Ferrera v 160 Henry St. Corp.
2025 NY Slip Op 33542(U)
September 15, 2025
Supreme Court, Kings County
Docket Number: Index No. 506153/2019
Judge: Ingrid Joseph
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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of September, 2025.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

--X

RICARDO FERRERA,

Plaintiff,

-against-

160 HENRY STREET CORPORATION and PRESERV BUILDING RESTORATION MANAGEMENT,

Defendants.

--X

PRESERV BUILDING RESTORAATION MANGEMENT CORPORATION,

Third- Party Plaintiff,

-against-

EVEREST SCAFFOLDING, INC. and RHG MANPOWER INC.,

Third-Party Defendant.

--X

DECISION & ORDER
(Mot. Seq. Nos. 3-6)

Index No.: 506153/2019

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	157-174, 175-196, 197-230, 232-250
	259-261, 262-265, 266-268, 269-271, 272-277, 278-284, 285, 286, 287, 288, 289-299
Opposing Affidavits (Affirmations)	300-301, 302-303, 304-305, 306, 307, 308
Affidavits/ Affirmations in Reply	
Other Papers:	

Upon the foregoing papers, plaintiff Ricardo Ferrera (plaintiff) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment as to liability on his Labor Law

§ 240 (1) cause of action (motion sequence number 3). Third-Party Defendant Everest Scaffolding, Inc. (Everest) moves for an order, pursuant to CPLR 3212, (1) for summary judgment dismissing the plaintiff's complaint, or, in the alternative, for an order granting Everest leave to serve an Amended Third-Party Answer to assert affirmative defenses and counterclaims against plaintiff sounding in fraud; (2) granting summary judgment to Everest dismissing the Third-Party Complaint insofar as asserted against it; (3) granting summary judgment to Everest on its crossclaims asserted against RHG Manpower, Inc. (RHG); and (4) granting summary judgment to Everest dismissing RHG's crossclaims insofar as asserted against Everest (motion sequence number 4). Defendant/Third-Party Plaintiff Preserv Building Restoration Management Incorporated (Preserv) moves (1) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiff's complaint or, in the alternative, for an order, pursuant to CPLR 3025 (b) granting it leave to amend its answer to assert a counterclaim and affirmative defense sounding in fraud; and (2) for an order, pursuant to CPLR 3212, granting it summary judgment on its third-party causes of action, as asserted against Everest and RHG, sounding in contractual and/or common law indemnification or contribution and additional insured status for defense and indemnification and dismissing the counterclaims of Everest and RHG insofar as asserted against it (motion sequence number 5). Defendant 160 Henry Street Corporation (160 Henry) moves for an order, pursuant to CPLR 3212, (1) granting it summary judgment, dismissing the complaint insofar as asserted against it; and (2) granting it summary judgment on its crossclaims as asserted against Preserv, sounding in contractual indemnification (motion sequence number 6).

Plaintiff Ricardo Ferrera pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), based on injuries suffered on January 15, 2019, when he was allegedly struck by a wooden plank and other materials, causing him to fall from a scaffold he was dismantling, while working at premises located at 160 Henry Street, Brooklyn, New York (premises) (NY Cts Elec Filing [NYSCEF] Doc No. 161). The premises was owned by defendant 160 Henry, which had retained Preserv as the general contractor on a façade work project (NYSCEF Doc No. 49 at 10-11). Preserv, in turn, subcontracted with Everest in order to erect and disassemble the scaffold required to perform the necessary façade work (NYSCEF Doc No. 169 at 12; NYSCEF Doc No. 171 at 28). Everest then subcontracted with RHG in order to obtain a team of workers to disassemble the scaffolding on January 14, 2019, and January 15, 2019 (NYSCEF Doc No. 169 at 19).

According to plaintiff's deposition testimony, the accident occurred at approximately 10:40 am or 11:40 am on January 15, 2019 (NYSCEF Doc No. 8 at 120). Plaintiff stated that he had worked at the premises on January 14, 2019, along with four other people including his supervisor, who was named Manuel (NYSCEF Doc No. 167 at 123, 152). Plaintiff first met the foreman in person on January 14, 2019, and arrived at about 7:00 am (*id.* at 226). Plaintiff stated that when he arrived at the job site, he didn't have to fill out any paperwork, and he did not see a sign-in sheet, nor did he sign in anywhere (*id.* at 226-227). When he arrived at the job site, he was wearing his work clothes, and had brought a hard hat and harness, provided to him by a friend who stayed in the building he lived in for a few days (*id.* at 228). When plaintiff arrived on the site, the foreman explained that he was "going to take apart the scaffold that was placed in this building" (*id.* at 241). Plaintiff testified that there were about eight workers at the site, that the foreman provided everyone with instructions, and that there was no one else on site who provided instructions (*id.* at 244). Plaintiff also stated that the foreman did not specifically tell plaintiff that he was working for a specific company, or that plaintiff was hired by a specific company (*id.* at 245). However, plaintiff testified that he was working for Everest and mentioned that he saw an Everest truck at the site (*id.* at 246, 267).

Plaintiff described his job as removing nails from the boards that were on the scaffolding, and then patching up holes in the wall left by the "pipes or tubes that go into the brick wall" (*id.* at 252). As he was working on the scaffold, plaintiff was wearing his harness, which had a ten-foot safety line that he would hook and unhook as he walked, so he could remain tied off (*id.* at 254). By the time he had finished working on January 14, 2019, the right side of the scaffold had been removed, and the left side remained (*id.* at 261). He arrived at 7:00 am on January 15, 2019, and the same crew was on site as the day before (*id.* at 266). Plaintiff testified that the accident happened when he was on the seventh level of the scaffold (*id.* at 272). Plaintiff testified that he was "bending to remove a nail" when "[s]ome materials and metal pieces collapsed from the top and started falling on top of [him] and coming down" (*id.* at 273, 275). Specifically, plaintiff stated that a wooden plank hit him on the back "pushing [him] to the outside of the scaffold" and that he "fell outside of the scaffold" and "was hanging in the air and that's when all the metal pieces kept dropping on [him]" (*id.* at 276, 278).

