Velasquez v Story Ave. E. Residential LLC
2025 NY Slip Op 32338(U)
February 18, 2025
Supreme Court, Bronx County
Docket Number: Index No. 29377-2019E
Judge: Myrna Socorro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9

---X

Miguel Velasquez,
Plaintiff

-against-

Story Avenue East Residential LLC, L&M Builders LLC, and L&M Builders Group LLC,
Defendants

---X

Story Avenue East Residential LLC, and L&M Builders Group LLC,
Third Party Plaintiffs

-against-

4Matic Construction Corp., and Libros Masonry Corp.,
Third Party Defendants

---X

Index No. 29377-2019E
Motion seq #5, 6, 7 & 8

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

The following papers were read on the motion by third-party defendant 4Matic Construction Corp. ("4Matic") (Seq. No. 5) for **summary judgment**; on the motion by defendants/third-party plaintiffs Story Avenue East Residential LLC ("Story Avenue") and L & M Builders Group LLC ("L & M") (Seq. No. 6) for **summary judgment**; on the motion by the plaintiff (Seq. No. 7) for **summary judgment**; and on the motion by third-party defendant Libros Masonry Corp. ("Libros") (Seq. No. 8) for **summary judgment,** all motions orally argued and marked submitted on May 31, 2024.

Papers	NYSCEF Doc. No.
Motion seq #5	
Notice of Motion by Third-Party Defendant 4Matic Construction Corp, Affirmation in Support, Statement of Material Facts and Exhibits	# 123-143
Third-Party Defendant Libros Masonry Corp.'s Affirmation in Opposition and Response Statement of Material Facts	# 313-314
Third-Party Defendant 4Matic Construction Corp's Reply Affirmation and Exhibits	# 320-326
Motion seq #6	
Notice of Motion by Defendants/Third-Party Plaintiffs Story Avenue East Residential LLC and L & M Builders Group LLC – Affirmation in Support, Statement of Material Facts, and Exhibits	# 190-215

Third-Party Defendant 4Matic Construction Corp.'s Affirmation in Opposition, Response Statement of Material Facts, Memorandum of Law in Opposition, and Exhibits	# 239-248
Third-Party Defendant Libros Masonry Corp.'s Affirmation in Opposition and Response Statement of Material Facts	# 315-316
Plaintiff's Affirmation in Opposition	# 319
Reply Affirmation by Defendants/Third-Party Plaintiffs Story Avenue East Residential LLC and L & M Builders Group LLC to Libros	# 327
Reply Affirmation by Defendants/Third-Party Plaintiffs Story Avenue East Residential LLC and L & M Builders Group LLC to Plaintiff	# 329
Motion seq #7	
Notice of Motion by Plaintiff – Affirmation in Support and Exhibits	# 169-189
Third-Party Defendant 4Matic Construction Corp's Affirmation in Opposition, Memorandum of Law in Opposition, and Exhibits	# 249-257
Defendants/Third-Party Plaintiffs Story Avenue East Residential LLC's and L & M Builders Group LLC's Affirmation in Opposition and Exhibits	# 267-288
Third-Party Defendant Libros Masonry Corp.'s Affirmation in Opposition	# 317
Plaintiff's Reply Affirmation	# 328
Motion seq #8	
Notice of Motion by Third-Party Defendant Libros Masonry Corp. – Affirmation in Support, Memorandum of Law in Support, Affidavit, and Exhibits	# 144-168
Third-Party Defendant 4Matic Construction Corp.'s Affirmation in Opposition, Memorandum of Law in Opposition, and Exhibits	# 258-266
Defendants/Third-Party Plaintiffs Story Avenue East Residential LLC's and L & M Builders Group LLC's Affirmation in Opposition and Exhibits	# 289-312
Plaintiff's Affirmation in Opposition	# 318
Third-Party Defendant Libros Masonry Corp.'s Reply Affirmation to Third-Party Defendant 4Matic Construction Corp.	# 331
Third-Party Defendant Libros Masonry Corp.'s Reply Affirmation to Plaintiff	# 332

Motion seq #5, by third-party defendant 4Matic, for an order pursuant to CPLR §3212, granting judgment on its cross-claims against third-party defendant Libros for contractual indemnification, common-law indemnification, contribution, and breach of contract for failure to procure; **motion seq #6,** by defendants/third-party plaintiffs Story Avenue and L & M, for an order pursuant to CPLR §3212, *inter alia*, dismissing the plaintiff's complaint and any and all cross-claims as against them, and for an order, dismissing plaintiff's Labor Law §241(6) and Labor Law §200 and/or common-law negligence claims, and granting judgment on their third-party claims against 4Matic and Libros for contractual indemnification; **motion seq #7**, by the plaintiff, for an order pursuant to CPLR §3212,

inter alia, granting judgment on the Labor Law §240(1) and §241(6) claims against defendants/third-party plaintiffs Story Avenue and L & M, judgment against L & M on his Labor Law §200 claim, dismissal of all affirmative defenses, and an award of costs, disbursements, and attorneys fees; and **motion seq #8**, by third-party defendant Libros, for an order pursuant to CPLR §3212, dismissing the Labor Law §240(1) and §241(6) claims, all third-party claims by defendants/third-party plaintiffs Story Avenue and L & M against it, and third-party defendant 4Matic's cross-claims against it, are decided as follows:

According to the plaintiff, on the day of the accident, August 18, 2017, he was employed by third-party defendant Libros as a laborer at a project located at 1530 Story Avenue, Bronx County. Libros was retained by 4Matic to provide masonry labor at the project. Pursuant to a subcontract, 4Matic was initially hired by general contractor L & M to perform masonry work at the property. L & M was retained by Story Avenue, owner of the premises, to construct and build up two buildings on the premises. Plaintiff testified that, on the date of his accident, he was tasked to assist concrete masons by gathering and assembling equipment used in connection with the pouring of wet concrete and the construction of concrete walls with cinderblock. He testified that he worked at the job site for about three months, as he commenced at the site in June 2017, before his accident occurred and received his assignments primarily from his foreman (Mike Kuhpetenia) employed by 4Matic. Plaintiff testified that wet concrete would be pumped into cinderblock walls through elevated grouting pipes connected to a truck at ground level. He further testified that the grouting pipe had to be elevated atop a scaffold. He testified that he assembled the grouting pipe atop a five-foot scaffold by climbing on the scaffold to attach and secure the grouting pipe to the hook joint. The plaintiff testified that the scaffold was wet from rain, wobbly, lacked any footings and guardrails. He testified that as he descended the scaffold by stepping on the crossbars, the scaffold wobbled causing his left foot to slip on the wet crossbar and subsequently falling to the ground, sustaining personal injuries. Plaintiff testified that he used the subject scaffold the day before his accident when he assembled and disassembled grouting pipes. He further testified that he observed his foreman and the L & M superintendent walk by while conducting their daily inspection when he was performing work on the wobbly and wet scaffold the day before his accident. Plaintiff testified that, on the date of the accident, he complained to his foreman about the wet and slippery work conditions on the ninth floor where he was assigned, but was told to continue his work.

Louis Lazzinnaro (4Matic senior project manager) testified that 4Matic did not perform any masonry work and had no laborers employed at the site. Lazzinnaro testified that Libros, 4Matic's subcontractor, performed the actual work. He also testified that although the scaffolds for the subject worked was owned and provided to the site by 4Matic, Libros assembled the scaffolds on the job site. Lazzinarro also testified that Libros workers did not report to 4Matic's foreman (Kuhpetenia)

and that said foreman did not supervise or instruct Libros workers on the tasks to be performed.

Michael Kuhpetenia (4Matic foreman) testified that Libros performed all the physical work at the site and that 4Matic only had supervising employees on the site. Kuhtenia testified that he did not direct the work and only dealt with the Libros foreman ("Dutch"). He further testified that no Libros employees reported to him and that he did not issue work assignments to anyone.

In support of its motion for summary judgment, third-party defendant 4Matic submitted, *inter alia*, photographs of the accident area and subject scaffold, deposition testimonies of the plaintiff, Hugh Emmanuel (L & M project superintendent), Louis Lazzinnaro (4Matic senior project manager), Michael Kuhpetenia (4Matic foreman) and Yvette DeJesus (Libros company president), a copy of the worker's compensation lien and C2-F accident report, the subcontract between 4 Matic and Libros, and the Libros certificate of insurance. 4Matic argues that it is entitled to contractual indemnification against Libros as the plaintiff's accident arose out of the negligent acts or omissions of Libros in connection with the performance of Libros' work. 4Matic also contends that it is entitled to judgment on its breach of contract claim for Libros' failure to procure primary and excess insurance and add 4Matic as an additional insured pursuant to the parties' subcontract. Finally, 4Matic contends that it is entitled to summary judgment on its common-law indemnification and contribution claims against Libros as any liability on the part of 4Matic is merely vicarious and that Libros was negligent for the plaintiff's accident.

In support of their motion for summary judgment, defendants/third-party plaintiffs Story Avenue and L & M submitted, *inter alia*, copies of the pleadings, deposition testimonies of the parties, and the construction contract between L & M and 4Matic. Story Avenue and L & M contends that the Labor Law §200 and/or common-law negligence claims should be dismissed as they did not supervise, direct, or control any aspect of plaintiff's work and also did not supply plaintiff with any materials or equipment. They argue that the Labor Law §241(6) claim should also be dismissed as none of the alleged Industrial Codes are applicable to the present facts. They also contend that they are entitled to judgment on their contractual indemnification claims against 4Matic and Libros as there is no record evidence of their negligence and that plaintiff's accident arose out of or resulted from 4Matic's or Libros' work. They further seek dismissal of all cross-claims and counterclaims against them.

In support of his summary judgment motion, the plaintiff submits, *inter alia*, deposition testimonies of the parties, a sworn affidavit of plaintiff, a sworn affidavit of expert occupational safety consultant, John P. Coniglio, the construction contract between Story Avenue and L & M, the construction contract between L & M and 4Matic, and a copy of an incident report. Plaintiff argues

that the defendants Story Avenue and L & M violated Labor Law §240(1) by failing to provide a scaffold equipped with safety railings or any other safety device to prevent his fall while performing his work. He further argues that the failure to provide an adequate safety device resulted in his injuries when he was caused to slip on a wet condition while descending the scaffold he was provided while working at an elevated height. Plaintiff also contends that L & M violated Labor Law §200 based on evidence in the record that L &M had the authority to supervise and control the means and methods of plaintiff's work and that it had notice of the wet condition on the subject scaffold through L & M's daily walkthroughs of plaintiff's work area. Plaintiff further seeks liability against defendants Story Avenue and L & M under Labor Law §241(6) for alleged violations of Industrial Codes 12 NYCRR §23-5.1(b), §23-5.3(g)(1) and (2), and §23-5.3(e) and (f).

In support of its motion for summary judgment, third-party defendant Libros submits, *inter alia*, copies of the pleadings and deposition testimonies of the parties, photographs of the alleged scaffold, and an L & M incident report. Libros contends that Labor Law §240(1) was not violated as plaintiff's actions were the sole proximate cause of his accident. It further contends that the Labor Law §241(6) claim should be dismissed as Industrial Codes cited by plaintiff are too general or inapplicable to the present facts. Libros also argues that defendants/third-party plaintiffs Story Avenue and L & M as well as 4Matic are not entitled to contractual indemnification against it as the accident was not caused or contributed by any negligence on the part of Libros. It further argues that common-law indemnification and/or contribution claims should be dismissed as Libros was plaintiff's employer and plaintiff did not suffer a grave injury, thereby barred by Workers Compensation Law §11. Finally, Libros seeks dismissal of 4Matic's cross-claim for breach of contract for failure to procure because there is no evidence that Libros did not obtain the requisite insurance pursuant to its subcontract.

Summary Judgment Review

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD3d 479 [1st Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508; 894 NYS 2d 422 [1st Dept 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]; Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant

fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.* 64 NY 2d 851; 487 NYS 2d 316 (1985)

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted]).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability 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 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

This court finds the plaintiff established his *prima facie* burden of a Labor Law §240(1) violation as he demonstrated that defendants Story Avenue and L & M failed to supply him with a scaffold equipped with guardrails, proper footing or other protective device to safely descend the scaffold to protect the plaintiff from falling, a failure of which proximately caused his accident (*see Ordonez v One City Block, LLC*, 191 AD3d 412 [1st Dept 2021]; *see also Deschaine v Tricon Constr., LLC*, 187 AD3d 599 [1st Dept 2020]; *Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478 [1st Dept 2019]).

Here, Story Avenue and L & M failed to provide plaintiff with adequate safety devices to prevent him from falling based on plaintiff's testimony that he was provided with no other safety protection except a wet wobbly scaffold, which plaintiff fell from as he attempted to descend the scaffold (*see Ortiz v City of New York*, 224 AD3d 631 [1st Dept 2024]).

In opposition, any sole proximate cause or recalcitrant worker argument fails if the defendants' statutory violation served as a proximate cause for the accident, thus, the plaintiff cannot be solely to blame for it (*see Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]). Thus, any alleged negligence by the plaintiff amounts to comparative negligence and would not defeat his Labor Law §240(1) claim.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident (*see Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995]).

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Codes 12 NYCRR §23-5.1(b) (General provisions for all scaffolds; Scaffold footing or anchorage), §23-5.3(g)(1) and (2) (General provisions for metal scaffolds; Footings), 23-5.3(e) (General provisions for metal scaffolds; Safety railings), and §23-5.3(f) (General provisions for metal scaffolds; Access), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent (*see Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014]).

As to Industrial Code 12 NYCRR §23-5.1(b), this provision has been found to be insufficiently concrete or insufficiently specific to support a Labor Law §241(6) claim (*see Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607 [1st Dept 2021]). Therefore, the Labor Law §241(6) claim as predicated upon an alleged violation of this provision is dismissed.

As to Industrial Code 12 NYCRR § 23-5.3(g)(1), which provides that "[f]ootings for metal scaffolds shall be sound, rigid and capable of supporting the maximum design loads of such scaffolds without

settlement or deformation" and that such footings must be "secure against movement in any direction." Here, the plaintiff established *prima facie* that §23-5.3(g)(1) was violated by the defendants as he specifically testified that the scaffold "didn't have any footings" (NYSCEF Doc No. 281, plaintiff's TR-34). Defendants failed to raise a triable issue of fact that plaintiff was provided proper footings in accordance with this provision. Accordingly, plaintiff is entitled to judgment on his Labor Law §241(6) claim as predicated on a violation of § 23-5.3(g)(1).

Plaintiff further alleges that the defendants violated Industrial Code 12 NYCRR §23-5.3(g)(2), which provides, in relevant part, that metal base plates of the scaffold must be of a dimension "of not less than 16 square inches in area by one-eighth inch in thickness." Here, the plaintiff never alleged that the metal base plates to the subject scaffold was not composed of the proper dimensions. Plaintiff's expert also does not set forth an opinion as to how this provision was violated. As plaintiff has not met his burden, the request for summary judgment as to this code is denied, and defendant's motion is granted, and the Labor Law 241(6) claim as predicated on a violation of §23-5.3(g)(2) is dismissed.

Industrial Code 12 NYCRR §23-5.3(e) requires that every metal scaffold be equipped with safety railings. Plaintiff established *prima facie* that the scaffold he used to perform his work and subsequently fell from was not equipped with safety railings based on photographs of the subject scaffold and his specific testimony that the scaffold was missing guardrails. Defendants failed to raise a triable issue of fact. Therefore, plaintiff is entitled to judgment on the Labor Law §241(6) claim as predicated on a violation of this Industrial Code 12 NYCRR §23-5.3(e)

Finally, plaintiff alleges that the defendants violated Industrial Code 12 NYCRR § 23-5.3(f), which provides that "[l]adders, stairs or ramps shall be provided for access to and egress from the platform levels of metal scaffolds which are located more than two feet above or below the ground, grade, floor or other equivalent level." Here, plaintiff testified that he was not provided with a ladder to use with the scaffold to perform his work. 4Matic foreman (Kuhpetenia) further testified that an A-frame ladder would normally be used to ascend and descend the subject scaffold, not to use the horizontal bars at the base (NYSCEF Doc No. 178, plaintiff's TR- 96-97). Plaintiff therefore demonstrated his *prima facie* entitlement to judgment on his Labor Law 241(6) claim with respect to this predicate under Industrial Code 12 NYCRR§23-5.3(f).

Labor Law §200 and/or Common-Law Negligence

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*see id.*).

Initially, the plaintiff did not submit opposition to the branch of defendants'/third-party plaintiffs' Story Avenue's and L & M's motion seeking dismissal of the Labor Law §200 claim as against Story Avenue. Therefore, the branch of defendants/third-party plaintiffs' summary judgment motion seeking dismissal of the Labor Law §200 and/or common-law negligence claim as against Story Avenue, is granted without opposition.

Although the record demonstrates that L & M did not actually direct, supervise, or control the means and methods of the plaintiff's work, said defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

Here, L & M also failed to establish *prima facie* that it neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law §200 and common-law negligence claims against it (*see Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022]). Said defendant submitted no evidence of when the work site was last inspected as part of their moving papers (*see id.; see also Kolakowski v 10839 Assoc.*, 185 AD3d 427 [1st Dept 2020]; *Pereira v New Sch.*, 148 AD3d 410 [1st Dept 2017]). Even if L & M met its initial burden, there are triable issues of fact as to whether L & M knew or should have known about a hazardous scaffold condition when an L & M superintendent conducted daily walkthroughs of plaintiff's work area. Accordingly, defendant L&M' motion to dismiss plaintiff's Labor Law §200 and common-law negligence claims is denied.

4Matic's Cross-Claim against Libros for Contractual Indemnification

4Matic and Libros seek summary judgment against the other pursuant to the indemnification provision in the subcontract between the parties, which provides as follows:

> **§ 4.6 Indemnification**
> **§ 4.6.1** To the fullest extent permitted by law, the Subcontractor [Libros] shall defend, indemnify, and hold harmless the Owner [Story Avenue], Contractor [4Matic], Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's [Libros'] Work under this Subcontract,…but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable…
>
> (NYSCEF Doc No. 164 at 6).

4Matic contends that Libros must indemnify them as the plaintiff's accident arose out of the negligent acts or omissions of Libros. It argues that although 4Matic owned the scaffolds, the scaffolds were assembled by Libros employees and that Libros performed all of the physical work on the site and that none of the Libros work was supervised, controlled, or directed by 4Matic. 4Matic further argues that since the Libros foreman was authorized to stop the Libros work, plaintiff's actions to descend the scaffold by using the horizontal step or crossbar of the scaffold was the result of Libros failing to properly direct and supervise the work of its employees. 4Matic further contends that any weather condition that may affect plaintiff's ability to perform his work was subject to Libros' authority to stop the workers from performing work due to a hazardous condition.

Libros contends that 4Matic is not entitled to contractual indemnification as there is no evidence that plaintiff's accident arose out of Libros' negligence or its work. It argues that plaintiff was the sole proximate cause of his accident by failing to make use of a readily available safety device in the form of an A-frame ladder, and not due to any negligence on the part of the employer. Moreover, according to Libros, it was the negligence and culpable conduct of 4Matic in supervising plaintiff's work while supplying and assembling the subject scaffold involved in plaintiff's accident.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]).

Pursuant to General Obligations Law §5-322.1, a clause in a construction, repair or maintenance contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy. *See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]. However, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable. *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton*

v Pankow Bldrs., 296 AD2d 321, 322 [1st Dept 2002].

Although, the subject indemnification provision sufficiently contains the appropriate savings clause to avoid violation of the General Obligations Law, the record demonstrates that there are triable issues of fact as to the degree of negligence, if any, on the part of 4Matic and Libros (*see Devlin v AECOM*, 224 AD3d 437 [1st Dept 2024]; *see also Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006]). Therefore, summary judgment on 4Matic's cross-claim for contractual indemnification against Libros is denied.

Claims against Libros for Common-Law Indemnification and/or Contribution

To the extent that 4Matic, Story Avenue, and L & M seek judgment on their claims sounding in common-law indemnity and/or contribution against Libros, plaintiff's employer, these parties failed to demonstrate their *prima facie* entitlement to judgment on said claims as they are barred by Workers Compensation Law §11 since the plaintiff's injuries are not "grave" within the meaning of the statute (*see Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 [1st Dept 2019]). Accordingly, that portion of the motion is denied.

4Matic's Cross-Claim for Breach of Contract for Failure to Procure against Libros

A party moving for summary judgment on its claim for breach of contract for failure to procure insurance establishes its *prima facie* entitlement by demonstrating that a contract provision requiring procurement of insurance was not complied with. *See Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]. The burden then shifts to the opposing party to "raise an issue of fact by tendering the procured insurance policy in opposition to the motion." *Id.* at 506.

In support of its motion, 4Matic appends the relevant commercial general liability policy issued to Libros that was effective on the date of the accident, which included a blanket endorsement that covered Libros' obligation to provide insurance to the contractor as an additional insured, in contractual limits of $1 million for each occurrence and $2 million in the general aggregate. 4Matic contends, however, that Libros failed to procure excess insurance as required under the subcontract.

In opposition, Libros failed to raise a triable issue of fact that they complied with its contractual obligation to procure an excess policy by tendering a procured excess policy of insurance or some other admissible evidence demonstrating that it complied with the contract provision regarding insurance procurement (*see Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555 [1st Dept 2022]).

Accordingly, the 4Matic's request for judgment on its cross-claim for breach of contract for failure to procure against Libros, is granted.

Story Ave's and L & M's Third-Party Claim against 4Matic for Contractual Indemnification

Story Avenue and L & M seek an order granting judgment on their third-party claim for contractual indemnification against 4Matic pursuant to the indemnification provision in the agreement between the parties, which provides, in relevant part:

> Section 12.2 Indemnity Requirements
>
> (a) To the fullest extent permitted by law, Trade Contractor [4Matic] shall indemnify, defend (with counsel acceptable to GC and Owner) and hold harmless GC [L & M], Owner [Story Avenue], Lender, Lender's Engineer, Architect, and all Additional Insureds identified in **Exhibit B**,…from and against all losses, claims…demands, causes of action, lawsuits…arising from, in connection with or relating to: (I) the performance (or non-performance) of the Work; (ii) any negligent or wrongful act or omission of Trade Contractor, its employees, Subcontractors, representatives or other persons for whom Trade Contractor is responsible; (iii) any breach of the Contract Documents by Trade Contractor, its employees, Subcontractors, representatives or other persons for whom Trade Contractor is responsible…
>
> (NYSCEF Doc No. 214 at 32).

Here, the broad indemnification provision in said agreement was triggered by plaintiff's accident in the course of the work by 4Matic and/or Libros (plaintiff's employer and retained by 4Matic) (*see Asian v Flintlock Constr. Servs., LLC*, 225 AD3d 462 [1st Dept 2024]). The subject indemnification provision also does not run afoul of General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]). The court finds that Story Avenue is entitled to summary judgment on its contractual indemnification claim against 4Matic as Story Avenue can only be found vicariously liable. L & M is entitled to conditional summary judgment on its contractual indemnification claim against 4Matic pending the determination of its negligence, if any.

Story Ave's and L & M's Third-Party Claim against Libros for Contractual Indemnification

Story Avenue and L & M seek an order granting judgment on their third-party claim for contractual

indemnification against Libros pursuant to the indemnification provision in the L & M – Libros subcontract, which provides, in relevant part, that:

> **§ 4.6 Indemnification**
> **§ 4.6.1** To the fullest extent permitted by law, the Subcontractor [Libros] shall defend, indemnify, and hold harmless the Owner [Story Avenue], Contractor [4Matic], Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's [Libros'] Work under this Subcontract,…but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable…
>
> (NYSCEF Doc No. 164 at 6).

As the record demonstrates that there are triable issues of fact as to the degree of negligence on the part of 4Matic and Libros (*see Devlin v AECOM*, 224 AD3d 437 [1st Dept 2024]; *see also Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006]), any determination on Story Avenue's and L & M's third-party claim against Libros for contractual indemnification is to be determined at trial as there is a triable issue of fact. Accordingly, that branch of the motion is denied.

Plaintiff's Request for Dismissal of Affirmative Defenses

The branch of the plaintiff's motion to dismiss all affirmative defenses raised by all defendants as to issues related to assumption of risk, comparative negligence, contributory negligence, and/or culpable conduct of plaintiff, is denied. The issue of whether the plaintiff shares some portion of the liability for causing his own accident, for example, by not using available ladders to assist in the performance of his work, is a triable issue of fact for a jury to determine.

Plaintiff's Request for an Award of Costs, Disbursements, and Attorneys Fees

To the extent that plaintiff seeks an award for costs, disbursements, and attorneys fees, generally, "attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (A. *G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). However, the plaintiff, in his motion papers, does not point to a contractual or statutory provision entitling them to attorney's fees. Accordingly, the branch of plaintiff's motion seeking this relief is denied.

The court has considered the additional contentions of the parties not specifically addressed herein.

To the extent that any relief requested by any movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

ORDERED, that 4Matic's summary judgment motion (Seq. No. 5), is **GRANTED IN PART**; and it is further

ORDERED, that 4Matic is entitled to and **granted** summary judgment on its cross-claim against Libros for breach of contract for failure to procure; and it is further

ORDERED, that the summary judgment motion by Story Avenue and L & M (Seq. No. 6), is **GRANTED IN PART**; and it is further

ORDERED, that the request for dismissal of the Labor Law §200/common-law negligence claims as against Story Avenue, is **granted**; and it is further

ORDERED, that the request for dismissal of plaintiff's Labor Law §241(6) claim as predicated on alleged violations of Industrial Codes 12 NYCRR §23-5.1(b) and §23-5.3(g)(2), is **granted** and therefore dismissed; and it is further

ORDERED, that the request for dismissal of any cross-claims or counterclaims against Story Avenue and L & M, is **granted**, without opposition; and it is further

ORDERED, that Story Avenue is entitled to and **granted** judgment on its third-party claim for contractual indemnification against 4Matic; and it is further

ORDERED, that L & M is entitled and **granted** to conditional summary judgment on its third-party claim for contractual indemnification against 4Matic; and it is further

ORDERED, that the summary judgment motion by the plaintiff (Seq. No. 7), is **GRANTED IN PART**; and it is further

ORDERED, that plaintiff is awarded judgment on the Labor Law §240(1) claim against Story Avenue and L & M; and it is further

ORDERED, that plaintiff is awarded judgment on the Labor Law §241(6) claim as predicated on

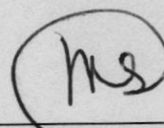
Industrial Codes 12 NYCRR §23-5.3(g)(1) and §23-5.3(e) and (f); and it is further

ORDERED, that the summary judgment motion by Libros (Seq. No. 8), is **GRANTED IN PART**; and it is further

ORDERED, that the request for dismissal of any claims against Libros for common-law indemnification and/or contribution, is **granted**; and it is further

ORDERED, the movants of each motion shall serve a copy of this order with notice of entry upon all parties within fifteen (15) days of the date of this Decision and Order.

This constitutes the decision and order of this court.



Dated: February 18, 2025

HON. MYRNA SOCORRO, J.S.C.