SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

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SAID RIVERA,

Plaintiff,

- v -

LG CHELSEA LLC, FLINTLOCK CONSTRUCTION SERVICES LLC,

Defendants.

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INDEX NO. 160187/2019

MOTION DATE 04/28/2025, 05/29/2025, 05/30/2025

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

LG CHELSEA LLC, FLINTLOCK CONSTRUCTION SERVICES LLC

Plaintiff,

-against-

BMNY CONSTRUCTION CORP., BMNY CONTRACTING CORP.

Defendants.

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Third-Party
Index No. 595005/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 103, 109, 112, 114, 116, 119, 123, 124

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 104, 110, 113, 115, 117, 120, 125, 126, 127

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 111, 118, 121, 122, 128

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

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries arising out of a workplace accident that occurred on May 22, 2019.

FACTS

Sometime before January 2019, defendant LG Chelsea LLC ("Chelsea"), the owner of the premises on 113 West 24th Street, entered into a Construction Management Agreement with Flintlock Construction Services, LLC ("Flintlock") to construct a forty-two-story hotel. The Construction Management Agreement provided that Flintlock would award contracts to subcontractors to perform construction work on the site subject to Chelsea's approval (Exhibit P (mot. seq. 004) at 29, ¶ 8.01).

Pursuant to this agreement, Flintlock awarded third-party defendant BMNY Construction Corp. ("BMNY Construction") a contract to perform the superstructure work for the building. Around January 2019, BMNY Construction began work on the project. On February 18, 2019, Flintlock sent BMNY a letter of intent ("Letter of Intent") that articulated the scope of the work. The Letter of Intent was then signed by Ben Cupo, BMNY Construction's president and sole shareholder, and returned to Flintlock by February 19, 2019 (Letter of Intent, Exhibit Q (mot. seq. 004) at 13; Exhibit M (mot. seq. 004) at 46 [deposition of Ben Cupo]). BMNY Construction then performed work on the site from January 2019 through June 2019 (Exhibit M (mot. seq. 004) at 57, 63).

Plaintiff Said Rivera ("Rivera") was a lather employed by BMNY Construction. On May 22, 2019, Rivera was working on the ninth floor of the unfinished building. Rivera had been wearing a safety harness that he had provided for himself (Exhibit 6 (mot. seq. 002) at 59–60),

but he testified that he was not provided with safety equipment that he could have used to attach himself onto the building (*id.* at 60).

Unbeknownst to Rivera, a sizable hole on the ninth floor was covered by a loose piece of plywood. As Rivera walked across the ninth floor to speak with a coworker, he stepped on the plywood, the plywood gave way, and he fell to the eighth floor. Rivera sustained serious injuries because of his fall.

Following the accident, on June 4, 2019, Flintlock and BMNY executed a subcontractor agreement ("Subcontractor Agreement") generated by the American Institute of Architects (Exhibit B (mot. seq. 003) at 1, 26). The Subcontractor Agreement provided that the parties entered into the contract as of May 6, 2019 (*id.*). The Subcontractor Agreement also provided that BMNY Construction would indemnify Flintlock and Chelsea for liability arising out of the work performed by BMNY or any violation of any applicable laws by BMNY or its employees (*id.* at 9).

PENDING MOTIONS

On June 13, 2025, Rivera moved for an order granting summary judgment under CPLR § 3212 against Chelsea and Flintlock for a violation of Labor Law § 240(1).

On June 20, 2025, third-party defendants BMNY Construction and BMNY Contracting Corp. ("BMNY Contracting") moved for an order granting summary judgment under CPLR § 3212 to dismiss the claims of Chelsea and Flintlock for contractual indemnification, common-law indemnification and breach of contract.

On July 16, 2025, Chelsea and Flintlock moved for an order granting summary judgment under CPLR § 3212 against BMNY Construction and BMNY Contracting for contractual

indemnification. They also moved for an order granting summary judgment against Rivera to dismiss his complaint against Chelsea and Flintlock.

The motions are consolidated herein for disposition and granted to the extent set forth below.

DISCUSSION

Standard of Review

Summary judgment is a drastic remedy reserved for cases when it is apparent that "no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). To prevail on a motion for summary judgment, the movant must establish prima facie entitlement to judgment as a matter of law, providing evidence in admissible form that demonstrates the absence of any triable issues of fact (CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25–26 [2019]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). When the movant meets this burden, the nonmovant may overcome the motion by offering evidence in admissible form that shows the existence of triable issues of fact (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016]). However, "[m]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*id.*, quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). Courts view the evidence in a light most favorable to the nonmovant, according the nonmovant "the benefit of every reasonable inference" (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Rivera's and Chelsea and Flintlock's Motions for Summary Judgment

Triable issues of fact exist as to whether Flintlock was statutory agent under Labor Law §§ 240(1).

Before addressing the merits of Rivera's Labor Law §§ 240(1) and 241(6) claims, Chelsea and Flintlock argue that Flintlock cannot be liable under the statute because Flintlock was a construction manager on the project rather than a general contractor (Affirmation in Support (mot. seq. 004) at 13). Labor Law § 240(1) provides:

> "All contractors and owners and their agents . . . in the erection . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240(1)).

Similarly, Labor Law § 241 provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements" (Labor Law § 241).

While a general contractor can be held liable under sections 240(1) and 241(6), a construction manager is generally only liable when they are a statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863–64 [2005], citing *Russin v Louis N Picciano & Son*, 54 NY2d 311, 317–18 [1981] [regarding Labor Law § 240(1)]; *see also DaSilva v Haks Engrs.*, 125 AD3d 480, 481 [1st Dept 2015] [dismissing section 240(1) and 241(6) claims against a construction manager because the manager was not considered a statutory agent]).

However, when work that would give rise to the statutory duties under sections 240(1) and 241(6) is delegated to a construction manager, that entity becomes a statutory agent of the owner or general contractor when it "obtains the concomitant authority to supervise and control that work" (*Walls*, 4 NY3d at 864, quoting *Russin*, 54 NY2d at 318). The supervision or control delegated to the construction manager must involve "the specific work area involved or the work which [gave] rise to the injury" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011] [alteration in original], quoting *Headen v Progressive Painting Corp.*, 160 AD2d

319, 320 [1st Dept 1990]). A construction manager's having "overlapping authority" with another subcontractor to supervise the plaintiff's work does not release it as a statutory agent (*see id.*, citing *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

In *Walls v Turner Construction Co.*, the Court of Appeals held that a construction manager of a project was a statutory agent under section 240(1) (4 NY3d at 863–64). The Court of Appeals reasoned that (1) contractual terms created an agency relationship delegating safety and supervisory responsibilities from the owner to the construction manager, (2) no general contractor was assigned to the project, (3) the construction manager actually exercised the duty to oversee the construction site for safety, and (4) the construction manager's representative acknowledged that it had the authority to stop unsafe work practices (*id.* at 864).

Conversely, in *Balthazar v Full Circle Constr. Corp.*, the First Department held that factual issues existed as to whether a construction manager was a statutory agent because the plaintiff's employer had been delegated the authority to supervise the plaintiff's injury-producing work (268 AD2d 96, 99 [1st Dept 2000]). The First Department observed that the contract between the construction manager and the plaintiff's employer expressly provided that the construction manager was not to coordinate safety programs for the plaintiff's employer nor supervise the acts or omissions other entities' employees (*id.* at 98).

Applying the first factor of the Court of Appeals's *Walls* analysis to the facts herein, there were express contractual terms creating an agency relationship in which Flintlock could exercise supervisory control of the premises. The Agreement states that Flintlock was to "establish, implement and observe all safety, health and environmental protection measures" (Exhibit P (mot. seq. 004) at 23), and Flintlock's "Site Safety Manager" would be responsible for "the prevention of accidents" (*id.*). Two individuals were designated as project manager and

superintendent "to supervise performance of the Work" (*id.* at 43). Such "Work" included (1) construction management services, (2) the furnishing of all labor and materials connected to the project and (3) furnishing business administrative duties in relation to the project (*id.* at 7–9). Further, the Agreement provided for rates for persons designated as Flintlock's "Risk Manager / Safety Director," "in house safety inspections," "Senior Superintendent," "Carpenter / Safety," "Labor Foreman," and "Hoist / Elevator Operators" (*id.* at 86). Thus, the creation of this agency relationship granting Flintlock authority over the safety practices on the site weighs in favor of designating Flintlock as a statutory agent.

Second, there was no general contractor on this site, weighing in favor of designating Flintlock as a construction manager (*see Walls*, 4 NY3d at 864). The Construction Management Agreement between Chelsea and Flintlock designates Chelsea as "Owner" and Flintlock as "Construction Manager" (Exhibit P (mot. seq. 004) at 1). Nothing within the document designates Flintlock as a general contractor (*see id.*). Rivera points out that Jeffrey Lam, the owner of the premises, admitted that Flintlock served as the general contractor on the project (Exhibit I (mot. seq. 004) at 16).

Under the third prong of the *Walls* analysis, Chelsea and Flintlock counter that Rivera's employer, BMNY, was the only entity who actually exercised direct supervision and control over Rivera on that day, releasing them of liability under the statute (Affirmation in Support (mot. seq. 004) at 15, ¶ 80–81). They offer evidence from Rivera's deposition, in which he testified that BMNY left Rivera in charge of supervising the work of other BMNY employees on the day of his injury (Exhibit F (mot. seq. 004) at 80–81). Further, Kevin Griffin, one of Rivera's supervisors at BMNY, stated that BMNY, not Flintlock, hired carpenters whose duties were to

put up "[g]uardrails on the edge of the deck, covering floor holes, protecting elevator shafts and staircases, building ladders" (Exhibit J (mot. seq. 004) at 44–45).

Even though BMNY may have had the duty to ensure worksite safety and stop unsafe work practices, that does not release Flintlock from liability as a statutory agent (*see Walls*, 4 NY3d at 864). As the First Department held in *Nascimento*, whether Flintlock "actually supervised the plaintiff" on the day that the injury occurred is irrelevant (86 AD3d at 193). And the fact that BMNY "possessed concomitant or overlapping authority to supervise" the injury-producing work does not weigh upon whether Flintlock had the authority to supervise and control Rivera's work for the purposes of being designated as a statutory agent (*id.*). The only evidence Flintlock offers in opposition is that Rivera testified that BMNY supervised Rivera on the day of the accident (Affirmation in Support (mot. seq. 004) at 15). Flintlock has not shown that it did not possess the authority to supervise Rivera's work on the day of the injury.

Because there was (1) express contractual terms delegating Flintlock the duty to coordinate safety practices on the worksite, (2) there was no general contractor on the worksite, and (3) Flintlock has not shown that it lacked the authority to supervise Rivera's work, the Court holds that Flintlock was a statutory agent under Labor Law §§ 240(1) and 246(1).

Rivera is entitled to summary judgment on his Labor Law § 240(1) claim against Chelsea because he demonstrated that he was not provided with adequate safety equipment that would have prevented his fall.

Labor Law § 240(1) "imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury" (*Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 338 [2008], quoting *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). As the Court of Appeals explained, the purpose of the statute is "to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner

and general contractor, instead of the workers themselves" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The statute imposes liability on an owner, general contractor, or statutory agent when they fail to provide adequate safety devices "without regard to external considerations such as rules and regulations, contracts or custom and usage" (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 523 [1985]). When a plaintiff demonstrates a prima facie case that a violation of section 240(1) proximately caused their injury, the burden shifts to defendants to present "evidence of a triable issue of fact relating to the prima facie case or to [the] plaintiff's credibility" (*Klein v City of New York*, 89 NY2d 833, 835 [1996]). Additionally, the plaintiff's contributory negligence will not defeat a section 240(1) claim (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]).

Rivera argues that Chelsea and Flintlock violated Labor Law § 240(1) when they failed to provide "any safety equipment, let alone adequate safety equipment" that would have prevented him from falling through the hole created in the floor of the building (Plaintiff's Memorandum of Law in Support at 5, ¶ 14). Chelsea and Flintlock, in opposition, argue that Rivera has not made out a *prima facie* case because he "had a harness, yo-yo and an elevated point above him" onto which he could have secured himself (Chelsea and Flintlock's Affirmation in Support at 13, ¶ 68). However, Chelsea and Flintlock fail to mention that Rivera *provided himself* with this equipment—not that the equipment was provided by Chelsea, Flintlock, or the BMNY defendants (Exhibit F (mot. seq. 004) at 60). Rivera testified that he bought his harness from Amazon, and if he thought he needed a yo-yo or safety line on a particular day, he would bring them to the worksite himself (*id.*). While Rivera did bring his yo-yo with him that day to the worksite, he did not have a yo-yo available at the time of his injury (*id.* at 112–13). Because

section 240(1) places this duty "on the owner and general contractor" rather than "the workers themselves" (*Gordon*, 82 NY2d at 559), Rivera's possession of his own harness and yo-yo at the site on the day of injury does not defeat his motion for summary judgment.

Rivera's having provided himself with his harness and yo-yo also negates Chelsea and Flintlock's defense that Rivera was a "recalcitrant worker." An injured party's section 240(1) claim fails under the "recalcitrant worker" defense when the plaintiff (1) disobeyed an "immediate and active direction" not to use a particular unsafe piece of equipment or (2) refused to use adequate safety equipment "*when such were provided*" (*Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96, 99 [1st Dept 2000] [emphasis added], quoting *Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 680 [2d Dept 1996], *affd* 88 NY2d 946 [1996]). Rivera neither disobeyed an immediate directive to secure himself to the structure, nor did BMNY Construction or Chelsea and Flintlock provide him with an adequate safety device.

Rivera has thus made a *prima facie* case that he was not provided with any safety equipment on the day his injury occurred and that the lack of this equipment was the proximate cause of his elevation-related injury. In turn, Cheslea and Flintlock have not raised any triable issues relating to the cause of Rivera's injury, nor have they sufficiently impeached his credibility (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]). Accordingly, the Court grants Rivera's motion for summary judgment seeking judgment on his section 240(1) claim against Chelsea and Flintlock.

Rivera's Claims Under Labor Law § 241(6)

Chelsea and Flintlock move for dismissal on all of Rivera's section 241(6) claims. Given the above award to plaintiff of summary judgment on liability, this motion is denied as moot.

Rivera's Common-Law Negligence and Labor Law § 200 Claims

Chelsea and Flintlock also move for summary judgment dismissing Rivera's common-law negligence and Labor Law § 200 claims (Chelsea and Flintlock's Affirmation in Support at 20). Rivera did not move the Court for summary judgment on these claims, and he oppose Chelsea and Flintlock's motion for summary judgment in reply (*see* Plaintiff's Memorandum of Law). Because Rivera did not oppose Chelsea and Flintlock's motion for summary judgment on these claims, the Court deems them abandoned and dismisses them against Chelsea and Flintlock (*Linares v Massachusetts Mut. Life Ins. Co.*, 225 AD3d 520, 521 [1st Dept 2024] [affirming dismissal of a plaintiff's common-law negligence and Labor Law § 200 claim because the plaintiff did not oppose its dismissal on summary judgment]).

The BMNY Defendants' and Chelsea and Flintlock's Motions for Summary Judgment

In the BMNY defendants' motion for summary judgment, they argue that no indemnity obligation existed between them because (1) no express contract was in effect on the date of Rivera's injury that granted Chelsea and Flintlock a right of indemnity and (2) Workers' Compensation Law § 11 bars Chelsea and Flintlock's claims against them for common-law indemnification and contribution. Chelsea and Flintlock counter that the BMNY defendants must indemnify them from Rivera's claim because either (1) the February 19, 2019, letter of intent ("Letter of Intent") prepared by Flintlock effected a binding contract between the parties that granted Chelsea and Flintlock a right of indemnity or (2) the Standard Form AIA Agreement ("AIA Agreement") executed on June 4, 2019, applied retroactively to May 9, 2019, which grants Chelsea and Flintlock indemnity. Finally, the BMNY defendants separately argue that all of Chelsea and Flintlock's claims should be dismissed against BMNY Contracting Corp.

("BMNY Contracting") because BMNY Contracting was not a party to any purported contract nor did it ever perform work on the subject worksite.

For the reasons set forth below, the Court grants the BMNY defendants' motion for summary judgment to dismiss all of Chelsea and Flintlock's claims against BMNY Contracting. The Court grants Chelsea and Flintlock's claim for contractual indemnity against BMNY Construction and dismisses Chelsea and Flintlock's common-law indemnity claim. Finally, the Court grants the BMNY defendants' motion for summary judgment relating to contribution.

BMNY Contracting Corp.

The BMNY defendants first argue that BMNY Contracting need not indemnify Chelsea and Flintlock because it was not a party to any purported agreement between BMNY Construction, Chelsea and Flintlock, nor did it perform work on the site of Rivera's injury.

In their Affirmation in Reply, Chelsea and Flintlock refer to BMNY Construction and BMNY Contracting collectively as "BMNY"; however, they do not contest this portion of the BMNY defendants' motion. The record also supports the BMNY defendants' argument: The AIA Agreement hiring BMNY Construction as a subcontractor contains the names of Chelsea, Flintlock, and BMNY Construction but not BMNY Contracting (Exhibit B (mot. seq. 003), at 2). Additionally, nowhere do the underlying papers indicate that BMNY Contracting performed any work at the site where Rivera was injured. The president of BMNY Construction testified that BMNY Contracting ceased operating 2016—three years before Rivera's injury (*see* Exhibit 11 (mot. seq. 002) at 15–16).

Accordingly, the Court grants the BMNY defendants' motion for summary judgment to dismiss Chelsea and Flintlock's claims for contractual indemnification, common-law indemnification, and contribution against BMNY Contracting.

Chelsea and Flintlock's Contractual Indemnification Claim Against BMNY Construction

Indemnity involves "the right of one party to shift the entire loss to another" (23 NY Jur 2d, Contribution, Indemnity, and Subrogation § 73). A party's right of indemnity arises out of two scenarios: (1) contractual, or express, indemnification and (2) common-law, or implied, indemnification. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374–75 [2011]). Courts strictly construe a contract assuming an indemnity obligation "to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491 [1989]).

Sometimes, parties will execute an indemnification contract after the date of an accident that would give rise to indemnification. An indemnification obligation in such a contract applies retroactively to a pre-execution date when "evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of [a pre-accident date], and that the parties intended that it apply as of that date" (*Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361, 362 [1st Dept 2004] [*alteration in original*] [*internal quotations omitted*], quoting *Stabile v Viener*, 291 AD2d 395, 396 [2d Dept 2002]). The proponent must demonstrate that the agreement contains "express words or necessary implication [by which] it clearly appears to be the parties' intention to include past obligations" (*Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464, 465 [1st Dept 2016] [alteration in original], quoting *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

The American Institute of Architects Subcontractor Agreement

Chelsea, Flintlock, and BMNY Construction signed a subcontractor agreement generated by the American Institute of Architects ("Subcontractor Agreement") on June 4, 2019 (Exhibit R (mot. seq. 004) at 26). The indemnity provision of the Subcontractor Agreement provides:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Construction Manager [and] Owner . . . . In addition, to the fullest extent permitted by law, the Subcontractor shall indemnify, defend . . . and hold harmless the Construction Manager [and] Owner . . . from and against all liability (including but not limited to statutory liability), lawsuits, causes of action, liens, fines, demands, suits, claims, damages, losses, judgments, awards, penalties, interest and expenses, including but not limited to attorneys' fees, costs and disbursements, to the extent arising or alleged to arise from: (i) a breach of this Agreement; (ii) the Work performed hereunder by the Subcontractor or any of its sub-subcontractors; (iii) the violation of any applicable law by Subcontractor or its sub-subcontractors and their employees, in connection with the provision of the Work hereunder; (iv) Subcontractor's failure to perform any of its obligations under this Agreement; (v) any act or omission of Subcontractor or its sub-subcontractor or their employees or agents, whether negligent, reckless or intentional; or (vi) disharmony or interference with other subcontractors or the Construction Manager or the labor of each of them, provided that this indemnity shall not extend to the liability of any Indemnitee from its own negligence or willful misconduct." (*id.* at 9–10, § 4.7.1).

Regarding the date that this Subcontractor Agreement would take effect, the contract's plain language showcases an intent to apply retroactively. The first page of the Subcontractor Agreement expressly states that the agreement was "made as of the 9th day of May in the year 2019" (*id.* at 1). The signature page of the Subcontractor Agreement—immediately above where the representatives from Flintlock and BMNY signed—the states, "This Agreement entered into as of the day and year first written above" (*id.* at 26). And the first date written on the Subcontractor Agreement is May 9, 2019 (*see id.* at 1, 26). Additionally, Andrew Weiss, a managing member of Flintlock, testified, "I believe I signed [the Subcontractor Agreement] when it was created which is the as of date on the [Subcontractor Agreement]. As of date is the date that the contract is generated" (Exhibit L (mot. seq. 004) at 22).

While the BMNY defendants emphasize that the AIA Agreement was "executed more than three weeks after [Rivera's] accident" (BMNY's Memorandum of Law at 3), the essential question is whether the contract was "*made*," not executed, on a pre-accident date (*Podhaskie,* 3 AD3d at 362 [emphasis added]; *see also Penske Truck Leasing Co., LP v Home Ins. Co.*, 251

AD2d 478, 479 [2d Dept 1998]). An execution date factors into a factfinder's consideration of when the contract was made, but that date is not dispositive (*see Podhaskie*, 3 AD3d at 362).

Thus, both the plain language of the document coupled with the additional testimony compels the "necessary implication" that the parties both intended the obligations in the contract to have retroactive effect on May 9, 2019, and that the contract was made on that date (*see Juarez v Rye Depot Plaza, LLC*, 140 AD3d at 465). The Court thus grants Chelsea and Flintlock's motion for summary judgment against BMNY Construction, holding that BMNY Construction must indemnify Chelsea and Flintlock for claims arising out Rivera's accident pursuant to the provision of their May 9, 2019, Agreement. Because the Court holds that the Subcontractor Agreement was in effect on the date of Rivera's accident, the Court dismisses Chelsea and Flintlock's claim for common-law indemnity against BMNY Construction.

Chelsea and Flintlock are not entitled to contribution from BMNY because Rivera did not suffer a "grave injury" under Workers' Compensation Law §

Workers' Compensation Law § 11 provides:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" (Workers' Compensation Law § 11(1) [internal quotation marks in original]).

A "grave injury" includes:

> "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (*id.*).

Absent an express indemnification agreement or a grave injury, "an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits" (*Fleming v Graham*, 10 NY3d 296, 299 [2008]).

The Court of Appeals strictly interprets the meaning of "grave injury" to include an injury or condition specifically enumerated by the statute. In *Fleming v Graham*, the Court of Appeals reversed decisions of both the trial court and the Appellate Division, holding that a plaintiff's permanent and severe facial disfigurement did not qualify as a "grave injury" under section 11 because it was not explicitly listed by the statute (*see* 10 NY3d at 298–99). Similarly, in *Castro v United Container Machinery Group, Inc.*, the Court of Appeals held that the *partial* loss of multiple fingers was not a grave injury because the statute's use of the term "loss of multiple fingers" meant a *complete* loss of fingers (96 NY2d 398, 400–01 [2001]).

The BMNY defendants argue that they cannot be held liable for contribution because Rivera did not suffer a "grave injury" under Workers' Compensation Law § 11. While Rivera's Bill of Particulars alleges serious and permanent injuries, it does not allege any injuries that the statute specifically lists (*see* Exhibit 3 (mot. seq. 002) at 1–2). Because Rivera did not suffer a "grave injury" under Workers' Compensation Law § 11, the Court grants the BMNY defendants' motion for summary judgment to dismiss Chelsea and Flintlock's claim for contribution against BMNY Construction.

Chelsea and Flintlock's Breach of Contract Claim

Finally, the BMNY defendants moved to dismiss Chelsea and Flintlock's claim for breach of contract, arguing that they properly purchase liability insurance pursuant to their Subcontractor Agreement (BMNY's Affidavit in Support (mot. seq. 003) at 7–8). Chelsea and Flintlock did not oppose this portion of the BMNY defendants' motions in their supporting papers (*see* Chelsea and Flintlock's Affirmation in Support).

The Subcontractor Agreement stipulated that the BMNY defendants were to purchase coverage for general liability in the amount of $1,000,000.00 and coverage for excess liability in

the amount of $1,000,000.00, naming Flintlock as an additional insured (Exhibit B (mot. seq. 003) at 143, 143 ¶ 6.3). In support of their motion for summary judgment, the BMNY defendants produced a Certificate of Liability Insurance, dated February 19, 2019, showing $1,000,000.00 in general liability coverage and $3,000,000.00 in excess liability coverage (Exhibit E (mot. seq. 003), at 1). The certificate also named Flintlock as an additional insured (*id.*).

Because Chelsea and Flintlock have not shown "facts sufficient to require a trial of any issue of fact" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]), the Court grants the BMNY defendants' motion for summary judgment to dismiss Chelsea and Flintlock's claim for breach of contract.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion of Said Rivera (mot. seq. 002) is granted to the extent of awarding Plaintiff summary judgment as to liability pursuant under Labor Law § 240(1) as against LG Chelsea LLC and Flintlock Construction Services LLC; and it is further

ORDERED that the motion of BMNY Construction Corp. and BMNY Contracting Corp. (mot. seq. 003) is granted to the extent that all claims of LG Chelsea LLC and Flintlock Construction Services LLC against BMNY Contracting Corp. are dismissed; and it is further

ORDERED that the motion of BMNY Construction Corp. and BMNY Contracting Corp. (mot. seq. 003) is further granted to the extent of dismissing the claim of LG Chelsea LLC and Flintlock Construction Services LLC for common-law indemnification, contribution, and breach of contract against BMNY Construction Corp; and it is further

ORDERED that the motion of BMNY Construction Corp. and BMNY Contracting Corp. (mot. seq. 003) is otherwise denied; and it is further

ORDERED that the motion of LG Chelsea LLC and Flintlock Construction Services LLC (mot. seq. 004) is granted to the extent of dismissing the Labor Law §§ 200 claim and common-law negligence claim and denied as moot as to the 241(6) claim; and it is further

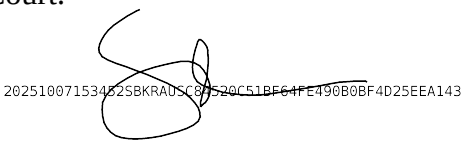
ORDERED that the motion of LG Chelsea LLC and Flintlock Construction Services LLC (mot. seq. 004) is granted to the extent of awarding them summary judgment on their claim for contractual indemnification against BMNY Construction Corp. and is otherwise denied; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that, within twenty (20) days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119, New York, NY 10007); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes and the decision and order of this Court.



10/7/2025
DATE

SABRINA KRAUS, J.S.C.

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**