,

-against-

ADCO ELECTRIC d/b/a ADCO ELECTRICAL CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 137, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 180

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 138, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 184

were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this action arising out of a construction site accident, defendant/third-party defendant ADCO Electric d/b/a ADCO Electrical Corp. (ADCO) moves, pursuant to CPLR 3212, for

summary judgment dismissing the complaint and the third-party complaint in their entirety (motion sequence number 002).

Plaintiff Lucian Cucchiarella (plaintiff) moves, pursuant to CPLR 3212, for partial summary judgment under Labor Law § 240 (1) as against defendants/third-party plaintiffs Tishman Interiors Corporation (Tishman) and OAC 550 Owner LLC (Owner) (motion sequence number 003).

BACKGROUND

This action arises out of an accident that occurred on December 18, 2020 at 550 Madison Avenue, New York, New York (the premises) (NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified complaint ¶¶ 6, 135). Owner admitted that it was the fee owner of the premises on the date of the accident (NYSCEF Doc No. 168, verified answer ¶ 6). Owner retained Tishman as a construction manager to renovate, reconstruct, reposition, and construct a commercial mixed-use building on the premises (NYSCEF Doc No. 116). Tishman subsequently retained plaintiff's employer, nonparty D'Aprile Inc. (D'Aprile), the masonry subcontractor, on the project (NYSCEF Doc No. 170). Tishman also hired ADCO, the electrical subcontractor (NYSCEF Doc No. 171).

Plaintiff testified at his deposition that he started working as a bricklayer for D'Aprile in June 2020 (NYSCEF Doc No. 110, plaintiff tr at 23-24). He stated that he had an accident while working on a construction project on Madison Avenue (*id.* at 35). He had been working there "on and off," "as soon as the weather changed that's when they started to send [him] to Madison Avenue" (*id.* at 36). D'Aprile was "going down a punch list of going through different things and repairing things and caulking and fixing bricks and blocks here and there" and "[s]tuccoing here and there" (*id.*). Plaintiff received his assignments from his foreman when he arrived at the

site (*id.* at 38). Plaintiff testified that his foreman told him what he had to do that day, and he obtained the supplies that he needed to do it (*id.* at 41-42). On the day of the accident, his foreman was Nicholas Cucchiarella, his nephew (*id.* at 39). The other foreman was his other nephew, John Cucchiarella (*id.*).

On the day of the accident, plaintiff was “preparing a wall to be waterproofed with caulking”; he “had to put material inside [horizontal and vertical joints] to make sure water doesn’t get in there” (*id.* at 40, 43, 46). His accident occurred in the afternoon after his lunch break (*id.* at 96). There was no one else in the area at the time (*id.* at 98). In order to perform his work, plaintiff needed a caulking gun, caulking, a type of insulation that was packed into the joints, and a carpenter knife (*id.* at 41). He was using an orange, fiberglass A-frame ladder to perform his work (*id.* at 44). Plaintiff testified that he found the ladder leaning up against a wall, and that he did not ask to use the ladder (*id.* at 92, 95). Plaintiff did not know who owned the ladder and did not remember if the ladder had any markings on it (*id.* at 57, 92). Plaintiff had never heard of ADCO (*id.* at 99). He had been up and down the ladder many times that day before the accident (*id.* at 59, 96). He did not notice any defects or shakiness in the ladder (*id.* at 96). He stated that he had moved the ladder to perform his work, locked the braces in place before he ascended the ladder each time he moved the ladder, and made sure that it was stable (*id.* at 63, 97).

Plaintiff testified that, while he was preparing the wall about midway up the ladder, “it was like someone kicked the ladder from underneath [him],” which caused his legs to swing sideways and him to land on his right hip on the concrete floor (*id.* at 47, 54). According to plaintiff, “it felt like the ladder shot out from underneath [him] and then [he] was falling” (*id.* at 110). He stated that he was not reaching or leaning when he was on the ladder (*id.* at 55). He

was “always moving the ladder . . . if things [were] out of reach” (*id.* at 66). He did not remember where his hands were exactly, but believed that one hand would have been on the ladder (*id.* at 63). After he fell to the ground, plaintiff tried to stand up on his broken bone, but collapsed to the floor, in “excruciating pain” (*id.* at 48-49, 50). Plaintiff did not notice if the ladder was broken (*id.* at 58). A worker named “Brian” asked plaintiff if he had fallen off the ladder (*id.* at 49). He told Brian that he had fallen off the ladder (*id.*). Plaintiff did not believe that anyone saw him fall (*id.* at 50). When shown photographs depicting a ladder, plaintiff testified that he did not recognize the ladder shown therein (*id.* at 62, 93). Plaintiff further testified that he did not remember “ADCO” markings on the ladder (*id.* at 63). He did not tell anyone that he was leaning out when he fell (*id.* at 105). His nephew drove him to the hospital (*id.*).