Steven Kramberg, who worked as the designated managing agent for the premises at the time of the accident, testified that, in January 2019, to the best of his recollection, the masonry and

Local Law façade safety project had been completed or substantially completed and that sidewalk bridging and piping needed to be removed from the premises (NYSCEF Doc No. 168 at 14, 19-20). He explained that 160 Henry had entered into a contract with Preserv, and that Preserv had the authority to bring in subcontractors for the project (*id.* at 22, 25). His recollection was that Preserv had subcontracted with another company to provide the bridging and scaffolding (*id.* at 26). He did not recall any safety issues during the course of the work (*id.* at 29). Kramberg also indicated that 160 Henry did not have any employees that were overseeing the disassembling of the scaffold, and did not provide any safety equipment, manpower or safety plan with respect to this project (*id.* at 33). He believed that, generally, Preserv had a daily presence on the job, but didn't recall if there was any document indicating that Preserv's work was complete (*id.* at 37-38). Kramberg testified that he was not present on the site on January 15, 2019, and had no personal knowledge with respect to the relationship between Preserv and Everest or whether Everest workers were dismantling the scaffolding at the premises (*id.* at 50, 54, 54). Kramberg did note that he received a call "that there had been an accident at that section, some of the pipe that was being removed or planks had done some damage to the building, breaking a window and damaging some stonework" but that "nothing was reported, as far as personal injury to anybody" (*id.* at 55-56). Kramberg visited the premises and observed that the windows were broken, and the window frame was damaged, "like something very heavy had hit it," but that "[t]here was definitely no indication that anybody was hurt" (*id.* at 57). Kramberg testified that his understanding "was they dropped some piece, whoever was dismantling, had dropped a piece of material that made up the scaffold or the planking and that's what caused the damage" (*id.*). He testified that he believed that Preserv made and paid for the repairs to the stonework and the windows that were broken (*id.* at 61).

Christopher J. Downes, the owner of Everest, testified that Preserv hired Everest to install the sidewalk bridge and pipe scaffolding at the premises (NYSCEF Doc No. 169 at 11, 12). Downes testified that he was not personally engaged in any work at the project and had no specific recollection of it (*id.* at 17). With respect to Everest employees, Downes testified that there was no foreman present on behalf of Everest on site at 160 Henry, and that Everest only had a truck driver at the job site (*id.* at 18). Downes further testified that there was an estimator and project manager with respect to the project, named Carlos Villanueva, who "would deal with whoever [they] [were] doing the work for" (*id.* at 23). Everest was only responsible for the installation and

removal of the pipe scaffolding, but not for the whole project (*id.* at 31). He testified that Everest subcontracted out to RHG to provide laborers to perform the scaffolding work and that Everest made sure all of their workers had scaffold training, otherwise they wouldn't have allowed them on site (*id.* at 32). He further noted that subcontractors, including RHG, would supply their own tools and safety equipment (*id.* at 45, 55). Downes stated that Everest did not have any role in ensuring that its subcontractors employed proper safety equipment for the job or that any workers performing work on its behalf remained safe (*id.* at 58). He noted that on this job, Everest didn't inspect any fall arrest systems because "[i]t was another company that was removing it…So it would have been their responsibility" (*id.* at 67). Downes was not familiar with the plaintiff and did not witness his accident; nor did he direct RHG with respect to how to dismantle the scaffold (*id.* at 77).

Konstantin Oleynikov, who, at the time of the accident, was employed by RHG as an office manager, also had no knowledge of who the plaintiff was (NYSCEF Doc No. 170 at 7-8, 12). Oleynikov testified that an invoice indicated that, for the project at the premises, RHG was hired by Everest (*id.* at 15). He did not personally provide any instructions with respect to any job sites, and his duties were invoicing and writing reports (*id.* a 13, 20). He noted that RHG employees are supervised by the foreman on jobs, and did not know if the foreman took any instruction, direction, or guidance from someone at Everest with respect to this project (*id.* at 28-29, 30). Oleynikov was not aware of any accident report prepared for this accident, although, if an accident occurred, an accident report would generally be created with all possible information from any witnesses (*id.* at 44).

The vice-president of Preserv, Jeffrey MacGregor testified that he had negotiated the agreement to perform façade work at the premises and that Preserv was the general contractor (NYSCEF Doc No. 172 at 21-22, 25). MacGregor testified that Preserv had hired Everest to erect and dismantle the sidewalk shed and pipe scaffolding (*id.* at 28). Although Preserv had received a proposal for this work from Everest, MacGregor had not signed the Everest proposal (*id.* at 31). The project started in August 2018 and was completed by January 2019 (*id.* at 32). MacGregor therefore did not have any type of regular presence at the job site in January 2019, and no one was there on a daily basis on behalf of Preserv at that time (*id.* at 32). He testified that no Preserv employee assisted with disassembling the scaffolding at this project or oversaw it in January 2019 (*id.* at 33). Macgregor testified that Preserv "had no presence on the job" on the day of the

plaintiff's accident, but that Preserv was "informed of a broken window and a damaged stone from a plank that fell" (*id.* at 43, 45). However, he testified that Preserv "had no knowledge of any accident, anyone being injured" (*id.* at 55).

"'[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue'" (*Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978], quoting *Moskowitz v Garlock*, 23 AD2d 943 [3rd Dept 1965]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ Med Center*, 64 NY2d 851 [1985]). When evaluating a motion for summary judgment, "facts must be viewed 'in the light most favorable to the nonmoving party'" (*Vega v Restani Const Corp*, 18 NY3d 499, 503 [2012]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, 18 NY3d at 505).

In support of his motion for partial summary judgment with respect to his Labor Law § 240 (1) claim, plaintiff argues that it is uncontested that he was engaged in a protected activity when the accident occurred, and that the collapse of the scaffold establishes a prima facie case of liability under the statute, regardless of whether he was positioned on or under the scaffold when it collapsed (NYSCEF Doc No. 158 at 10). Plaintiff further contends that falling objects, such as the unsecured plank that allegedly struck him, fall with the ambit of Labor Law § 240 (1), and that he has established that the plank was in the process of being lowered at the time of the accident, and is therefore entitled to judgment as a matter of law.

In opposition, and in support of the branches of their respective motions seeking summary judgment dismissing the plaintiff's complaint, Everest and Preserv argue that the plaintiff has failed to present any evidence, aside from his own testimony, that the plaintiff was actually working at the job site on the date of the accident, or that the accident occurred as claimed by plaintiff. Further, Everest argues that a triable issue of fact remains as to whether plaintiff was the sole proximate cause of his accident. 160 Henry also argues, in opposition to plaintiff's motion and in support of its motion for summary judgment, that the plaintiff has failed to establish his prima facie entitlement to judgment as a matter of law, since the plaintiff has presented inconsistent versions of the accident and the evidence indicating that plaintiff was not working at the job site

creates a triable issue of fact as to whether the accident occurred as plaintiff claimed or, at all. 160 Henry further argues that, even if there were no issues of fact as to how plaintiff's accident occurred, the materials that allegedly fell were not in the process of being hoisted or secured and did not require securing for the purposes of the undertaking, and therefore did not fall within the ambit of Labor Law § 240 (1)'s protections. Moreover, 160 Henry contends that the plaintiff's alleged accident was not caused by the absence or inadequacy of any safety device.

"Labor Law § 240 (1) requires contractors to provide appropriate safety devices for the protection of workers engaging in labor that involves elevation related risks" (*Santiago v Hanley Group, Inc.*, 216 AD3d 833, 833-834 [2d Dept 2023]). Labor Law § 240 (1) provides that:

> "[a]ll 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 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"

"To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must show, prima facie, that the defendant violated the statute and that such violation was a proximate cause of his or her injuries" (*Lochlan v H&H Sons Home Improvement, Inc.*, 216 AD3d 630, 632 [2d Dept 2023]). However, "'[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 failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Medina-Arana v Henry Street Property Holdings, LLC*, 186 AD3d 1666, 1667 [2d Dept 2020], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Moreover, "[t]he protections of Labor Law § 240 (1) 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "The single decisive question in determining whether Labor Law § 240 (1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]).

Therefore, in a falling object case, "for section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object

fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 268 [2001]). "'[F]alling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Construct. Corp.*, 11 NY3d 757, 758-759 [2008]). "Rather, liability may be imposed where an object or material that fell, causing injury, was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Sung Kyu-To v Triangle Equities, LLC*, 84 AD3d 1058, 1060 [2d Dept 2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d at 268). "'While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work'" (*Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018], quoting *Niewojit v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016]). However, "[t]he statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected" (*Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013]). "To prevail on a motion for summary judgment in a Labor Law § 240 (1) 'falling object' case," it must be shown that "at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" (*Passos v Noble Construction Group, LLC*, 169 AD3d 706, 707 [2d Dept 2019]).

Here, plaintiff argues that it is uncontested that he was working on the scaffold when part of the scaffold collapsed and struck him, and therefore he is entitled to summary judgment on his Labor Law § 240 (1) cause of action. In support of this argument, plaintiff points to his deposition testimony that he was kneeling down to remove a nail when a plank from the scaffold above struck him (NYSCEF Doc No. 167 at 272-273, 275, 276, 278). However, plaintiff also submits in support of his motion the testimony of representatives of the defendants who testified that they had never heard of the plaintiff or his accident and that, although a plank damaged a window and stonework at the premises, they had no knowledge of any individual being injured on the date on which plaintiff claimed his accident occurred (NYSCEF Doc No. 168 at 35, 55-57; NYSCEF Doc No. 169 at 77; NYSCEF Doc No. 170 at 32, 44; NYSCEF Doc No. 171 at 34, 43, 45, 55). In opposition to plaintiff's motion and in support of the branches of their motions seeking dismissal of plaintiff's Labor Law § 240 (1) cause of action, defendants also submitted the affidavit of plaintiff's alleged foreman, who averred that "[plaintiff] did not work for RHG or Everest on January 15, 2019" and

that "[n]o one was injured at 160 Henry Street, Brooklyn NY from either Everest or RHG" (NYSCEF Doc No. 295 at 4).

Contrary to plaintiff's contentions, defendants are not collaterally estopped from contending that the plaintiff's accident did not occur as was described by the plaintiff or, at all. "Under the doctrine of collateral estoppel, a party is precluded from 'relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same'" (*Vitello v Amoy Bus Co.*, 83 AD3d 932, 933 [2d Dept 2011], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In order for collateral estoppel to apply, "[t]here must be 'an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling'" (*Lennon v 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 69 [2d Dept 2021], quoting *Buechel v Bain*, 97 NY2d 295 [2001]).

As is relevant to the instant action, however, Section 118-a of the Workers' Compensation law provides that "[w]ith respect to an action for a workers' compensation claim permissible under this chapter, no finding or decision by the [W]orkers' [C]ompensation [Board], judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer-employee relationship" (WCL §118-a). "Sections 118-a and 11(2) of the Workers' Compensation Law have retroactive effect, in that they apply to cases involving injuries that occurred prior to the Law's enactment on December 30, 2022" and Section 118-a "precludes reliance ... on a prior determination of a Workers' Compensation Board (WCB) for collateral estoppel purposes in a subsequent proceeding or action (apart from a determination of whether there was an employee-employer relationship)" (*Nunez v CH Housing Development Fund Corporation*, 234 AD3d 600, 600 [1st Dept 2025]). Since defendants' contentions with respect to the factual circumstances regarding the accident are distinct from any determination of whether there was an employee-employer relationship, defendants are not collaterally estopped from litigating that issue in this action. Moreover, plaintiff has failed to demonstrate that the factual circumstances surrounding his accident were a disputed issue at a proceeding before the Workers' Compensation Board, or that the Workers' Compensation Board specifically adjudicated that issue (*see Calixte v City of New York*, 207 AD3d 431, 432 [2d Dept 2022]).

Overall, plaintiff's own submissions, as well as the defendants,' highlight the existence of myriad triable issues of fact, specifically with respect to whether plaintiff was present at the job site on the date of the accident, whether he was authorized to perform the work he was allegedly engaged in, and how, and if, the accident itself occurred (*see e.g. Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dept 2022]; *Majerski v City of New York*, 193 AD3d 715, 717 [2d Dept 2021]; *Yao Zong Wu v Zhen Jia Wang*, 161 AD3d 813, 814-815 [2d Dept 2018] ["Here, the plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries"]). Moreover, there remain triable issues of fact as to whether the plywood plank and metal debris which allegedly fell on the plaintiff (while being removed as the scaffold itself was being disassembled) were objects that required securing for the purposes of removal, whether this was "a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected," whether such a device would have been contrary to the objectives of the work plan of disassembling and removing the scaffold itself, and whether the plank and debris fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute (*see Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002] ["Here, the asbestos that fell on the plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law § 240 (1) does not apply … This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"] [internal quotation marks omitted]; *Crichingno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664, 665 [2d Dept 2020] ["The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability with respect to the Labor Law § 240 (1) cause of action by showing that while he was working at ground level in the basement, a piece of plywood fell from an elevated height and struck him. However, in opposition, the defendants' submissions raised a triable issue of fact as to whether the plywood that struck the plaintiff was an object that did not require securing"] [internal citations omitted]; *Pazmino v 41-50 78th Street Corp.*, 139 AD3d 1029, 1030 [2d Dept 2016] ["The evidence submitted by the plaintiff was insufficient to establish that the wood fell because of the absence or inadequacy of a safety device … under the circumstances, including that the plaintiff did not see where the wood fell from, the plaintiff did not establish, prima facie, that his injuries were proximately caused by the absence or

inadequacy of a safety device or other violation of the statute"]; *Saber v 69th Tenants Corp.*, 107 AD3d 873, 876 [2d Dept 2013] ["While the object that fell was to be removed as part of the project, the location in which that item was situated and the lack of any device to protect the worker directly below it from a clear risk of injury raise a factual issue as to whether the object required securing for the purposes of the undertaking"])). Accordingly, the plaintiff's motion for partial summary judgment with respect to his Labor Law § 240 (1) cause of action is denied.

In light of the foregoing issues of fact discussed above, the branch of 160 Henry's motion for summary judgment seeking dismissal of the plaintiff's Labor Law § 240 (1) cause of action is denied.

With respect to the plaintiff's Labor Law § 241 (6) cause of action, "Labor Law § 241 (6) imposes a [non-delegable] 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" (*Song v CA Plaza, LLC*, 208 AD3d 760, 761 [2d Dept 2022] [internal quotation marks omitted]). "'To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" (*Graziano v Source Builders & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

Here, in his bill of particulars, plaintiff alleges violations of Industrial Code (12 NYCRR) §§ 23-1.7(e)(2); 23-5.1(c)(2); 23-5.1(e)(1) and (5); 23-5.1(f); 23-5.1(h); 23-5.6 (c); and 23-5.6 (g) (NYSCEF Doc No. 235 at 5).

Plaintiff does not oppose 160 Henry's motion insofar as it seeks dismissal of his Labor Law § 241 (6) cause of action to the extent it is based on 12 NYCRR §§ 23-1.7(e)(2); 23-5.1(c)(2); 23-5.1(e)(1) and (5); 23-5.1 (f); 23-5.6 (c); and 23-5.6 (g), and has withdrawn his claims that defendants violated these provisions of the Industrial Code (NYSCEF Doc No. 285 at 2). Notwithstanding, 160 Henry has established that Industrial Code (12 NYCRR) §§ 23-1.7(e)(2) (pertaining to tripping and other hazards); 23-5.1(c)(2) (pertaining to horizontal and diagonal bracing of scaffolds); 23-5.1(e)(1) and (5) (pertaining to scaffold planking requirements); 23-5.1(f) (pertaining to scaffold maintenance and repair); 23-5.6(c) (pertaining to bracing of pole scaffolds); and 23-5.6(g) (pertaining to specification requirements for pole scaffolds) are plainly inapplicable to the circumstances of this action. Accordingly, 160 Henry's motion, to the extent it seeks

dismissal of the plaintiff's Labor Law § 241 (6) cause of action is granted to the extent said claim is premised on the above-referenced provisions of the Industrial Code.

Plaintiff, however, contends that there remain triable issues of fact as to whether defendants violated Industrial Code § 23-5.1 (h), and whether such violation proximately caused his injuries. That provision provides that "[e]very scaffold shall be erected and removed under the supervision of a designated person" (12 NYCRR § 23-5.1[h]). Industrial Code § 23-1.4 (b) (14) further defines "designated person" as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty" (12 NYCRR §23-1.4[b][14]). Plaintiff argues that the fact that the foreman was, even by plaintiff's own account, present on site at the time of his accident is insufficient to establish that there was no violation of this section of the Industrial Code, since "Mr. Lucero failed in his duties as a supervisor by failing to provide the proper protection for Plaintiff to avoid being injured" (NYSCEF Doc No. 285 at 16). However, insofar as it is uncontested his foreman was present and supervised the removal of the scaffold at the time of plaintiff's accident, 160 Henry has established, as a matter of law, that this provision of the Industrial Code was not violated, in that the scaffold was removed under the supervision of a designated person – to wit, plaintiff's foreman, who plaintiff admitted provided instructions on how to dismantle the scaffold and was present and in the process of dismantling the scaffold along with plaintiff at the time of the alleged accident (NYSCEF Doc No. 167 at 226, 241-242, 243, 244, 266, 268; NYSCEF Doc No. 239 at 18, 67-68; *see e.g. Ortega v Trinity Hudson Holding LLC*, 176 AD3d 625, 626 [1st Dept 2019]; *Atkinson v State*, 49 AD3d 988, 989 [3rd Dept 2008]; *Leopoldino v 206 Kent Investor LLC*, 84 Misc 3d 1216[A], 2024 NY Slip Op 51457[U], at *5-6 [Sup Ct, Kings County 2024]). Accordingly, the branch of 160 Henry's motion to dismiss plaintiff's Labor Law § 241 (6) cause of action is granted, and said claim is dismissed in its entirety.

"'Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors and their agents to provide workers with a safe place to work'" (*Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020], quoting *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]). "'Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site and those involving the manner in which the work is performed'" (*Southerton v City of New York*, 203 AD3d 977, 979-98 [2d Dept 2022], quoting *Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]).

Where plaintiffs allege that their injuries result from the means or methods by which work is performed, "to be held liable under Labor Law § 200, 'a defendant must have the authority to exercise supervision and control over the work'" (*Narvarra v Hannon*, 197 AD3d 474, 476 [2d Dept 2021], quoting *Torres v City of New York*, 127 AD3d at 1165). "'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed'" (*Roblero v Bais Ruchel High School, Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). "'Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200'" (*Medina-Arana v Henry Street Property Holdings, LLC*, 186 AD3d 1666, 1668 [2d Dept 2020], quoting *Ortega v Puccia*, 57 AD3d at 62).

Here, 160 Henry has established its prima facie entitlement to judgment as a matter of law with respect to plaintiff's Labor Law § 200 and common-law negligence claims by establishing that they lacked sufficient authority to supervise or control the plaintiff's alleged work sufficient to impose liability. Plaintiff testified that he only received instruction or direction from his foreman, and that he was unaware of anyone who worked at 160 Henry (NYSCEF Doc No. 239 at 18). In opposition, plaintiff does not oppose that branch of 160 Henry's motion seeking to dismiss his Labor Law § 200 and negligence causes of action as against it. Accordingly, this branch of 160 Henry's motion is granted.

160 Henry also seeks summary judgment on its cross-claim for contractual indemnification as against Preserv. 160 Henry points to the contract in effect at the time of the accident between it and Preserv, which reads as follows under § 9.15:

> "To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Managing Agent, Unit Owners, Tenants, Architect, Architect's consultants and agents and employees, and officers, directors and shareholders of any of them (collectively, 'Indemnitees') from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work . . . *but only to the extent caused by the negligent acts or omissions* of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(NYSCEF Doc No. 247 at 13 [emphasis added]). Here, 160 Henry argues that this indemnification is clear and unambiguous, and, since the plaintiff's accident arose out of or resulted from the work set forth in the agreement and there is no evidence that 160 Henry was actively negligent, 160 Henry is entitled to a finding of contractual indemnification. In opposition, Preserv argues that plaintiff's accident, if it happened as alleged, did not occur at a time during which Preserv's work was ongoing, and that plaintiff's alleged accident was not caused by the negligent acts or omissions of Preserv or any subcontractor with which Preserv had direct contact. Preserv argues that, at a minimum, triable issues of fact preclude summary judgment as to 160 Henry's contractual indemnification claim.

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*McNamara v Gusmar Enters., LLC*, 204 AD3d 779, 783 [2d Dept 2022]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*id.*). "In the absence of a legal duty to indemnify, a contract for indemnification should be strictly construed to avoid imputing any duties which the parties did not intend to assume" (*id.*).

Here, the indemnity provision at issue limits Preserv's duty to indemnify 160 Henry "*only to the extent caused by the negligent acts or omissions* of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (NYSCEF Doc No. 247 at 13) [emphasis supplied]. However, at this juncture, any negligence, or lack thereof, by Preserv, Everest, or RHG, has not been established, since there are issues of fact surrounding the circumstances of the plaintiff's accident. Accordingly, 160 Henry has failed to establish that the indemnification provision has been triggered. Therefore, this branch of 160 Henry's motion is denied, without regard to Preserv's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In support of the branch of its motion seeking summary judgment dismissing the plaintiff's complaint, Preserv argues that it has established its prima facie entitlement to judgment as a matter of law, since plaintiff has failed to provide any corroborating witness or evidence to establish that the accident occurred, and because the evidence proffered by Preserv has conclusively established that there was no accident that occurred as plaintiff alleges. Preserv contends that since the evidence presented suggests that the plaintiff was not employed at the job site on the date of the accident, the protections of the Labor Law are not available to him, and the complaint must be

dismissed. In support of this contention, Preserv points to the attestation of Manuel Jesus Lucero Bonilla, who averred that plaintiff was not working at the job site in January 2019, and that no accident occurred on January 15, 2019 (NYSCEF Doc No. 211 at 3-4). Preserv further points to the testimony of representatives from 160 Henry, Preserv, Everest, and RHG, who each testified that they had no knowledge of plaintiff or any accident on the premises, as well as the fact that the plaintiff failed to provide any corroborating evidence, and provided inconsistent versions of his accident (NYSCEF Doc No. 207 at 35, 55-57; NYSCEF Doc No. 208 at 34, 43, 45, 55; NYSCEF Doc No. 209 at 77; NYSCEF Doc No. 210 at 32, 44). Furthermore, Preserv notes that, although plaintiff testified that there were no sign-in sheets at the job site, sign-in sheets for January 14, 2019, and January 15, 2019, were produced and do not list the plaintiff's name on either day (NYSCEF Doc No. 215).

Everest, in support of its motion seeking summary judgment dismissing the plaintiff's complaint, also argues that it is clear that the plaintiff was not on site or authorized to work on the day of his accident, and that the plaintiff has failed to present any evidence that an accident occurred as claimed. In support of this contention, Everest, much like Preserv, also points to the sign-in sheets, which do not list plaintiff's name (NYSCEF Doc No. 194), and the affidavit of the RHG foreman in which he avers that plaintiff was not working on the day of his alleged accident and that no accident occurred (NYSCEF Doc No 191 at 4). Everest also maintains that since it only requested five workers and the sign-in sheet shows five workers other than the plaintiff, "[i]t would defy logic for RHG to be paid to provide five workers and then provide a sixth worker free of charge" (NYSCEF Doc No. 178, at 4).

Here, plaintiff has testified that he was on site and working to dismantle the scaffold when he suffered an accident (NYSCEF Doc No. 188 at 272-273, 275, 276, 278; NYSCEF Doc No. 206 at 272-273, 275, 276, 278). To the extent that Preserv and Everest have presented evidence that would seem to contradict the circumstances surrounding the plaintiff's accident, such evidence raises an issue of triable fact and credibility of the parties. Accordingly, those branches of Preserv and Everest's respective motions seeking dismissal of the plaintiff's complaint on the ground that the plaintiff was not employed by any defendant or third-party defendant at the time of the accident must be denied (*see Bank of New York Mellon v Gordon*, 171 AD3d 197, 201-202 [2d Dept 2019]; *People v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012]; *Pryor v Mandelup LLP v Sabbeth*, 82 AD3d 731, 732 [2d Dept 2011]).

Alternatively, Preserv seeks leave under CPLR 3025(b) to amend its answer to add affirmative defenses and counterclaims for fraud, citing questions about whether plaintiff was even present at the job site on the date of the alleged incident (NYSCEF Doc No. 230 at 9). Similarly, Everest seeks to amend its answer to assert fraud-based defenses and counterclaims, alleging that plaintiff fabricated the accident for financial gain and made false statements about both the occurrence of the incident and the treatment received (NYSCEF Doc No. 178 at 13–14).

In the proposed amended answers for both Everest and Preserv, the parties seek to add an affirmative defense alleging that "[p]laintiff's accident did not occurred [sic] as alleged ... [p]laintiff has intentionally and knowingly made false and fraudulent statements of material fact to others, including physicians, and in the pleadings submitted in the within action" (NYSCEF Doc No. 196 at 7; NYSCEF Doc No. 228 at 10). Everest and Preserv further allege, in their respective proposed amended answers, that:

> "Upon information and belief, Plaintiff has intentionally and knowingly made a false and fraudulent statements of material fact to others, which he knew would be relied upon by the New York State Workers' Compensation Board and the Workers' Compensation carrier for his apparent employer... Upon information and belief, Plaintiff intentionally and knowingly went to medical providers to manipulate his medical treatment for the sole and specific purpose of claiming his injuries were causally related to this accident, even though Plaintiff knows they are not ... Upon information and belief, Plaintiff has consented to undergo treatments that were either not medically necessary or not related to injuries sustained in the within accident for financial gain to the detriment of Defendant(s) ... Upon information and belief, Plaintiff has intentionally and knowingly made false and fraudulent statements of material fact to others by submitting or causing to be submitted bills and supporting documentation that contained false representations of material fact concerning his apparent accident"

(NYSCEF Doc No. 196 at 7-8; NYSCEF Doc No. 228 at 10-11). Furthermore, Everest and Preserv allege that "[t]he false and fraudulent statements of material fact [included] representations that ... [1] plaintiff's alleged accident occurred; (2) plaintiff's alleged injuries were related to the accident alleged in the complaint; [and] the treatments received were medically necessary due to the alleged accident" and that "[p]laintiff knew the above-described misrepresentations were false and fraudulent when they were made" and "made the above-described misrepresentations and engaged in such conduct to induce Defendant(s) and/or their insurance carriers into relying on the misrepresentation and, thereafter, to obtain a windfall tort recovery herein" (NYSCEF Doc No. 196 at 8; NYSCEF Doc No. 228 at 11).

Everest and Preserv also seek to amend their respective answers to assert a counterclaim against plaintiff, alleging that "plaintiff did purposely and with knowledge and understanding, make numerous false statements and misrepresentations of facts to further a scheme of fraud" and that "[t]he purpose of such false and misleading statements was to keep knowledge from Defendants in attempting to defend this suit" (NYSCEF Doc No. 196 at 9; NYSCEF Doc No. 228 at 15). Preserv further alleges that plaintiff pursued an unnecessary course of medical treatment "to address non-existent or preexisting unrelated degenerative conditions, while claiming they were related to this accident" and "caused multiple written documents to be submitted to this court and to the parties containing false, misleading, or fraudulent statements of material fact, including but not limited to, a summons and complaint and bills of particulars, as well as the contents of multiple medical records" (NYSCEF Doc No. 196 at 9; NYSCEF Doc No. 228 at 15-16). The counterclaim alleges that "[p]laintiff made these above-referenced false statements and material misrepresentations with the intent to induce Defendants' reliance, and to recover damages on his fraudulent personal injury claim," that defendants "and the Court have been forced to justifiably rely on these false statements and material misrepresentations," and that they have "been forced to expend significant sums to defend the suit" (NYSCEF Doc No. 196 at 10; NYSCEF Doc No. 228 at 16).

"'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted'" (*Deutsche Bank National Trust Co. v Groder*, 218 AD3d 542, 545 [2d Dept 2023], quoting *U.S. Bank N.A. v Singer*, 192 AD3d 1182, 1185 [2d Dept 2021]). "While '[n]o evidentiary showing of merit is required under CPLR 3025 (b),' the court must still determine 'whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit'" (*Beharrie v MRAG Development, LLC*, 210 AD3d 945, 945-946 [2d Dept 2022], quoting *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). "'Generally, to state a counterclaim or affirmative defense sounding in fraud, a defendant must allege that (1) the plaintiff made a representation or a material omission of fact which was false and the plaintiff knew to be false, (2) the misrepresentation was made for the purpose of inducing the defendant to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury'" (*Emigrant Mtge Co., Inc. v Public Adm'r of Kings County*, 207 AD3d 437, 440-441 [2d Dept 2022], quoting *Shah v Mitra*, 171 AD3d 971,975 [2d Dept 2019]).

Here, the proposed affirmative defenses and counterclaims submitted by Everest and Preserv (which are nearly identical) are palpably insufficient and fail to plead the elements of fraud with sufficient particularity, especially with respect to the essential element of justifiable reliance. The conclusory statement indicating that Everest and Preserv "have been forced to justifiably rely on these false statements and material misrepresentations" is insufficient (NYSCEF Doc No. 196 at 10; NYSCEF Doc No. 228 at 16) (CPLR 3016[b]; *Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1141 [2d Dept 2016]). Moreover, there is no indication that Preserv and Everest have in fact relied on plaintiff's alleged misrepresentations with respect to the factual circumstances of his alleged accident. Notably, they have instead denied these allegations in their answers and throughout the litigation (*see Breton v Dishi*, 234 AD3d 432, 432 [1st Dept 2025]; *Republic of Kazakhstan v Chapman*, 217 AD3d 515, 517 [1st Dept 2023]). Further, to the extent that Preserv and Everest allege that they have been damaged by having "been forced to expend significant sums to defend the suit" (NYSCEF Doc No. 196 at 10; NYSCEF Doc No. 228 at 16), their "remedy would be to seek sanctions under CPLR 8303-a; however, that provision does not support an independent cause of action" (*Breton v Dishi*, 234 AD3d at 433). Accordingly, the proposed amendments are devoid of merit, the branches of Preserv's and Everest's motion seeking leave to amend their respective answers are denied.

Everest also seeks summary judgment dismissing the Preserv's third-party complaint as against it, as well as summary judgment on its contractual indemnification claim against RHG. In support of this branch of its motion, Everest points to the proposal submitted to Preserv, which it states was incorporated by reference into the subcontract between Everest and Preserv (Subcontract) and requires Preserv to indemnify Everest. Additionally, Everest notes that common law indemnification or contribution would be unavailable to Preserv, since Everest was not on site on the date of the accident. Further, Everest maintains that it entered into a contract with RHG (Sub-subcontract), which provides that RHG would indemnify Everest, and warrants summary judgment on its contractual indemnification claim against RHG. Everest also argues that RHG's common law indemnification and contribution crossclaims must be dismissed, since the evidence has demonstrated that Everest neither caused the plaintiff's injuries nor created an unsafe condition that caused same. Everest also notes that, since there is no contractual provision requiring Everest to defend or indemnify RHG or name it as an additional insured, RHG's contractual

indemnification and breach of contract for failure to procure insurance crossclaims should be dismissed.

Preserv, in turn, also seeks summary judgment on its third-party claims for contractual and common law indemnification as against Everest and RHG. Preserv argues that the Subcontract itself contained a provision requiring Everest, as subcontractor, to indemnify Preserv, as well as 160 Henry, and that, because Preserv was entirely finished with its façade restoration work, it was entirely free from negligence and therefore entitled to indemnification under the terms of the Subcontract. Preserv also contends that the provision in the Everest proposal, although incorporated by reference into the Subcontract, is not applicable to the circumstances here, since the proposal was executed only by Everest, and remained unsigned by Preserv. Preserv further seeks summary judgment on its breach of contract claim, stating that Everest and RHG are in breach of contract for failing to ensure that their respective insurance carriers recognize Preserv and Owner as an Additional Insured, although Preserv concedes that "Everest did, in fact, procure a Commercial General Liability and Excess Liability policy with Lloyd's of London with a combined per occurrence limit of $8,000,000 and obtained a Certificate of Insurance with Preserv as the certificate holder/Additional Insured" (NYSCEF Doc No. 230 at 19).

RHG opposes Everest's motion only insofar as it seeks to dismiss RHG's cross-claim for common law indemnification and contribution against Everest, and to the extent that it seeks summary judgment on Everest's common law indemnification and contribution claims, arguing that plaintiff testified that he worked for Everest, rather than RHG, and that there remains a triable issue of fact as to whether the individuals who allegedly caused plaintiff's injuries were employed by Everest. Similarly, RHG also opposes Preserv's motion to the extent that it seeks to dismiss RHG's counterclaims of common law indemnification and contribution, as asserted against Preserv, and to the extent it seeks summary judgment on Preserv's claims against RHG, arguing that Preserv is not a party to the subcontractor agreement between Everest and RHG, and therefore cannot assert a cause of action sounding in breach of contract or failure to procure insurance against RHG.

The subcontract between Preserv and Everest (Subcontract) states, in relevant part:

> "To the fullest extent permitted by law, Subcontractor shall defend, indemnify, save and hold harmless PRESERV, the owner of the Site, the owner's mortgage lender and their respective principals, officer, members, directors, agents, servants and employees (collectively, the 'Indemnified Parties') from and against claims,

> damages, losses, violations and expenses, including but not limited to disease or death, or to injury to or destruction of tangible property including loss of use resulting therefrom, but only to the extent caused in whole or in part by intentional acts, negligence acts or omissions to act of Subcontractor, a sub-subcontractor, at any tier, anyone directly or indirectly employed by Subcontractor, or by any such sub-subcontractor, or anyone for whose acts Subcontractor, or any such sub-subcontractor may be liable"

(NYSCEF Doc No. 185 at 4). The Subcontract also notes that "[t]his Agreement of Subcontract, as well as the annexed Terms and Conditions, and Everest proposal (attached as Exhibit A) shall hereinafter be referred to as the 'Subcontract'" (*id.* at 1). The Everest proposal (Proposal) provides, in pertinent part, that:

> "To the fullest extent permitted by law, the Customer agrees to indemnify, defend and hold harmless Everest, its officers, directors, agents, employees and partners (hereafter collectively 'Indemnitees' from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries, property damages (including loss of use thereof), trespass, nuisance, or any other action or legal proceeding, brought against any of the Indemnitees by any person or entity arising out of or in connection with the Project, including but not limited to the use and/or operation of the leased equipment"

(*id.* at 8). The Proposal notes that "[u]pon signing this agreement, it shall constitute a contract and is non-transferable (*id.* at 7), and that "[t]o the extent that Everest signs any other agreement or contract, the terms of the Everest Agreement shall be primary to the extent that the clauses are inconsistent" (*id.* at 9). This proposal is unsigned by Preserve, and the signature block, which reads that "[t]he foregoing document has been read and signing indicates agreement to its content, Scope and 'Term & Conditions'" is blank (*id.* at 9).

The subcontract between RHG and Everest (Sub-subcontract) reads, in pertinent part, that:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless Everest, Everest's Customer(s), Project Owner(s), Property Owner(s), and Property Manager(s) of the Project locations where Subcontractor is performing work, from and against claims, damages, losses and expenses (including but not limited to reasonable attorney's fees and court costs) arising directly, indirectly, or in any way relating to Subcontractor's work at 1150 Longwood Avenue, the Project locations, and any other location for Everest"

(NYSCEF Doc No. 186). The parties also produce an email regarding the project that is the subject of this action, noting that Preserv is the customer, which reads "[t]o the fullest extent permitted by law RHG Manpower, Inc. agrees to defend, indemnify and hold harmless Everest Scaffolding,

Inc., the Customer, and Owner identified above from any claims arising out of or in any way relating to your work at the Address identified above and to name Everest Scaffolding, Inc., the Customer, and Owner identified above on a primary basis on all policies of insurance" and is followed by an email purportedly from Gil Menashe which reads, "I agree" (NYSCEF Doc No. 187).

With respect to the contractual indemnification causes of action, "[t]he right to contractual indemnification depends upon the specific language of the contract" and a promise to indemnify should not be found unless such promise can be "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Roldan v New York Univ.*, 81 AD3d 625, 628 [2d Dept 2011]). "In addition, 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor'" (*Reisman v Bay Shore Union Free School*, 74 AD3d 772, 773 [2d Dept 2010], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature" (*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]).

At this juncture, any negligence, or lack thereof, by Preserv, Everest, and RHG has not yet been established, in light of the issues of triable fact surrounding the factual circumstances of the plaintiff's accident. As neither Preserv nor Everest has established, as a matter of law, that they are free from negligence with respect to plaintiff's alleged accident, neither are entitled to summary judgment on their respective contractual indemnification claims against each other. Similarly, that branch of Everest's motion seeking summary judgment on its contractual indemnification crossclaim against RHG is also denied (*see LaGuarina v Metropolitan Transit Authority*, 109 AD3d 793, 796 [2d Dept 2013]; *Bellefleur v Newark Beth Israel Medical Center*, 66 AD3d 807, 809 [2d Dept 2009]).

Furthermore, with respect to the branch of Preserv's motion seeking summary judgment on its causes of action sounding in breach of contract for failure to procure insurance as asserted against Everest and RHG, Preserv has failed to establish its prima facie entitlement to judgment as a matter of law. "A party seeking summary judgment based on alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision

required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Associates Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]).

Here, Preserv contends that Everest "was contractually obligated to procure insurance and cause said insurance to name Preserv Building Restoration Management Incorporated as an Additional Insured under said policies with limits of not less than $6,000,000" and that "in its sub-subcontract with RHG Manpower, Everest required the latter 'to indemnify and hold harmless' Everest, the property owner and Everest's customer (e.g. Preserv), *and* procure insurance for all of their benefit as 'additional insured on a primary, non-contributory basis with respect to all policies'" (NYSCEF Doc No. 230 at 19). However, Preserv has failed to present any evidence that Everest or RHG failed to comply with their obligation to procure insurance, instead conceding that, at least "Everest did, in fact procure a Commercial General Liability and Excess Liability policy with Lloyd's of London with a combined per occurrence limit of $8,000,000 and obtained a Certificate of Insurance with Preserv as the certificate holder/Additional Insured" (NYSCEF Doc No. 19). Thus, Preserv has failed to establish its prima facie entitlement to judgment as a matter of law on its third-party breach of contract for failure to procure insurance claim against Everest and RHG (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]). Accordingly, this branch of Preserv's motion is denied without regard to the opposition of Everest or RHG (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

However, to the extent that Everest seeks dismissal of RHG's contractual indemnification and breach of contract for failure to procure insurance crossclaims insofar as asserted against it, Everest has established its prima facie entitlement to judgment as a matter of law. Everest provided a copy of the Sub-subcontract which provides that RHG, not Everest, bears the duty to indemnify and procure insurance (NYSCEF Doc No. 218; NYSCEF Doc No. 219). RHG has failed to address or oppose this branch of Everest's motion, and therefore has failed to raise a triable issue of fact as to whether Everest entered into any contract which requires Everest to indemnify or procure insurance on behalf of RHG. Accordingly, RHG's second and third crossclaims as against Everest are dismissed.

Lastly, since there remain triable issues of fact as to whose negligence, if any, caused the plaintiff's alleged accident, the branches of Preserv's and Everest's motions seeking dismissal of RHG's counterclaims and crossclaims, respectively, asserting causes of action for common law

indemnification and contribution are denied (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 845 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (motion sequence number 3) is denied in its entirety; and it is further

ORDERED, that Everest's motion (motion sequence number 4) is granted to the extent that RHG's Second and Third Crossclaims are dismissed insofar as asserted against Everest. Everest's motion is otherwise denied; and it is further

ORDERED, that Preserv's motion (motion sequence number 5) is denied in its entirety; and it is further

ORDERED, that160 Henry's motion (motion sequence number 6) is granted to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed in its entirety, and plaintiff's Labor Law § 200/common-law negligence claims are dismissed insofar as asserted against 160 Henry. 160 Henry's motion is otherwise denied.

All arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein.

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice