SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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BARA ADAMAN,
Plaintiff,
- v -

PARK 65TH ASSOCIATES, L.P., 610 PARK AVENUE CONDOMINIUM and THE BOARD OF MANAGERS OF 610 PARK AVENUE,
Defendants.

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610 PARK AVENUE CONDOMINIUM
Third-Party Plaintiff,

-against-

SCHNELLBACHER-SENDON GROUP,
Third-Party Defendant.

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INDEX NO. 156314/2019

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

Third-Party
Index No. 595029/2020

The following e-filed documents, listed by NYSCEF document number (Motion 008) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 225, 238, 239, 240, 241, 242, 260, 263, 264

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

The relevant facts of this case are as follows: Based on the pleadings and a notice to admit, plaintiff was allegedly injured on May 8, 2019, when he "fell from a hanging scaffold or 'rig'" while performing work at the jobsite located at 610 Park Avenue, New York, New York (the, "premises") (NYSCEF Doc. No. 1, *summons and complaint*; 28, *notice to admit*), which is owned by defendants 610 PARK AVENUE CONDOMINIUM ("610 Park Condo") and managed by THE BOARD OF MANAGERS OF 610 PARK AVENUE ("610 Park Board") (collectively, the "610 Park defendants").

Plaintiff commenced this action by summons and complaint, asserting negligence and claims based on violations of Labor Law §§ 200, 240(1), and 241(6) (NYSCEF Doc. No. 1). In a bill of particulars dated July 2, 2020, plaintiff alleged that defendants violated New York Industrial Code Sections 23-1.16; 23-1.17; and 23-5. (NYSCEF Doc. No. 245). 610 Park Condo commenced a third-party action against SCHNELLBACHER-SENDON GROUP ("SSG"), plaintiff's employer, a subcontractor retained to perform certain exterior restoration work at the premises, asserting a claim for contractual indemnification based on an agreement executed by the parties on or about June 21, 2017, as well as a claim for failure to procure and/or maintain coverage (NYSCEF Doc. No. 208, *third-party complaint*).

SSG now moves the court, pursuant to CPLR 3212, for dismissal of the verified complaint, the third-party complaint, and all cross-claims and counterclaims asserted against it, with prejudice (NYSCEF Doc. No. 177, *notice of motion*).

SSG argues that plaintiff's Labor Law § 240(1) claim should be dismissed as a matter of law because plaintiff was the sole proximate cause of his own accident. SSG maintains that plaintiff was provided all the necessary equipment, including a harness and rope, which he was using at the time of the accident. SSG further claims that, on the morning prior to the accident, plaintiff was instructed to anchor the scaffold to the wall to perform the work but nevertheless elected to ignore said instructions and proceeded to load materials onto the scaffold without anchoring the scaffold. Addressing the Labor Law § 241(6), SSG contends that, to the extent plaintiff relies on alleged violations of the Industrial Code 23-1.16; 23-1.17; and 23-5, they are inapplicable and, thus, the Labor Law § 241(6) claim must be dismissed as a matter of law. SSG also argues that plaintiff's Labor Law § 200 and negligence claims must be dismissed because there was no unsafe condition on site. Furthermore, SSG argues that there is no concrete evidence that plaintiff fell from the scaffold or that a defective or dangerous condition caused his alleged accident. However, to the extent plaintiff did fall off the scaffold, SSG posits that it was due to plaintiff's own failure to tie-off the scaffold and follow proper protocol. Therefore, SSG argues that the Labor Law § 200 and common law negligence claims do not lie.

SSG also argues that the third-party contractual indemnification claim lodged against it, premised on the contract executed between 610 Park and SSG, pursuant to which SSG is required to indemnify 610 Park against liabilities, actions, causes of action, claims, etc., arising out of any negligent acts or omissions in connection with the work by the contractor, its subcontractors, or employees, must also be dismissed because it was neither negligent nor did it breach its duty. Although SSG maintains that plaintiff was the sole proximate cause of its own injuries, it argues that, should the court find otherwise, 610 Park is not entitled to contractual indemnification against it because a jury could decide that 610 Park's negligence contributed to the cause of the accident.

Additionally, SSG claims that the third-party claims based on common law indemnification and contribution must be dismissed because plaintiff has not claimed nor sustained a grave injury pursuant to the Workers' Compensation laws (NYSCEF Doc. No. 180, *memo of law*).

Plaintiff opposes the motion, arguing that SSG fails to meet its *prima facie* burden establishing dismissal of plaintiff's claims because SSG's motion rests entirely on the deposition testimony of Jose Antonio Chavarria, plaintiff's foreman, who testified that he instructed plaintiff to ensure that the scaffolds were tied off to the walls. However, plaintiff insists that, as he testified to at his deposition, there were no devices to protect him while working on the scaffold, that defendants failed to provide safety railings and tie ins, and that he was never made aware of any anchors to tie the scaffolding into the wall; thus, triable issues of fact remain warranting denial of the motion.

Plaintiff also claims that questions of fact remain as to his Labor Law § 240(1) claim because there is evidence that he was not the proximate cause of his own injuries. Instead,

plaintiff maintains that defendants are liable under Labor Law § 240(1) because they instructed him to use a scaffold that did not have a safety railing and provided him a harness with a faulty locking mechanism; thus, defendants failed to adequately protect him from the height related risks to which he was exposed.

As for that prong of the motion seeking dismissal of the Labor Law § 200 claims, plaintiff posits that SSG has failed to provide any admissible evidence as to the length of time that these conditions were present on the premises, or when the premises were last inspected. Inasmuch as defendants conceded during their testimony to conducting walkthroughs at the premises, plaintiff represents that they knew of should have known of the dangerous and defective condition of the scaffold that plaintiff was working on at the time of the accident.

Addressing the Labor Law § 241(6) claim, plaintiff argues that it has a claim pursuant to Industrial Code § 23-5.8(g), given plaintiff's testimony that he was not made aware of any anchors or brakes to secure the suspended scaffolding from moving. Therefore, defendants maintains that the motion fails as a matter of law (NYSCEF Doc. No. 238, *Gablehouse aff.*).

Plaintiff submits the expert affidavit of Kathleen Hopkins, a certified site safety manager, who opines, *inter alia*, that plaintiff was directed to work on a two-point suspended scaffold erected on the back of the building, which contained a safety railing on the front length but had no safety railing on the back length that was facing the building's exterior wall. Although plaintiff was wearing a safety harness with the lanyard connected by a rope grab anchored to the hanging lifeline, Hopkins states that the rope grab failed to lock and, thus, did not prevent plaintiff from falling. Hopkins avers that in her opinion, to a reasonable degree of professional certainty, plaintiff's injurie on May 8, 2019, were caused by defendant's violation of Labor Law § 240(1) (NYSCEF Doc. No. 239, *Hopkins aff.*).

The 610 Park defendants submit partial opposition to the motion, arguing that 610 Park Condo is entitled to contractual indemnification against SSG because they exercised no direction or control over plaintiff's work at the project, and, thus, cannot be found negligent. Assuming, *arguendo*, this court were to find that issues of fact remain as to 610 Park Condo's negligence, this does not mandate dismissal of its contractual indemnification claim because the savings clause in the subject agreement, i.e., "to the fullest extent permitted by law", allows for partial indemnification for damages not caused by 610 Park Condo's active negligence (NYSCEF Doc. No. 240, *Meade IV aff.*).

In reply, SSG argues that plaintiff's attempt to raise an issue of fact by claiming that he was not aware that there were anchors to tie the scaffold to the wall and that he was not instructed to use, is undermined by the evidence in the record. According to SSG, the evidence demonstrates that plaintiff — a trained scaffold operator — knew how to operate the subject scaffold and knew now to anchor the scaffold to the wall. Further, SSG argues that although plaintiff claims that he fell off the scaffold, he only reported that he was poked by a beam while standing on the scaffold. Plaintiff admitted that he did not follow instructions provided to him and failed to follow the proper protocol with respect to the use of the scaffold.

Further, SSG submits the expert affidavit of Preston Quick, P.E. (NYSCEF Doc. No. 264, *Quick aff.*) in support of its claim that the scaffold was compliant with all rules and regulations, and that the scaffold would not have swayed from left to right if plaintiff had followed the instructions and protocol by tying off the scaffold to the wall. SSG further affirms that its proof establishes that the scaffold, ropes, and harness were inspected the morning of the accident. SGG also reiterates that plaintiff's Labor Law § 241(6) predicated on Industrial Code § 23-5.8(g) should be dismissed as inapplicable to the proof elicited (NYSCEF Doc. No. 263).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "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].)

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "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" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]; see *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). Therefore, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

SSG submits, *inter alia*, the deposition testimony of plaintiff; Anthony Milstein ("Milstein"), on behalf of Brown Harris Stevens, the property manager of the subject premises; Jesus Sendon ("Sendon"), the vice president of SSG; and the deposition testimony of Jose Antonio Chavarria ("Chavarria"), the foreman for SSG (NYSCEF Doc. Nos. 188-193). The sum and substance of their testimony is set forth in the decision and order deciding Mot. Seq. 007 and, thus, shall not be repeated here.

"Pursuant to Labor Law § 240 (1), owners and contractors engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, except

certain owners of one- and two-family dwellings, must furnish or erect . . . 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 employed in the performance of such labor. Section 240 (1) aims to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015] [internal quotation marks and citations omitted]). "To achieve that goal, the statute imposes absolute liability where the failure to provide [proper] protection is a proximate cause of a worker's injury" (*id.* [internal quotation marks and brackets omitted]).

"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 v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Labor Law § 241(6) is a "'hybrid' statute, as the first sentence 'reiterates the general common-law standard of care,' while the second sentence imposes a nondelegable duty with respect to compliance with rules of the Commissioner which contain 'specific, positive command[s]'" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503-504 [1993]). Under said statute, "an owner or general contractor 'is vicariously liable without regard to [their] fault,' and 'even in the absence of control or supervision of the worksite,' where a plaintiff establishes a violation of a specific and applicable Industrial Code regulation" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-350 [1998]; see *Toussaint v Port Auth. of NY & NJ*, 38 NY3d 89, 94 [2022]; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]). "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

Here, for the reasons stated in this court's decision and order deciding Mot. Seq. 007, which, among other things, rejected the 610 Park defendant's same argument that the proof establishes plaintiff was the proximate cause of his own injuries, those branches of the motion seeking dismissal of the claims premised on the Labor Law §§ 200/negligence, 240(1), and 241(6) are denied as moot.[1] Additionally, turning next to that branch of the motion seeking dismissal of the third-party claim premised on contractual indemnification and contribution,[2] SSG's argument that it is entitled to dismissal of the contractual indemnification claim, based on its assertion that plaintiff was the proximate cause of his own injuries, is rejected given the findings above and this court's prior determination that there was no proof of 610 Park Condo's active negligence. Accordingly, it is hereby

[1] This court notes that no direct claims are made by plaintiff as against the movant, SSG.
[2] Upon this court's review of the third-party complaint, 610 Park Condo does not appear to make a claim for contribution against SSG.

ORDERED that SCHNELLBACHER-SENDON GROUP's motion is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this court.

July 17, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**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**