Brian Rogers provided a sworn statement on January 28, 2021 indicating that:

“Mr. Cucchiarella was using a large caulking gun to firestop the joints and ceiling of the wall. Mr. Cucchiarella was using a 6 foot ladder to fire stop the joints. I had just passed Mr. Cucchiarella ten minutes before I returned + found him sitting on the floor with his back to the wall. The A frame ladder Mr. Cucchiarella was using was also on the floor laying on it’s [sic] side. I asked him what happen and he explained that the ladder fell over while he was fire stopping the wall joints. Mr. Cucchiarella asked me to give him a minute because he was in pain” (NYSCEF Doc No. 111 at 1).

Chris Hughes (Hughes) testified that he was employed as a project manager by Tishman in December 2020 (NYSCEF Doc No. 112, Hughes tr at 12). Hughes testified that Tishman builds high-rise buildings (*id.* at 19). Hughes “ran the field, daily operations for 550 Madison and other projects that [he] was on, [he] was in charge of making reports, daily man counts, [he] was in charge of overseeing everything on the project with the exception of the financial” (*id.* at 12, 15). He was responsible for “the job, everything that happened on the job,” including scheduling and daily operations (*id.* at 12-13). Hughes created incident/accident reports and

construction daily reports (*id.* at 13). According to Hughes, the subcontractors supplied their own ladders (*id.* at 30, 31, 56). Hughes testified that if Tishman’s representatives observed an unsafe ladder, they would cut it in half and throw it away (*id.* at 30-31). CR Safety Group (CR Safety) was responsible for general site safety on the project (*id.* at 33). According to Hughes, Jeffery Keeley (Keeley) from CR Safety walked the site and looked for safety issues (*id.*). CR Safety filed project daily reports in the site safety log (*id.* at 37). Hughes also testified that a worker should use a lift rather than a ladder if the worker could not maintain three points of contact on the ladder (*id.* at 53). He recalled observing ADCO ladders on the site; “ADCO was diligent about marking their ladders with their name on it” (*id.* at 54). ADCO put tags on their ladders to indicate if employees had used the ladder (*id.* at 55, 58). Hughes stated that he observed ADCO’s ladders locked or chained up (*id.* at 55).

When shown an incident report relating to the accident, Hughes testified that he filled out the top page of the report (*id.* at 41). The incident report states that plaintiff was “Using an A frame ladder 3 rungs down from the top – leaned over the edge to reach work area and slipped off the ladder hurting his right hip and right elbow” (NYSCEF Doc No. 113 at 1). Keeley told him about how the accident happened, but he did not know if there were any witnesses to the accident (NYSCEF Doc No. 112, Hughes tr at 43). He believed that Keeley spoke with plaintiff before he left the site (*id.* at 45). Hughes visited the scene of the accident, but was unable to speak with anybody (*id.* at 43). When asked if Tishman took notes of incidents involving ladders, he stated that Tishman did not track ladders (*id.* at 47-48). A photograph was taken of the ladder that plaintiff was using (*id.*). ADCO was the main electrical subcontractor on the project (*id.* at 50).

Keeley testified that he was a site safety manager employed by CR Safety on the project (NYSCEF Doc No. 114, Keeley tr at 9-10). Keeley was on site on December 18, 2020, and prepared a log (*id.* at 13). Keeley learned that an accident happened on Level B, the basement level (*id.* at 14). Keeley saw ADCO workers, plaintiff's foreman, and masons in the basement (*id.* at 16). The accident/incident report created by Keeley states that "While working off a A frame ladder Lucian leaned over to reach work area slipped off A frame ladder ladder landing on RT hip & RT elbo [sic]" (NYSCEF Doc No. 115 at 1). Keeley did not fill out the accident report that day because plaintiff was quickly rushed to the hospital (NYSCEF Doc No. 114, Keeley tr at 18-19). Keeley did not remember where he got the information about how the accident happened, but it mostly likely came from Nicholas Cucchiarella (*id.* at 21, 24). Keeley wrote under "Corrective action," "Don't reach, move ladder closer to work area" (*id.* at 25). Plaintiff never came back to the job site (*id.* at 27). Keeley was told that plaintiff was using a specific ladder, but he did not recall who told him that (*id.* at 36). He took a photograph of that ladder (*id.*). He did not recall inspecting that ladder (*id.*). The ladder in the photograph had an "ADCO" marking on it (*id.* at 40). Subcontractors generally locked up their ladders at the end of the day (*id.*). As a general policy, subcontractors did not allow employees from other contractors use their ladders (*id.* at 41).

Christopher Marchisotto (Marchisotto) testified that he was ADCO's general foreman (NYSCEF Doc No. 176, Marchisotto tr at 9). ADCO was responsible for the electrical part of the job (*id.* at 10). Marchisotto was on site on the project (*id.* at 22). Bobby Merch was ADCO's "head guy there at the time when [he] got there" (*id.*). ADCO was "doing infrastructure and mechanical room work, and like public lighting and public power" (*id.* at 23). ADCO "tagged" its ladders (*id.* at 33). In other words, if a worker was going to use an ADCO ladder, the worker

had to put the individual's initials indicating that the worker had inspected it before using it (*id.*). The worker would inspect the ladder for loose rungs and feet (*id.* at 34). ADCO locked up its ladders, and ADCO's workers were not allowed to give them to other contractors' workers (*id.* at 36, 41). Marchisotto testified that only ADCO employees should have been using its ladders (*id.* at 51). If he observed another employee using its ladder, he would have told that employee to get off its ladder (*id.* at 56). The ladder remained in use on the project (*id.* at 67).

Nick Cucchiarella provided a statement dated January 5, 2021 (NYSCEF Doc No. 179).

He stated that:

"On 12/18/2020, Mr. Cucchiarella was performing fire stop prep which includes stuffing roxul insulation for spraying and cleaning and stuffing expansion joints with bakel rod. While doing this, Mr. Cucchiarella was standing on an 8ft, A-frame, fiberglass ladder. This ladder is owner by ADCO. I believe this was a fairly new ladder. The ladder had an inspection tag on it. To my knowledge, I believe Mr. Cucchiarella was approximately 5 or 6 feet up on the ladder. I believe Mr. Cucchiarella tried to reach a corner of the wall and may have stretched too far. Mr. Cucchiarella and the 8ft ladder tipped over to the right causing him to fall to the ground. I would approximate that Mr. Cucchiarella fell 5 or 6 feet to the ground. I was not a witness to the accident. My Labor Foreman, Brian Rogers, called me to tell me what happened. I do not believe Mr. Rogers was a witness to this incident either" (*id.*).

Plaintiff commenced this action against Tishman and Owner, among others, asserting claims for violations of Labor Law §§ 200, 240, and 241 and under principles of common-law negligence (NYSCEF Doc No. 1).

Tishman and Owner then commenced a third-party action against ADCO, asserting claims for: (1) breach of contract; (2) contribution; (3) common-law indemnification; and (4) contractual indemnification (NYSCEF Doc No. 24).

Plaintiff then commenced a separate action against ADCO under index No. 162046/23, asserting the same claims (NYSCEF Doc No. 1, complaint in index No. 162046/23).

By order dated February 22, 2024, the court consolidated this action with index No. 162046/23 under this index number pursuant to the parties' stipulation dated February 14, 2024 (NYSCEF Doc No. 50).

DISCUSSION

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff’s Claims Against ADCO

At the outset, the court notes that plaintiff did not oppose dismissal of the complaint against ADCO. Accordingly, ADCO is entitled to dismissal of the complaint (*see Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 473 [1st Dept 2020]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment as to liability under Labor Law § 240 (1) as against Tishman and Owner. He contends that he is entitled to judgment because he fell from an unsecured ladder that kicked out from underneath him. Plaintiff maintains that he is not required to prove that the ladder was defective in order to recover under section 240 (1).

In opposition, Tishman and Owner assert that plaintiff has failed to demonstrate prima facie entitlement to summary judgment under section 240 (1). They argue that plaintiff has failed to establish that the ladder was inadequate or was defective or malfunctioned in any way. As support for their argument, Tishman and Owner rely on an affidavit from professional engineer, Erick H. Knox, Ph.D., P.E. (Knox), who states, based upon his review of the record, that “there is no objective evidence that the ladder was in any way defective,” “there is no objective evidence that the ladder in any way malfunctioned at the time of the subject accident,” and “the ladder depicted in this matter is a safe device for the work in which plaintiff was engaged” (NYSCEF Doc No. 178, Knox aff, ¶¶ 9-11). He emphasizes that plaintiff “maintained three points of contact on the ladder right before he fell,” and “points of contact are generally achieved with two feet and the body (legs and/or hip area)” (*id.*, ¶ 12). Knox opines that “the only possible explanation for [plaintiff’s] accident is that he applied forces to the ladder that caused it to tip over to the side and fall” (*id.*, ¶ 13).

Tishman and Owner also submit an affidavit from Nicholas Cucchiarella, in which he avers that D’Aprile had ladders on the job site (NYSCEF Doc No. 100, Nicholas Cucchiarella aff, ¶ 8). He instructed D’Aprile employees to use its ladders, and they were not permitted to use ladders from other trades (*id.*, ¶¶ 8, 10).

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

“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, in the erection,

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

Labor Law § 240 (1) “imposes absolute liability on building owners and contractors whose failure to ‘provide proper protection to workers employed on a construction site’ proximately causes injury to a worker” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). The legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather on workers, who “are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). It is well settled that “the duty imposed by Labor Law § 240 (1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Thus, the statute has been liberally construed to achieve its objectives (*Lombardi v Stout*, 80 NY2d 290, 296 [1992]), and “[n]egligence, if any, of the injured worker is of no consequence” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

“[I]n order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury” (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015]). The Court of Appeals has explained that “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk

arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Nevertheless, ““where a plaintiff’s own actions are the sole proximate cause of the accident, there can be no liability”” (*Barreto*, 25 NY3d at 433, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; see also *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 553 [2006]).

As the First Department has held, “[i]t is sufficient . . . that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent”” (*Rivera v 71 Fifth Ave. Owner LP*, 229 AD3d 401, 402 [1st Dept 2024], quoting *Montalvo v. J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). “It is irrelevant that plaintiff inspected the ladder and found it to be in good order before using it, as plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law § 240 (1) claim” (*Rodas-Garcia v NYC United LLC*, 225 AD3d 556, 556 [1st Dept 2024] [internal quotation marks and citation omitted]).

As a preliminary matter, the court notes that Owner admitted that it was the fee owner of the premises on the date of the accident (NYSCEF Doc No. 168, verified answer ¶ 6). As such, Owner may be held liable under Labor Law § 240 (1) (see *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]).

Furthermore, plaintiff has demonstrated that Tishman, as the construction manager, had “the ability to control the activity which brought about the injury”” (*Lind v Tishman Constr. Corp. of N.Y.*, 180 AD3d 505, 505 [1st Dept 2020], quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). Pursuant to its contract, Tishman “shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures for the Work, and for coordinating all portions of the Work under the Contract Documents or otherwise

required by good construction industry practice or Applicable Laws and Specifications” (NYSCEF Doc No. 116 § 4.10.1), and was “solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work including safety of all persons and property on the Site during performance of the Work” (*id.*, § 4.7.5). In addition, Hughes testified that “[i]f somebody was working and leaning or doing something that was putting themselves at risk, [he] would stop the work” (NYSCEF Doc No. 175, Hughes tr at 16). “The label of construction manager versus general contractor is not necessarily determinative” (*Walls*, 4 NY3d at 864). Tishman has not disputed that it may be held liable as a construction manager, and has therefore failed to raise an issue of fact.

Here, plaintiff has demonstrated prima facie entitlement to summary judgment under section 240 (1), based upon his testimony that the ladder “kicked out” from underneath him (NYSCEF Doc No. 110, plaintiff tr at 47-48, 52, 54). He testified that no one was holding the ladder (*id.* at 57). This evidence demonstrates that the ladder did not provide adequate protection (*see Rodas-Garcia*, 225 AD3d at 556 [worker “established prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim by submitting proof, including an expert affidavit, that he fell from an unsecured 12-foot A-frame ladder that suddenly moved as he was reaching overhead to plaster the ceiling”]; *Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650, 651 [1st Dept 2021] [“defendants violated Labor Law 240 (1) by failing to properly secure the ladder against movement or slipping and to ensure that it remained steady and erect”]). “The ladder did not prevent plaintiff from falling; thus the ‘core’ objective of section 240 (1) was not met” (*Gordon*, 82 NY2d at 561). Plaintiff was not required to show that the ladder was defective (*see Rodas-Garcia*, 225 AD3d at 556). Nor was plaintiff required to proffer an expert affidavit

(*Viruet v Purvis Holdings LLC*, 198 AD3d 587, 588 [1st Dept 2021], citing *Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]).

Tishman and Owner have failed to raise an issue of fact. Contrary to their contention, plaintiff was not required to demonstrate that the ladder was defective, and plaintiff's testimony was sufficient to show that the ladder was an inadequate safety device (*see Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574 [1st Dept 2019]).

Moreover, Tishman and Owner have failed to demonstrate that plaintiff was the sole proximate cause of his injuries.

“A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) ‘had adequate safety devices available,’ (2) ‘knew both that’ the safety devices ‘were available and that [they were] expected to use them,’ (3) ‘chose for no good reason not to do so,’ and (4) would not have been injured had they ‘not made that choice’” (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill*, 4 NY3d at 40).

“[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). As plaintiff has shown a statutory violation, plaintiff cannot be solely to blame for his injury. Plaintiff testified that it was a common practice to use whatever ladder was readily accessible in the area (NYSCEF Doc No. 110, plaintiff tr at 47, 92). Thus, Tishman and Owner have failed to demonstrate that plaintiff knew that other devices were available, that he was expected to use them, and that he chose not to do so for no good reason (*see Sacko v New York City Hous. Auth.*, 188 AD3d 546, 547 [1st Dept 2020]; *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 526 [1st Dept 2017]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). While plaintiff's foreman states that D'Aprile workers were instructed to use its ladders (NYSCEF Doc No. 100, Nicholas Cucchiarella aff, ¶

8), “a standing order to use safety devices does not raise a question of fact that the plaintiff knew that safety devices were available and unreasonably chose not to use them” (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 11 [1st Dept 2011]). Indeed, “[t]he mere presence of ladders or safety belts *somewhere* at the worksite does not establish ‘proper protection’” (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009] [internal quotation marks and citation omitted, emphasis in original]). Plaintiff was not required to search the site for other ladders (*Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 470 [1st Dept 2022]).

Additionally, even if plaintiff did lean out while he was on the ladder, as noted by the accident reports and his foreman’s statement (NYSCEF Doc Nos. 113, 115, 179), this conduct, at most, would constitute comparative negligence, which is not a defense to liability (*see Rocovich*, 78 NY2d at 513; *see also Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513, 513 [1st Dept 2025] [“Defendants’ argument that plaintiff’s reaching or leaning while atop the ladder constituted the sole proximate cause of his accident is not persuasive . . . where, as here, it is shown that a violation of Labor Law § 240 (1) was a concurrent cause of the accident”]; *Rodas-Garcia*, 225 AD3d at 556 [“even if plaintiff placed the ladder in a position where he had to reach when plastering the ceiling, this at most established comparative negligence, which is not a defense to a Labor Law § 240 (1) claim”]; *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 434 [1st Dept 2015], *appeal dismissed* 26 NY2d 1021 [2015] [same]). Assuming that plaintiff did apply “forces to the ladder” as asserted by Knox (NYSCEF Doc No. 178, Knox aff, ¶ 13), this does not change the fact that the ladder was an inadequate safety device for the waterproofing work that plaintiff was performing when he was injured (*see generally Diming Wu v 34 17th St. Project LLC*, 200 AD3d 508, 509 [1st Dept 2021] [“Whether the ladder moved or whether the plaintiff’s fall was caused by drill vibrations is immaterial, as the A-frame ladder was an inadequate safety

device for the work plaintiff was performing”]). “Nor does a lack of certainty as to exactly what preceded plaintiff’s fall raise issues of fact” (*Begnoja v Hudson Riv. Park Trust*, -- AD3d -- , 2025 NY Slip Op 02847, *1 [1st Dept 2025]).

In light of the above, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 240 (1) as against Tishman and Owner.¹

Third-Party Claims for Common-Law Indemnification and Contractual Indemnification Against ADCO

1. Common-Law Indemnification

ADCO moves for summary judgment dismissing the third-party claim for common-law indemnification,² arguing that Tishman and Owner were responsible for supervising plaintiff’s work, and that ADCO did not have the authority to supervise or control plaintiff’s work. In addition, ADCO asserts that it was not negligent in keeping a non-defective ladder on the site for use by its own employees. ADCO contends that plaintiff used its ladder without its knowledge or permission.

¹ As acknowledged by plaintiff in reply, in light of the grant of summary judgment to plaintiff on Labor Law § 240 (1), plaintiff’s remaining causes of action are academic (*Corleto v Henry Restoration Ltd.*, 206 AD3d 525, 526 [1st Dept 2022]; *Auriemma*, 82 AD3d at 12 [“The plaintiff’s damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic”]).

² Although ADCO’s notice of motion requests dismissal of the third-party complaint in its entirety (NYSCEF Doc No. 87), it only addresses the third-party claims for common-law indemnification and contractual indemnification in its moving papers (NYSCEF Doc No. 90, ADCO’s mem of law at 4, 18-22). Accordingly, ADCO has failed to meet its burden as to the remaining causes of action (*see Ryan*, 96 AD3d at 553). To the extent that ADCO seeks summary judgment dismissing the third-party claim for breach of contract for the first time in reply (NYSCEF Doc No. 180, ¶¶ 37-39), the court has not considered this argument. It is well established that “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

In response, Tishman and Owner assert that they are entitled to common-law indemnification and contribution from ADCO because plaintiff was injured while using one of ADCO's ladders.

In reply, ADCO contends that Tishman and Owner only speculate that plaintiff was injured while using an ADCO ladder. Furthermore, ADCO maintains that, even if plaintiff was using one of its ladders, there is no evidence that the ladder was defective, and it did not give plaintiff permission to use its ladder. It further argues that it was not negligent in failing to lock up its ladder on a lunch break.

“Implied[, or common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011] [internal quotation marks and citation omitted]). “To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy*, 17 NY3d at 377-378).

In this case, ADCO has established that it was not negligent and that it did not actually exercise supervision over the injury-producing work. As noted above, the court has dismissed plaintiff's negligence claim against ADCO. There is no evidence that the ladder was defective. To be sure, plaintiff testified that the ladder appeared steady, and he did not see anything wrong with it before or after the accident (NYSCEF Doc No. 91, plaintiff tr at 53-54, 57, 58, 63). Marchisotto stated that ADCO was still using the ladder after the accident; “it was a very good, brand new ladder” (NYSCEF Doc No. 95, Marchisotto tr at 51, 55). Hughes testified that he did

not recommend that the ladder be disposed after the accident (NYSCEF Doc No. 158, Hughes tr at 48). Plaintiff also testified that he did not ask to borrow the ladder, and stated that “if there’s a ladder within arm’s reach [he] just assume[s] that is the ladder [they] were working with that day” (NYSCEF Doc No. 91, plaintiff tr at 92). Marchisotto made clear that ADCO had a policy of not allowing other employees to use its ladders, and that he would not have permitted plaintiff to use its ladder if he had seen him using its ladder (NYSCEF Doc No. 95, Marchisotto tr at 42, 56). Moreover, plaintiff was employed by D’Aprile and received all of his instructions from his foreman (NYSCEF Doc No. 91, plaintiff tr at 38, 60). Tishman and Owner have failed to raise an issue of fact as to ADCO’s negligence or whether it was foreseeable that plaintiff would be injured using ADCO’s ladder, even if it was defective. In light of the above, ADCO is entitled to dismissal of Tishman and Owner’s common-law indemnification claim (*see Scekic v SL Green Realty Corp.*, 132 AD3d 563, 566 [1st Dept 2015] [subcontractor that owned ladder used by plaintiff without its knowledge or consent was not liable for common-law indemnification; “Imposing common-law indemnification . . . on Schindler for plaintiff’s improper use of its ladder . . . stretches the concepts of duty and foreseeability too far, regardless of whether Schindler’s ladder was defective”]; *see Hogan v 590 Madison Ave., LLC*, 194 AD3d 570, 572 [1st Dept 2021] [“Madison and Delphi’s common-law indemnification claims were correctly dismissed, as there is no evidence that Commodore or OH & M directed or supervised plaintiff’s work or were otherwise negligent”]).

2. *Contractual Indemnification*

ADCO also moves for summary judgment dismissing the third-party claim for contractual indemnification. ADCO insists that the indemnification provision in its subcontract is not triggered because plaintiff’s accident did not arise out of any act or omission by ADCO or

anyone working for ADCO. In support of its argument, ADCO relies on the First Department's decision in *DiBrino v Rockefeller Ctr. N., Inc.* (230 AD3d 127, 130, 136 [1st Dept 2024]), where the Court dismissed a contractual indemnification claim against a subcontractor where the relevant indemnification provisions in its subcontract had scope-of-work triggers, and the subcontractor did not supply the ladder to the plaintiff or give him permission to use it.

Tishman and Owner assert, in opposition, that plaintiff was using an ADCO ladder, and that ADCO was negligent in failing to secure its ladder on the job.

In reply, ADCO contends that the indemnification provision is not triggered, because there is only speculation and hearsay to support the claim that plaintiff was using ADCO's ladder, and even if he was using its ladder, plaintiff's accident did not arise out of its work. ADCO also argues that the indemnification provision violates the General Obligations Law.

The indemnification provision in ADCO's subcontract provides as follows:

“INDEMNITY

7. To the fullest extent permitted by law, the Contractor [ADCO] 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, or the Contractor's operations, including the performance of the obligations set forth in this Clause.* 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” (NYSCEF Doc No. 96 at 5 [emphasis added]).

“The right to contractual indemnification depends upon the specific language of the contract” (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]). “A party is entitled

to full contractual indemnification [for damages incurred in a personal injury suit] provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Even if ADCO owned the ladder, there is no evidence that plaintiff’s accident arose out of or resulted from ADCO’s acts or omissions in connection with its work, or performance or failure to perform its work (*see DiBrino*, 230 AD3d at 136 [dismissing contractual indemnification against subcontractor with scope-of-work triggers where “plaintiff was not [subcontractor’s] employee or agent” and there was no “record evidence that plaintiff was injured as a result of a [subcontractor’s] performance or completion of a task that [subcontractor] was contractually obligated to do”]; *DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019], *lv dismissed, denied in part* 35 NY3d 35 NY3d 963 [2020] [court correctly dismissed contractual indemnification claims against plaintiff’s employer, “finding that the accident did not arise out of the work performed by [the employer], which played no role in the crane’s maintenance or operation”]; *Pepe v Center for Jewish History, Inc.*, 59 AD3d 277, 278 [1st Dept 2009] [“The connection between plaintiff’s accident and the mere existence of the partially constructed wall where the wall had formally had been is too tenuous to trigger the indemnification clause”]; *cf. Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010] [laborer’s injury “arose out of, resulted from or was incidental to the work required under the relevant contracts, i.e., the erection and dismantling of

the scaffold . . . [where] plaintiff's injury was caused, at least, in part, by his presence on the partially dismantled scaffold"). There is no dispute that plaintiff was an employee of D'Aprile, not ADCO (NYSCEF Doc No. 91, plaintiff tr at 25). He was injured while waterproofing a wall with caulking (*id.* at 41). Plaintiff testified that he had never heard of ADCO, and did not ask to borrow the ladder (*id.* at 92, 99). As noted above, ADCO did not permit other employees to use its ladders, and only performed "[t]he electrical part of the job" (NYSCEF Doc No. 95, Marchisotto tr at 10, 42).

Therefore, ADCO is entitled to summary judgment dismissing the third-party claim for contractual indemnification.

CONCLUSION

Accordingly, it is

ORDERED that the branch of the motion (sequence number 002) of defendant/third-party defendant ADCO Electric d/b/a ADCO Electrical Corp. for summary judgment dismissing the complaint is granted and the complaint is dismissed against it; and it is further

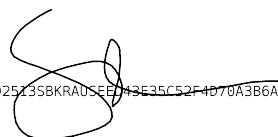
ORDERED that the branch of the motion (sequence number 002) of defendant/third-party defendant ADCO Electric d/b/a ADCO Electrical Corp. for summary judgment dismissing the third-party complaint is granted to the extent of dismissing the third-party claims for common-law indemnification and contractual indemnification, and the third-party claims for common-law indemnification and contractual indemnification are dismissed; and it is further

ORDERED that the claims against defendants Tishman Interiors Corporation and OAC 550 Owner LLC are severed, and the balance of the action shall continue; and it is further

ORDERED that the motion (sequence number 003) of plaintiff Lucian Cucchiarella for partial summary judgment is granted on the issue of liability under Labor Law § 240 (1) as

against defendants/third-party plaintiffs Tishman Interiors Corporation and OAC 550 Owner LLC, with the issue of plaintiff's damages to be determined at the trial of this action.

This constitutes the decision and order of the Court.



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5/13/2025
DATE

HON. SABRINA B. KRAUS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE