SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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CAN LAN LU,

Plaintiff,

- v -

ELK MAS 86 EAST 10TH, LLC,

Defendant.

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INDEX NO. 154690/2019

MOTION DATE 04/25/2025
04/25/2025
04/25/2025

MOTION SEQ. NO. 002, 003, 004

DECISION + ORDER ON MOTION

ELK MAS 86 EAST 10TH, LLC,

Third-Party Plaintiff,

-against-

FAÇADE IMPROVEMEMT, INC., also known as FAÇADE CONSTRUCTION SERVICES, INC., and FAÇADE CONSTRUCTION SERVICES, INC.

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 149, 150, 151, 152, 153, 156, 157, 161, 164, 167

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 162, 165, 168

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 134, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 154, 155, 158, 159, 163, 166, 169

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

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a demolition site accident, alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and

241(6), the plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability against the defendant third-party plaintiff, Elk Mas 86 East 10th, LLC (Elk), on his Labor Law § 240(1) cause of action (MOT SEQ 002). Elk and the third-party defendants, Façade Improvement, Inc., also known as Façade Construction Services, Inc., and Façade Construction Services, Inc. (the third-party defendants), oppose the motion. Elk moves pursuant to CPLR 3212 for summary judgment on the issue of liability on its third-party cause of action for contractual indemnification against the third-party defendants (MOT SEQ 003). The third-party defendants oppose that motion. The third-party defendants separately move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against Elk, and dismissing Elk's third-party complaint (MOT SEQ 004). Elk supports and joins in that branch of the third-party defendants' motion seeking summary judgment dismissing the plaintiff's complaint in the main action, and otherwise opposes the motion. The plaintiff opposes the third-party defendants' motion.[1]

The plaintiff's motion is granted, and he is awarded summary judgment on the issue of liability on his Labor Law § 240(1) cause of action against Elk. Elk's motion is granted, and it is awarded summary judgment on its third-party cause of action for contractual indemnification against the third-party defendants. The third-party defendants' motion is granted to the extent that summary judgment is awarded to Elk dismissing the common-law negligence and Labor

[1] The third-party defendants may move for summary judgment dismissing the complaint in the main action, despite the fact that the plaintiff has not asserted a claim directly against them (*see De Pan v First Natl. Bank*, 98 AD2d 885, 885 [3d Dept 1983]), inasmuch they may assert, against the plaintiff, any defenses that Elk has to the plaintiff's claims (*see* CPLR 1008; *Martinez v One Plus Rental Sys.,* 247 AD2d 594, 594 [2d Dept 1998]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102 [1st Dept 1997]; *Lewis v Borg-Warner Corp.* , 35 AD2d 722, 723 [2d Dept 1970]; 2 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 1008.03]). The plaintiff, however, lacks standing to oppose that branch of the third-party defendants' motion seeking summary judgment dismissing the third-party complaint, since he has no direct interest in the outcome of that motion, and will not be aggrieved by any order disposing of that motion (*see Lopez v Philip Ross Indus., Inc.,* 2025 NY Slip Op 50799[U], *4, 2025 NY Misc LEXIS 4236, *8 [Sup Ct, Nassau County, May 16, 2025]; *Pianin v Altorki*, 2022 NY Misc LEXIS 37682, *22 [Sup Ct, N.Y. County, May 17, 2022] [Kelley, J.]; *see also Augustine v Halcyon Constr. Corp.,* 71 Misc 3d 715, 716-717 [Sup Ct, Bronx County 2021]; *cf. Mixon v TBV, Inc.*, 76 AD3d 144, 149 [2d Dept 2010] [defining "aggrievement" for appellate purposes]).

Law § 200 causes of action, and the Labor Law § 241(6) cause of action, except insofar as that cause of action was premised upon an alleged violation of 12 NYCRR 23-1.16(b), and to the further extent of dismissing Elk's third-party cause of action sounding in breach of an agreement to procure liability insurance. The third-party defendants' motion is otherwise denied.

II. BACKGROUND

On November 1, 2018, the plaintiff was employed by the third-party defendants in connection with demolition work in the top-floor apartment at 86 East 10th Steet, New York, New York (the premises). Elk owned the premises, and contracted with the third-party defendants to remove the existing skylight window of the apartment, and to replace it with a new skylight. The removal of the glass portion of the skylight was completed prior to the plaintiff's commencement of his work at the premises. There was a scaffold erected and positioned below the opening in the ceiling where the removal work was occurring. The scaffold was elevated over the floor of the apartment by approximately six to seven feet, and was constructed of an iron frame, with cross braces and a wooden board atop the frame that served as the scaffold's platform. The scaffold, however, was not erected with guardrails. The proximity of the scaffold to the opening of the ceiling was such that, when a person stood on the scaffold's platform, his or her upper body would protrude through the opening. On the day in question, the plaintiff, along with a coworker, spent the morning removing the metal pieces of the old skylight. After their lunch break, the plaintiff and his coworker began removing the wooden pieces of the old skylight. At that time, the plaintiff's coworker was situated on the roof, using a pry bar to remove a 10- to 12-foot-long wooden beam from the skylight, while the plaintiff was on the platform of the scaffold, holding a portion of the beam in an attempt to loosen it. According to the plaintiff, as the beam was being removed, the scaffold moved, causing him to be cast backwards and fall to the floor below. As a result, the plaintiff suffered a fracture to his left ankle, which required the surgical placement of metal screws and a metal plate into his ankle.

On May 7, 2019, the plaintiff commenced this action. On July 18, 2019, Elk served and filed its answer. On October 10, 2019, Elk commenced the third-party action against the third-party defendants, asserting claims for common-law negligence, contractual and common law indemnification, and breach of contract. On September 27, 2021, the third-party defendants served and filed their answer to the third-party complaint. On December 13, 2023, the plaintiff filed the note of issue and certificate of readiness. On January 23, 2024 and February 12, 2024, the parties timely made the instant motions.

III. DISCUSSION

A. The Plaintiff's Summary Judgment Motion

In both his complaint and bill of particulars, the plaintiff alleged that Elk was negligent in its ownership, operation, supervision, management, and control of the premises and, thus, was liable to him for common-law negligence and violation of Labor Law § 200. The plaintiff also alleged that Elk failed to provide him with an appropriate scaffold or proper safety devices necessary to prevent him from falling or to protect him from the dangers posed by working at a height and, thus, was liable to him for violation of Labor Law § 240(1). He further alleged that Elk was liable to him pursuant to Labor Law § 241(6), inasmuch as it violated several provisions of Rule 23 of the Industrial Code of the State of New York (12 NYCRR), and the rules of the Occupational Safety and Health Administration (OSHA). In particular, the plaintiff alleged that the Elk violated 12 NYCRR 23-1.4(b)(13), (16), *et. seq*., and 23-1.5, 1.5(c)(3), 1.7, 1.8, 1.11, 1.15, 1.16, 1.17, 1.21, 1.22, 1.24, 2.3, 2.4, 2.5, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.13, 5.16, 5.17, and 5.18.

In support of his motion, the plaintiff submitted the pleadings, a statement of material facts, and the transcripts of his deposition testimony, along with the deposition transcripts of Huat Beng Khoo, the vice president and co-owner of Façade Improvement, Inc., and Andrea Ljahnicky, Elk's architectural designer in 2018. In addition, he submitted the skylight replacement agreement between Elk and Façade Improvement, Inc., the incident report from

the day of the accident, and the expert affidavit of civil engineer Herbert Heller, Jr. In opposition, Elk submitted the pleadings, a counterstatement of material facts, the deposition transcripts of the plaintiff, Khoo, and Ljahnicky, the skylight replacement agreement, a prior agreement between Elk and Façade Improvement, Inc., for similar work, the incident report, photos of the accident site, the work proposals and checks paid to the third-party defendants by Elk, and the expert affirmation of Angela Levitan, a Ph.D. in Industrial and Systems Engineering and a Certified Professional Ergonomist. In opposition to the plaintiff's motion, the third-party defendants submitted a counterstatement of material facts, the deposition transcripts of the plaintiff, Khoo, and Ljahnicky, the skylight replacement agreement, the incident report, and photos of the accident site taken on the day in question.

B. Summary Judgment Standards

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Flanders v Goodfellow, _____NY3d_____, 2025 NY Slip Op 02261, *1 [Apr. 17, 2025]; Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie

showing requires denial of the motion, regardless of the sufficiency of the opposing papers (s*ee id*.; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (s*ee Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

1. Labor Law § 240(1)

Labor Law § 240(1) provides, in pertinent part, that

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

The statute "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" (*Laverty v 1790 Broadway Assoc., LLC*, 2017 NY Slip Op 32309[U], *4 [Sup Ct, NY County 2017], quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp*., 18 NY3d 1, 7 [2011]). To establish liability, the plaintiff must prove a violation of the statute, and that the violation was a proximate cause of his or her injuries (*see id*.). "The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations, but only that it proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" (*Soriano v St. Mary's Indian Orthodox Church of*

Rockland, Inc., 118 AD3d 524, 526 [1st Dept 2014]] [internal quotation marks and citation omitted]).

A statutory violation of Labor Law § 240 is established if a scaffold or ladder shifts, slips, or collapses, causing injury to a worker (*see Castillo v TRM Contr. 626, LLC,* 211 AD3d 430, 430 [1st Dept 2022] citing *Panek v County of Albany*, 99 NY2d 452 [2003]; *Ruiz v BOP 245 Park LLC,* 231 AD3d 683, 684 [1st Dept 2024] [holding that the scaffold's sudden shift which caused plaintiff to fall, met the prima facie burden necessary to show a statutory violation]; *Rroku v W. Rac Contr. Corp.*, 164 AD3d 1176, 1176 [1st Dept 2018] [finding that liability under Labor Law § 240 was established when the scaffold plaintiff was descending wobbled and caused him to fall to the floor]).

The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action. The plaintiff testified at his deposition that, as he was holding onto the wooden beam that his coworker was prying, the wood "loosened up. The frame moved. Then I fell." When asked whether he was referring to the frame of the scaffold, the frame of the skylight, or something else, the plaintiff testified that he was referring to the scaffolding frame. Moreover, the plaintiff's expert opined that,

> "[i]n the area where the plaintiff was working, dangerous and improper conditions existed which exposed him to a risk of falling. Defendants were required to provide an elevated work area in the form of a stable scaffold that was safe, including safety railing. This was required by New York Labor Law § 240(1). It is my opinion, within a reasonable degree of construction site safety and engineering certainty, that the lack of a safety railing on the scaffold constituted a violation of Labor Law § 240(1).
>
> "It was also improper and in violation of §240(1) to use the scaffold, especially without proper fall protection including tie-off points for a harness, as an elevated work platform to work from the fourth floor to reach above. If the scaffolding safety railing had been provided, this would have provided a safe place for the plaintiff to stand and hold the wood being removed from the skylight frame above. The safety railing may also have prevented plaintiff from falling off the scaffold once the wood was released. In addition, even if tie-off points were provided, plaintiff was not provided a safety harness with which to use. Even if a safety harness and a retractable lanyard were provided to plaintiff, the use of the beams supporting the hvac equipment on the roof does not constitute a safe tie-

> off point because the beams were not tested to verify that they could support 5,000 pounds.
>
> "It is my opinion that defendants were obligated, but failed, to provide plaintiff with a proper safety device as to give plaintiff proper protection when working at an elevated height on the scaffold. The failure to provide a proper safety device was the cause of plaintiff's fall and subsequent injuries."

In opposition, neither Elk nor the third-party defendants raised a triable issue of fact. Elk and the third-party defendants argued that the plaintiff did not and could not establish that the scaffold was unstable at the time of the accident because the plaintiff had used it all day long without a problem, and he did not fall from the scaffold until after the 12-foot wooden beam was passed to him. They also argued that the plaintiff's own testimony created issues of fact as to whether the scaffold was unstable at the time of the accident, inasmuch as the plaintiff testified that the scaffold was only unstable since it could be moved around, and that it could not be used unless it was moved around the worksite. Elk and the third-party defendants further argued that the plaintiff's own conduct caused the accident since, according to Khoo, the plaintiff and his coworker assembled the scaffold themselves and failed to attach the guardrails provided to them. Lastly, Elk and the third-party defendants argued that the plaintiff's reliance on Ljahnicky's testimony and on his expert's opinion to establish liability under Labor Law § 240(1) was insufficient, since Ljahnicky did not witness the accident, and the expert did not have personal knowledge of the accident site or the subject scaffold. Despite these arguments, Elk and the third-party defendants failed to raise a triable issue of fact as to whether the scaffold, in and of itself, was sufficient to provide the plaintiff with proper protection.

Nor can Elk and the third-party defendants rely upon the "recalcitrant worker" defense (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). Although an owner who has provided safety devices is not liable for failing to insist that a recalcitrant worker use the devices (*see id.*), and Khoo testified that he had both provided guardrails for the scaffolding and told workers on the job site that "you have to put up safety rails," he admitted that none of the photographs taken at the accident site on the day of the accident depicted guardrails, while the

plaintiff testified that the scaffolding was not provided with any side or guardrails whatsoever. To invoke the recalcitrant worker defense, Elk and the third-party defendants were obligated to demonstrate that the plaintiff simply refused to employ the devices that were provided to him, and that he was the sole proximate cause of his own accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]; *Stolt v General Foods Corp*., 81 NY2d 918, 920 [1993]; *Plaku v 1622 Van Buren, LLC,* 198 AD3d 431, 432 [1st Dept 2021]), which they have failed to do here. Moreover, a party charged under Labor Law § 240(1) with the duty to provide enumerated safety devices will be absolved of liability where a worker attempts to perform a task at elevation without proper protection, but only if the proper safety device was "readily available" and it would have been the worker's "normal and logical response" to get it (*Montgomery v Federal Express Corp*., 4 NY3d 805, 806 [2005]; *see Rice v West 37th Group,* LLC, 78 AD3d 492, 495 [1st Dept 2010]). A device will not be deemed to be "readily available" where, at most, a worker knew that he or she could ask a foreman for whatever device might have been needed, and that the foreman could order it (*see Rice v West 37th Group, LLC,* 78 AD3d at 496). Nor can an owner satisfy its statutory obligations by vague assertions that procedures existed for obtaining necessary devices (*see id*.). Elk and the third-party defendants simply suggested that Elk had left guardrail piping somewhere on the job site, that the plaintiff and his coworker were responsible for assembling the scaffolding, and that the plaintiff should have asked someone on the site where the piping had been stored.

Moreover, any alleged negligence on the plaintiff's part goes only to the issue of comparative fault, and because Labor Law 240(1) imposes an absolute liability once a violation is shown, comparative fault is not a defense (*see DaSilva v Toll First Ave., LLC,* 199 AD3d 511, 513 [1st Dept 2021]; *Morin v Machnick Bldrs., Inc.*, 4 AD3d 668, 670 [3d Dept 2004]; *Sotarriba v 346 W. 17th St., LLC*, 2019 NYLJ LEXIS 840, *16-17 [Sup Ct, N.Y. County, Mar. 21, 2019]).

In light of the foregoing, the plaintiff's motion for partial summary judgment on the issue of liability against Elk on his Labor Law § 240(1) cause of action must be granted. For the same

reasons, that branch of the third-party defendants' motion seeking summary judgment dismissing the Labor Law § 240(1) cause of action, which had been asserted by the plaintiff against Elk, must be denied.

C. Remaining Branches of Third-party Defendants' Summary Judgment Motion

1. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon general contractors "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [citation and internal quotation marks omitted]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than generalized regulations for worker safety (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241(6) requires a plaintiff to show that the safety measures actually employed on a job site were unreasonable or inadequate, and that the violation was a proximate cause of his or her injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522 [1985]; *Baptiste v RLP-East, LLC*, 182 AD3d 444, 444 [1st Dept 2020] [Labor Law § 241(6) requires a finding that a defendant violated the Industrial Code, and the additional finding that the violation showed a lack of reasonable care]).

Here, the plaintiff asserted violations of 12 NYCRR 23-1.4(b)(13) and (16) (definitions of construction work and demolition work), 12 NYCRR 23-1.5 (general responsibility of employers), 12 NYCRR 23-1.7 (protection from general hazards), 12 NYCRR 23-1.8 (personal protective equipment), 12 NYCRR 23-1.11 (lumber and nail fastenings), 12 NYCRR 23-1.15 (safety railing), 12 NYCRR 23-1.16 (safety belts, harnesses, tail lines, and lifelines), 12 NYCRR 23-1.17 (life nets), 12 NYCRR 23-1.21 (ladders and ladderways), 12 NYCRR 23-1.22 (structural runways, ramps, and platforms), 12 NYCRR 23-1.24 (work on roofs), 12 NYCRR 23-2.3

(structural steel assembly), 12 NYCRR 23-2.4 (flooring requirements in building construction), 12 NYCRR 23-2.5 (protection of persons in shafts), 12 NYCRR 23-5.1 (general provisions for all scaffolds), 12 NYCRR 23-5.2 (approval required), 12 NYCRR 23-5.3 (general provisions for metal scaffolds), 12 NYCRR 23-5.4 (tubular welded frame scaffolds), 12 NYCRR 23-5.5 (tube and coupler metal scaffolds), 12 NYCRR 23-5.6 (pole scaffolds), 12 NYCRR 23-5.7 (outrigger scaffolds), 12 NYCRR 23-5.8 (all suspended scaffolds), 12 NYCRR 23-5.13 (carpenters' portable bracket scaffolds), 12 NYCRR 23-5.16 (trestle and extension trestle ladder scaffolds), 12 NYCRR 23-5.17 (ladder jack scaffolds), and 12 NYCRR 23-5.18 (manually-propelled mobile scaffolds).

The third-party defendants established, prima facie, that 12 NYCRR 23-1.16(b), 23.5.1(j)(1), and 23.5.3(e) either were not applicable to this case or had not been violated.

With respect to 12 NYCRR 23-1.16(b), the third-party defendants have made a prima facie showing that, while applicable, this provision was not violated because the plaintiff was provided with a safety harness and retractable lanyard, was instructed on how and where to secure the harness and lanyard, and was directed to use that equipment when working on the roof or scaffold. Nonetheless, in opposition to the third-party defendants' prima facie showing in this regard, the plaintiff raised a triable issue of fact. That Industrial Code provision is sufficiently specific to support a Labor Law § 241(6) cause of action (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]), and the plaintiff testified at his deposition that he was not provided with a harness or other similar fall-protection equipment. Moreover, while Khoo testified that he gave out harnesses and instructed the workers to use them on the first day that the third-party defendants were on the job site, the plaintiff testified that he was not present at all on that day to receive such equipment or instructions. Hence, that branch of the third-party defendants' motion which was for summary judgment dismissing so much of the Labor Law § 246(1) cause of action against Elk as was premised upon an alleged violation of 12 NYCRR 23-1.16(b) must be denied.

The third-party defendants established that 12 NYCRR 23.5.1(j)(1), which provides that the open sides of all scaffold platforms shall have safety railings, is not applicable to this case since the provision also provides an exception for "[a]ny scaffold with an elevation of not more than seven feet." Here, while the plaintiff claims that the scaffold was erected at an elevation of six to seven feet above the floor, and the defendants claim that it was six feet, none of the parties attested that the scaffold was more than seven feet (*see Monfredo v Arnell Constr. Corp*., 171 AD3d 600, 601 [1st Dept 2019]). Hence, the plaintiff failed to raise a triable issue of fact in opposition to the third-party defendants' showing with respect to this Industrial Code provision, and that branch of the third-party defendants' motion which was for summary judgment dismissing that cause of action to the extent that it was premised upon that Industrial Code provision must be granted.

Additionally, 12 NYCRR 23.5.3(e), which provides that safety railings shall be provided for every metal scaffold, is also inapplicable to this case, since the provision applies to "all scaffolds constructed of metal except mobile types." Here, the plaintiff himself testified the scaffold was a mobile one when he explained that the scaffold must be moved from location to location to be used. Hence, in opposition to the third-party defendants' showing in this respect, the plaintiff failed to raise a triable issue of fact, and that branch of the third-party defendants' motion which was for summary judgment dismissing that cause of action to the extent that it was premised upon that Industrial Code provision must be granted.

Finally, the third-party defendants have established, prima facie, that the remaining provisions of the Industrial Code that the plaintiff identified in his bill of particulars were either not sufficiently specific, were inapplicable, or were not violated. In the papers that he submitted in both Motion Sequences 002 and 004, the plaintiff specified that his claim pursuant to Labor Law § 241(6) was premised only upon violations of 12 NYCRR 23-1.16(b), 23.5.1(j)(1), and 23.5.3(e), that is, he argued that only the Industrial Code provisions supported by his expert's affidavit were in dispute. Since the plaintiff did not address the remaining Industrial Code

provisions, he failed to raise a triable issue of fact in opposition to the third-party defendants showing, and summary judgment must be awarded dismissing so much of the Labor Law § 241(6) cause of action against Elk, insofar as it was based upon violations of those Industrial Code provisions. With respect to these remaining provisions, the court notes that the Industrial Code sections that merely define terms employed in the Code "cannot be the basis for liability because it does not create a specific, positive command" (*Torres v Eastchester Union Free Sch. Dist.*, 2021 NY Slip Op 33260[U], *8, 2021 NY Misc LEXIS 9515, *14 [Sup Ct, Westchester County, Sep. 21, 2021]). Moreover, inasmuch as the plaintiff has sought to assert various OSHA provisions as a basis for liability under Labor Law § 241(6), those claims must be rejected, since violations of OSHA do not provide a basis for liability under Labor Law § 241(6) (*see Alberto v Disano Demolition Co.*, 194 AD3d 607, 608 [1st Dept 2021]; *Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]).

Thus, summary judgment dismissing the Labor Law § 241(6) cause of action against Elk must be awarded, except as to so much of that cause of action as was premised upon 12 NYCRR 23-1.16(b).

2. Labor Law § 200 and Common-law Negligence

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Kennedy v McKay*, 86 AD2d 597, 598 [2d Dept 1982]). There are two distinct standards applicable to Labor Law § 200 cases, depending on the situation involved---where the accident is the result of the means and methods used by the general contractor to do its work, and where the accident is the result of a dangerous premises condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]). Where, as here, the allegation is that the accident occurred when the scaffold upon which the plaintiff was working had shifted, causing

him to fall, the plaintiff thus is claiming an injury arising from the means and methods of the ongoing construction work, rather than an unsafe condition on the premises (*see Lemache v MIP One Wall St. Acquisition, LLC*, 190 AD3d 422, 423 [1st Dept 2021]).

To find an owner or general contractor liable under Labor Law § 200 for dangers arising from the means, methods, or materials of the work, it must be shown that the owner or general contractor had authority to supervise or control the injury-producing work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877). However, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-381 [1st Dept 2007]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 525 [2d Dept 2007]).

Here, the third-party defendants established, prima facie, that Elk did not have actual, direct supervisory control or input into how the plaintiff's work was performed. While Elk had assigned an architect, Ljahnicky, to the ongoing construction project at the premises, Ljahnicky testified that she did not have regular communication with Khoo while the work was being performed, and that she only visited and inspected the site occasionally. She testified that she did not inspect the site from the time the scaffold was constructed to the date of the accident, and that the frequency of her visits to the site increased only after the plaintiff's accident. In opposition, the plaintiff failed to raise a triable issue of fact. Thus, the plaintiff's Labor Law § 200 and common-law negligence cause of action against Elk must be dismissed.

3. Contractual and Common-law Indemnification and Breach of Contract

The court recognizes that a construction-related indemnification agreement that purports to indemnify a party for its own negligence is void and unenforceable (*see* General Obligations Law § 5-322.1; *Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870 [2d Dept 2008]). As

relevant here, the agreement between the third-party defendants, as contractors, and Elk, as construction manager, provided that:

> "[t]he contractor shall, to the fullest extent permitted by law defend, indemnify and hold Owner and Construction Manager, their partners, directors, members, officers, employees, servants, representatives, consultants and agents harmless from and against any and all claims, loss, (including attorneys' fees, witnesses' fees and all court costs), damages, expense and liability (including statutory liability), resulting from injury and/or death of any person or damage to or loss of any property arising out of any negligent or wrongful act, error, omission, breach of any statue, code or rule or breach of contract, in connection with the operations of the contractor, its subcontractors and sub-subcontractors. The foregoing indemnity shall include injury or death of any employee of the contractor or subcontractor and shall not be limited in any way by an amount or type of damages, compensation or benefits payable under any applicable Workers Compensation, Disability Benefits or other similar employee benefits acts. This clause shall survive the expiration or termination of this contract and the work, and applies to any cause of action arising during the period of contractor's work for Owner and/or Property Owner, now, in the past or in the future."

Where, as here, an agreement authorizes indemnification "to the fullest extent permitted by law," it does not violate General Obligations Law § 5-322.1 (*see Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d at 871; *Farrugia v 1440 Broadway Assoc.*, 157 AD3d 565, 569 [1st Dept 2018]), as the law itself permits indemnification where the indemnitor itself is shown to be negligent, or the indemnitee's liability arises solely because it violated a statute that does not require a finding of negligence, provided that there is no evidence of negligence on the part of the indemnitee. In those circumstances, an indemnification clause is enforceable (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *see also Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, n 5 [1997]). In fact, the courts have found that that statute also permits a partially negligent insured party to seek contractual indemnification "so long as the indemnification provision does not purport to indemnify" the party "for its own negligence" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]).

The third-party defendants failed to establish, prima facie, that the indemnification provision of its agreement with Elk is not enforceable. The court rejects the third-party defendants' contention that there was no enforceable contract in effect at the time the

construction project started or when the plaintiff's accident occurred. In this respect, the third-party defendants contend that, while Khoo and Elk's representative and member, Morry Kalimian, signed and dated the agreement on October 28, 2018 and October 29, 2018, respectively, the signatures were not affixed to the physical contract until, at the earliest, after November 13, 2018, which was days after the plaintiff's accident. The third-party defendants point to an email from Kalimian to Khoo and an additional person associated with Elk, sent on November 13, 2018, and titled "10th St.," which provided,

> "Robert, this need to be signed and sent back.
>
> Trish, please add the proposal to our typical contract form as an exhibit*, sign it 10/28,* and send it out. Robert you will need to sign the contract and send it back to Trish tomorrow morning."

(emphasis added). While the signatures and dates may have been affixed to the contract on November 13, 2018, it is apparent that the parties intended to ratify the contract retroactively to October 28, 2018, before the project started and the accident occurred, particularly because the parties began performing heir obligations under the contract shortly thereafter (*see Crovato v H&M Hennes & Mauritz, L.P.*, 176 AD3d 547, 548 [1st Dept 2019] [partial performance raises triable issue of fact as to whether agreement was, in fact, entered into and ratified by subsequent conduct]). Moreover, the Certificate of Liability Insurance referable to the subject project was in effect as early as August 15, 2018. Hence, the third-party defendants have failed to establish that there was no enforceable contract in effect at the relevant time. Thus, that branch of the third-party defendants' motion seeking summary judgment dismissing Elk's third-party cause of action for contractual indemnification must be denied.

With respect to Elk's third-party cause of action sounding in breach of a contract obligating the third-party defendants to procure applicable liability insurance, the third-party defendants established, prima facie, that they procured the appropriate liability insurance coverage pursuant to their agreement with Elk. In opposition, Elk failed to raise a triable issue

of fact Thus, the third-party defendants must be awarded summary judgment dismissing the third-party breach of contract cause of action based on an alleged failure to procure insurance.

The court concludes that there are triable issues of fact with respect to Elk's other third-party causes of action, which include its first third-party cause of action, which alleged that the third-party defendants otherwise breached their contract by failing to provide adequate on-site supervision, and so much of its second third-party cause of action as was for common-law indemnification. In connection with the latter claim, common-law indemnification is available to a party that has been held vicariously or statutorily liable from the party who was at fault in causing a plaintiff's injuries (*see McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 375 [2011] [statutory liability]; *Hawthorne v South Bronx Community Corp*., 78 NY2d 433, 437 [1991] [vicarious liability]; *Pena v Intergate Manhattan, LLC,* 234 AD3d 618, 618 [1st Dept 2025] [statutory liability]; *Structure Tone, Inc. v Universal Servs. Group, Ltd*., 87 AD3d 909, 911-912 [1st Dept 2011] [vicarious liability]). Inasmuch as the court has concluded that Elk is to be held liable, at least in part, for violating its statutory obligations under Labor Law § 240(1), and there are triable issues of fact as to whether the third-party defendants themselves were negligent, that branch of the third-party defendants' motion which was for summary judgment dismissing the third-party cause of action for common-law indemnity must be denied.

D. Elk's Summary Judgment Motion

Elk has established, prima facie, that the indemnification provision of its agreement with the third-party defendants is enforceable, even though they have failed to establish that their negligence did not cause or contribute to the plaintiff's accident, inasmuch as the primary claim upon which liability against them is grounded is a statutory, strict liability cause of action under Labor Law § 240(1) (*see Brown v Two Exch. Plaza Partners*, 76 NY2d at 179). In opposition, the third-party defendants failed to raise a triable issue of fact. For that reason, and for the reasons described above, Elk must be awarded summary judgment as to liability on its third-party cause of action for contractual indemnification against the third-party defendants.

IV. CONCLUSION

In light of the forgoing, it is,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action against the defendant third-party plaintiff, Elk Mas 86 East 10th, LLC (MOT SEQ 002), is granted; and it is further,

ORDERED that the motion of the defendant third-party plaintiff, Elk Mas 86 East 10th LLC, summary judgment on the issue of liability on its third-party cause of action for contractual indemnification against the third-party defendants, Façade Improvement, Inc., also known as Façade Construction Services, Inc., and Façade Construction Services, Inc. (MOT SEQ 003), is granted, and it is awarded summary judgment on the issue of liability on its third-party cause of action for contractual indemnification against the third-party defendants, Façade Improvement, Inc., also known as Façade Construction Services, Inc., and Façade Construction Services, Inc.; and it is further,

ORDERED that the motion of the third-party defendants, Façade Improvement, Inc., also known as Façade Construction Services, Inc., and Façade Construction Services, Inc., for summary judgment dismissing the complaint insofar as asserted against the defendant third-party plaintiff, Elk Mas 86 East 10th, LLC, and dismissing the third-party complaint insofar as asserted against them by the defendant third-party plaintiff, Elk Mas 86 East 10th LLC (MOT SEQ 004), is granted only to the extent that they are awarded summary judgment dismissing:

(a) the Labor Law § 241(6) cause of action that the plaintiff asserted against the defendant third-party plaintiff, Elk Mas 86 East 10th LLC, except to the extent that that cause of action is premised upon an alleged violation of 12 NYCRR 23-1.16(b),

(b) the common-law negligence and Labor Law § 200 cause of action that the plaintiff against the defendant third-party plaintiff, Elk Mas 86 East 10th, LLC, and

(c) the third-party cause of action asserted against them by the defendant third-party plaintiff, Elk Mas 86 East 10th LLC, sounding in breach of contract for failure to procure appropriate liability insurance,

those claims and causes of action are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 of 71 Thomas Street, New York, New York 10013, on August 5, 2024, at 10:30 a.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

7/3/2025
DATE

JOHN J. KELLEY, J.S.C.

MOTION 002:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**
MOTION 003:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**
MOTION 004:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**