

Gorski v Parisi Family L.P.

2025 NY Slip Op 34218(U)

January 3, 2025

Supreme Court, Queens County

Docket Number: Index No. 701732/2020

Judge: Joseph J. Esposito

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Joseph J. Esposito
Justice

Part 17

-----X
JAROSLAW GORSKI,

Plaintiff,

Index No. 701732/2020

Motion Date: 05/08/2024 and
07/17/2024

-against-

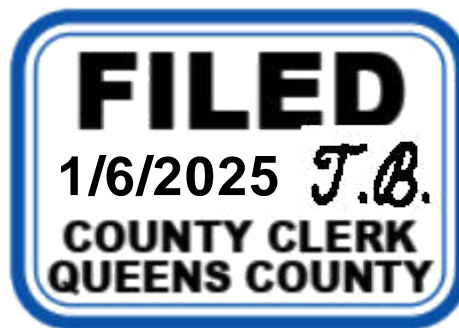
Motion Seq. No. 2, 5 and 6

THE PARISI FAMILY LIMITED PARTNERSHIP,
OCS BUILDERS GROUP, LLC and C.M. RICHLEY
ELECTRICAL CONTRACTORS, INC.,

Defendant.

-----X
OCS BUILDERS GROUP, LLC,

Third-Party Plaintiff,



-against-

SANITECH SERVICES INC.,

Third-Party Defendant.

-----X

The following numbered papers read on these motions: (1) the motion by the third-party defendant Sanitech Services Inc. (a) for summary judgment dismissing the third-party complaint, and (b) for partial summary judgment as to liability on its cross-claims for contractual indemnification, common law indemnification, and contribution against the defendant CM Richey Electrical Contractors Inc.; (2) the separate motion by the plaintiff for partial summary judgment as to liability on his Labor Law §§ 200, 240 (1), and 241 (6) claims asserted against the defendants; (3) the cross-motion by the defendant The Parisi Family Limited Partnership (a) for summary judgment dismissing the complaint insofar as asserted against it, (b) for partial summary judgment as to liability on its cross-claims for contractual indemnification and common law indemnification against the defendant CM Richey Electrical Contractors Inc.; and (4) the separate motion by the defendant OCS Builders Group, LLC (a) or summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims insofar as asserted against it, (b) for partial summary judgment as to liability on its cross-claim for common law indemnification against the

defendant CM Richey Electrical Contractors Inc., and (c) for partial summary judgment as to liability on its third-party claim for contractual indemnification asserted against the third-party defendant Sanitech Services Inc.

	<u>Papers Numbered</u>
<u>Seq #2</u>	
Notice of Motion – Affidavits – Exhibits	EF 86-111
Answering Affidavits – Exhibits	EF 135-138
 <u>Seq #5</u>	
Notice of Motion – Affidavits – Exhibits	EF 146-158
Notice of Cross-Motion – Affidavits – Exhibits	EF 181-203
Answering Affidavits – Exhibits	EF 206
	EF 208-209
	EF 212-216
Reply Affidavits	EF 217-219
	EF 223-224
 <u>Seq #6</u>	
Notice of Motion – Affidavits – Exhibits	EF 159-180
Answering Affidavits – Exhibits	EF 207
	EF 210-211
Reply Affidavits	EF 220-222

Upon the foregoing papers it is ordered that the motions and cross-motion are consolidated for the purpose of a single order and are determined as follows:

This action arises from injuries that the plaintiff allegedly sustained while working on a construction site in Maspeth. The plaintiff, an HVAC technician, testified that his accident occurred as he was walking to the porta potties at the job site. He indicated that, after walking into the room where the porta potties were located, he was struck in the head by a metal pipe, which fell from behind him. Although he did not actually see it fall, the plaintiff believed that the pipe, which he approximated to be ten feet long and four inches in diameter, fell from above him.

At the time of the plaintiff’s accident, two employees of the defendant C.M. Richey Electrical Contractors, Inc. (C.M. Richey) were attaching electrical conduit to the ceiling in the room where the plaintiff’s accident occurred. The two C.M. Richey employees, Deron Ross and Laechezar Lazaro, each testified that they were performing this work in an area immediately adjacent to the entrance to the room. To do so, Ross, would stand on an A-frame ladder located on one side of the entrance and pass pieces of conduit to Lazaro, who was standing on an elevated scissor lift on the opposite side of the entrance, and Lazaro would secure the conduit to the ceiling. Ross testified that when he set up the ladder, the entrance to the room was to his right, the scissor lift was further to his right, there was a wall to his left, and the porta potties were behind him. Ross further testified that, immediately prior to the plaintiff’s alleged accident, he leaned a piece of

conduit vertically against the wall to his left. Ross further testified that, as he was ascending the ladder, the conduit tilted and fell towards the porta potties. Although he heard the conduit hit the ground, Ross indicated that he did not actually see it fall or strike the plaintiff. According to Ross, each piece of conduit was ten feet long and three inches in diameter, and weighed approximately twenty-five pounds.

As a result of injuries he allegedly sustained in this accident, the plaintiff subsequently commenced this action against The Parisi Family Limited Partnership (Parisi), the owner of the property where the accident occurred, OCS Builders Group, LLC (OCS), the general contractor for the construction project, and C.M. Richey, asserting causes of action for common-law negligence and alleged violations of Labor Law §§ 200, 240 (1), and 241 (6). Parisi answered the complaint and asserted cross-claims for contractual indemnification, common-law indemnification, and breach of contract against OCS and C.M. Richey. C.M. Richey separately answered the complaint and asserted cross-claims for contractual indemnification, common-law indemnification, and contribution against OCS and Parisi. OCS separately answered the complaint and asserted cross-claims for contractual indemnification, common-law indemnification, contribution and breach of contract against Parisi and C.M. Richey.

OCS subsequently commenced a third-party action against Sanitech Services Inc. (Sanitech), asserting claims for contractual indemnification, common-law indemnification, contribution, and breach of contract. Sanitech's answer to the third-party complaint asserts counterclaims for contractual indemnification, common-law indemnification, contribution, and breach of contract against OCS. Sanitech's answer to the third-party complaint also asserts cross-claims for contractual indemnification, common-law indemnification, contribution, and breach of contract against Parisi and C.M. Richey.

Discovery having been completed, the plaintiff, Parisi, OCS, and Sanitech separately move for summary judgment.

The plaintiff's motion

In support of his motion, the plaintiff submits his bills of particulars, the transcripts from the deposition of the plaintiff, the transcript from the deposition of John Belsito, a project manager for Parisi, the transcript from the deposition of Paul Genna, a project manager for OCS, the transcript from the deposition of John D'Agnese, a project manager for C.M. Richey, the transcript from the deposition of Robert Madarasz, the vice president of operations and business development for Sanitech, the transcripts from the depositions of Ross and Lazaro, and the affirmation of Douglas D. Miller, the plaintiff's occupational safety expert. Based on these submissions, the plaintiff argues that he is entitled to partial summary judgment as to liability on his Labor Law § 240 (1) claim because Parisi, as the property owner, OCS, as the general contractor, and C.M. Richey, as the agent of the owner and general contractor, are all proper parties under the Labor Law. He further asserts that a violation of Labor Law § 240 (1) proximately caused his injuries because the metal conduit required securing and the failure to do so caused the conduit to fall and strike the plaintiff.

The plaintiff further asserts that he is entitled to partial summary judgment as to liability on so much of his Labor Law § 241 (6) claim as is predicated on an alleged violation of 12 NYCRR 23-2.1 (a) (1) because the area where the accident occurred was a walkway as contemplated by this provision, and the conduit was not being stored in a safe and orderly manner when the accident occurred. Finally, with respect to his Labor Law § 200 claim, the plaintiff contends that his submissions demonstrate that his accident falls under both the “means and methods” and “premises liability” categories of claims, and that his expert affirmation is sufficient to demonstrate that his accident resulted from a Labor Law § 200 violation.

Labor Law § 240 (1)

Under Labor Law § 240 (1), “[a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]” (Labor Law § 240 [1]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]). Labor Law § 240 (1) “imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks” (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]). Critically, however, “courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)” (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011] [internal quotation marks omitted]). Thus, “[t]he extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do ‘not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity” (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999], quoting *Ross*, 81 NY2d at 501 [emphasis in original]).

To prevail on a claim under Labor Law § 240 (1), a plaintiff must prove that the defendant violated the statute and that this violation was a proximate cause of his or her injuries (see *Jones v City of New York*, 166 AD3d 739, 740 [2d Dept 2018]). Where, as here, a Labor Law § 240 (1) claim is predicated on the “falling object” theory of liability, the statute “applies where the falling of an object is related to ‘a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured’” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). In such circumstances, a plaintiff must show (1) that at the time the object fell, it was being hoisted, secured, or required securing for the purposes of the undertaking, and (2) that the object fell *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute (see *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014]; *Narducci.*, 96 NY2d at 268; *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]).

Here, the plaintiff’s submissions are insufficient to establish prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim (see *Chuqui v Amna, LLC*, 203 AD3d 1018, 1021 [2d Dept 2022]; *Andres v N. 10 Project, LLC*, 192 AD3d 953, 953 [2d Dept 2021]). As an initial matter, to the extent that Miller opines that a violation of Labor Law § 240 (1) occurred here, an expert opinion as to a legal conclusion is impermissible (see *Colon v Rent-A-Ctr., Inc.*,

276 AD2d 58, 61 [1st Dept 2000]). In any event, the manner in which the plaintiff's accident occurred establishes that the piece of conduit was not being hoisted or secured at the time of the plaintiff's accident, and the plaintiff's submissions fail to demonstrate that the conduit required securing for the purposes of the undertaking. Although the plaintiff and Miller both contend that the piece of conduit was being stored at the time of the plaintiff's accident, this assertion is contradicted by the testimony of both Ross and Lazaro, who both indicated that different types of conduit, including the type of conduit at issue here, were stored in a cart located on the opposite end of the construction site. Ross further testified that after he placed the conduit against the wall, he began ascending the ladder, and that if the accident had not occurred he would have grabbed the conduit and passed it to Lazaro. Ross also indicated that only 20 or 30 seconds elapsed between placing the conduit against the wall and hearing the conduit fall. Finally, the plaintiff's motion papers make no effort to demonstrate how or why the piece of conduit required securing under these circumstances.

This branch of the plaintiff's motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Labor Law § 241 (6)

"Labor Law § 241 (6) imposes on owners and contractors a nondelegable duty 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" (*Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1258 [2d Dept 2019], quoting *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 2015]). "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" (*Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

As is relevant here, section 23-2.1 of the Industrial Code provides that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (12 NYCRR 23-2.1 [a] [1]). However, the plaintiff's submissions fail to demonstrate, prima facie, that a violation of this provision proximately caused his accident. Although the plaintiff and his expert assert that the conduit was being stored against the wall when his accident occurred, for the reasons previously stated, the plaintiff's evidentiary submissions fail to affirmatively demonstrate that this is the case (*see Brown v Tishman Constr. Corp. of New York*, 226 AD3d 529, 530 [1st Dept 2024]). Moreover, the plaintiff's testimony as to where he was standing when the accident occurred is insufficient to demonstrate that his accident occurred in a passageway, walkway, or other thoroughfare (*see Shewprasad v KSK Constr. Group, LLC*, 231 AD3d 762, 763 [2d Dept 2024]). This branch of the plaintiff's motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (*see Winegrad*, 64 NY2d at 853).

Labor Law § 200 and common-law negligence

“Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work” (*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” (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). Where an accident involves the “means and methods” category of Labor Law § 200 claims—i.e., the accident was caused by the manner in which the work was performed—then “recovery against a property owner cannot be had ‘unless it is shown that the [owner] had the authority to supervise or control the performance of the work’ ” (*Lazo v Ricci*, 178 AD3d 811, 813 [2d Dept 2019], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). However, “[w]here a plaintiff’s injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a contractor may be liable in common-law negligence and under Labor Law § 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it” (*Sotomayer v Metropolitan Transp. Auth.*, 92 AD3d 862, 864 [2d Dept 2012]).

Here, the plaintiff’s bills of particulars predicate his Labor Law § 200 cause of action on both the “means and methods” and “premises liability” categories of claims. To the extent that the plaintiff’s motion seeks partial summary judgment as to liability on so much of his Labor Law § 200 claim as is asserted against Parisi, the court notes that the plaintiff’s motion papers are devoid of any mention of Parisi or any explicit argument that Parisi is subject to liability under either the “means and methods” or the “premises liability” categories of claims. Moreover, to the extent that the plaintiff seeks partial summary judgment as to liability on so much of his Labor Law § 200 claim as is asserted against OCS, his arguments are limited to the “premises liability” category of claims. However, although the plaintiff contends that the piece of conduit, when left leaning against a wall, constitutes a dangerous condition which OCS had constructive notice of, his submissions are insufficient to demonstrate that this condition “exist[ed] for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]). As previously discussed, Ross testified that a maximum of thirty seconds had elapsed between placing the piece of conduit against the wall and the conduit striking the floor.

The plaintiff further asserts that C.M. Richey is subject to liability under the “premises liability” category of Labor Law § 200 claims because it created the dangerous condition. However, this argument, standing alone, is insufficient to establish prima facie entitlement to summary judgment, as the plaintiff failed to demonstrate, much less argue, that C.M. Richey had sufficient control over the work site to impose liability (*see Sotomayer*, 92 AD3d at 864). This branch of the plaintiff’s motion is therefore denied, regardless of the sufficiency of the parties’ opposition papers (*see Winegrad*, 64 NY2d at 853).

Parisi’s cross-motion

In support of its cross-motion, Parisi submits, among other things, the pleadings, the transcripts from the depositions of the plaintiff, Belsito, Genna, D’Agnese, Madarasz, Ross, and

Lazaro, the contract between OCS and Sanitech (the Sanitech contract), and the subcontract between Sanitech and C.M. Richey (the C.M. Richey subcontract). Based on these submissions, Parisi first asserts that Labor Law §§ 240 (1) and 241 (6) are inapplicable because the plaintiff was not engaged in an enumerated activity when his accident occurred. Nevertheless, Parisi also argues that it is entitled to summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim insofar as asserted against it because the piece of conduit was not being hoisted or secured when the plaintiff's accident occurred and did not need securing for the purposes of C.M. Richey's work. Parisi further asserts that it is entitled to summary judgment dismissing the plaintiff's Labor Law § 241 (6) claim insofar as asserted against it because each of the alleged Industrial Code provisions which form the basis for the plaintiff's claim either lack the requisite specificity to support a Labor Law § 241 (6) claim, are inapplicable to the plaintiff's accident, or were not violated. Parisi also contends that the plaintiff's Labor Law § 200 and common-law negligence claims fall squarely within the "means and methods" class of claims and argues that because it did not supervise or direct the work of either the plaintiff or C.M. Richey, these claims must be dismissed.

With respect to its cross-claims against C.M. Richey, Parisi asserts that the C.M. Richey subcontract requires C.M. Richey to indemnify and defend Parisi against any and all claims that arise as a result of C.M. Richey's work. Thus, because a piece of conduit utilized by C.M. Richey was involved in the plaintiff's accident, Parisi argues that the indemnification provision was triggered here. Similarly, because it was not negligent and C.M. Richey was responsible for supervising the work which led to the plaintiff's injury, Parisi asserts that it is entitled to summary judgment on its common-law indemnification cross-claim against C.M. Richey.

Whether the plaintiff was engaged in an enumerated activity

To the extent that Parisi asserts that the plaintiff was not engaged in an enumerated activity when his accident occurred, the court disagrees. "To recover [under Labor Law § 240 (1)], the plaintiff must have been engaged in a covered activity—'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013], quoting Labor Law § 240 [1]; see *Panek v County of Albany*, 99 NY2d 452, 457 [2003]). "Similarly, the protections of Labor Law § 241 (6) are inapplicable outside of the context of construction, demolition, or excavation" (*Alberici v Gold Medal Gymnastics*, 197 AD3d 540, 542 [2d Dept 2021]; see *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Notably, these statutes "should be construed with a commonsense approach to the realities of the workplace at issue" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]).

Parisi argues that Labor Law §§ 240 (1) and 241 (6) are inapplicable because the plaintiff was not actually doing any construction work at the moment his accident occurred, but rather, he was walking to the restroom. However, to accept Parisi's argument on this point, the court would have to disregard the plaintiff's position as an HVAC mechanic and his employer's role at this job site. As the Second Department has noted, "[t]o myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers" (*Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004] [citation and internal quotation marks omitted]). Thus, "the fact that the plaintiff was not engaged in HVAC work at the moment of his

accident does not preclude the application of” Labor Law §§ 240 (1) and 241 (6) (*Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 980 [2d Dept 2021]).

Labor Law § 240 (1)

On the merits, Parisi’s submissions are insufficient to establish prima facie entitlement to summary judgment dismissing the plaintiff’s Labor Law § 240 (1) claim insofar as asserted against it. Parisi’s argument relies on the premise that the piece of conduit did not require securing for the purpose of C.M. Richey’s work because it was being stored when the plaintiff’s accident occurred. Parisi also contends that multiple pieces of conduit were being stored in the area where the plaintiff’s accident occurred. However, Ross’s testimony contradicts this assertion. Ross testified that there was only one piece of conduit leaning against the wall, that conduit was generally stored elsewhere at the job site, and the piece of conduit at issue here was placed against the wall with the intention of using it almost immediately if the plaintiff’s accident had not occurred. Parisi therefore failed to eliminate issues of fact as to whether the piece of conduit required securing for the purpose of the undertaking (*see Rzepka v City of New York*, 227 AD3d 922, 923 [2d Dept 2024]). This branch of Parisi’s motion is therefore denied, regardless of the sufficiency of the plaintiff’s opposition papers (*see Winegrad*, 64 NY2d at 853).

Labor Law § 241 (6)

In his bill of particulars, the plaintiff bases his Labor Law § 241 (6) cause of action on alleged violations of sections 23-1.5, 23-1.7 (a) (1), 23-1.7 (a) (2), 23-1.8, 23-1.16, 1.17, 23-1.18, 23-1.21, 23-1.32, 23-2.1 (a), and 23-2.1 (b) of the Industrial Code. As an initial matter, the court disagrees with Parisi’s assertion that the plaintiff abandoned all alleged Industrial Code provisions except for section 23-2.1 (a) (1) by failing to raise them in his motion for summary judgment. Indeed, where a defendant moves for summary judgment and addresses particular Industrial Code provisions, a plaintiff will abandon reliance on those provisions by failing to address them in opposition (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]). However, this is not the case where a plaintiff is the moving party (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

In any event, as Parisi correctly contends, section 23-1.5 is too general to support a cause of action under Labor Law § 241 (6) (*see Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1091 [2d Dept 2016]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1224 [2d Dept 2011]). Parisi’s submissions are also sufficient to establish that section 23-1.7 (a) is inapplicable, as the deposition testimony demonstrates that the area where the accident occurred was not normally exposed to falling material or objects (*see Flores v Fort Green Homes, LLC*, 227 AD3d 672, 674 [2d Dept 2024]; *Cruz v 451 Lexington Realty, LLC*, 218 AD3d 733 [2d Dept 2023]). Parisi also correctly argues that section 23-1.18 is inapplicable because the plaintiff’s accident did not occur on a sidewalk (*see Turgeon v Vassar Coll.*, 172 AD3d 1134, 1135 [2d Dept 2019]). In addition, the plaintiff’s testimony that he was in the middle of the room when he was struck by the piece of conduit is sufficient to demonstrate that section 23-2.1 (a) is inapplicable, since his accident did not occur in a passageway, walkway, stairway, or other thoroughfare (*see Chuqui*, 203 AD3d at 1021; *Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012]).

To the extent that the plaintiff alleges a violation of section 23-1.8, Parisi's motion papers only address subsection (c) (1). However, the assertion that the plaintiff was provided with a hard hat is insufficient to demonstrate, prima facie, that the construction project here was not a hard hat job or that the plaintiff's lack of head protection played no role in the injuries he sustained when he was struck in the head by the piece of conduit (see *Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1018 [2d Dept 2023]). Moreover, Parisi does not address the alleged violations of sections 23-1.16, 1.17, 23-1.21, 23-1.32, or 23-2.1 (b).

Based on the manner in which Parisi met its prima facie burden, the plaintiff was only required to oppose so much of this branch of Parisi's motion which addressed the alleged violations of sections 23-1.5, 23-1.7 (a), 23-1.18, and 23-2.1 (a) of the Industrial Code (see *Winegrad*, 64 NY2d at 853). Yet as is relevant here, the plaintiff's opposition papers only address section 23-2.1 (a) (1). However, the plaintiff's argument with respect to section 23-1.7 (a) (1) is effectively identical to the argument raised in support of his own motion for summary judgment. Therefore, for the reasons previously stated this argument is insufficient to raise an issue of fact with respect to an alleged violation of section 23-1.7 (a) (1) (see *Stewart*, 212 AD3d at 747).

Labor Law § 200 and common-law negligence

As stated previously, the plaintiff's bill of particulars predicates his Labor Law § 200 and common-law negligence claims on both the "premises liability" and "means and methods" categories of claims. However, a defendant is not "required to blindly accept a plaintiff's categorization of an accident," and in moving for summary judgment, may "establish, as part of its prima facie showing, that the accident falls into one of the two broad categories of Labor Law § 200 cases" (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 673 [2d Dept 2018]; see *Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841-842 [2d Dept 2021]). Parisi effectively does so here by contending that the deposition testimony demonstrates that the plaintiff's accident only falls within the "means and method" category of claims. Under these circumstances, the court agrees with Parisi's assessment here. Moreover, the testimony of the plaintiff, D'Agnese, Ross, and Lazaro demonstrates that Parisi did not supervise or control the work of either the plaintiff or C.M. Richey (see *Argueta v City of New York*, 223 AD3d 862, 864-865 [2d Dept 2024]).

The plaintiff's opposition papers do not address Parisi's arguments on this point. This branch of Parisi's motion is therefore granted.

Contractual indemnification

A party's right to contractual indemnification is dependent on the specific language of the contract (see *O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). "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" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; see *Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2d Dept 2015]). "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 Dist.*, 74 AD3d 772, 773 [2d Dept 2010], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, Parisi's submissions are insufficient to establish prima facie entitlement to summary judgment on its contractual indemnification claim asserted against C.M. Richey (*see Crutch*, 192 AD3d at 981-982). The C.M. Richey subcontract makes no specific reference to the construction project where the plaintiff's accident occurred, but rather states that "[Sanitech] desires to engage [C.M. Richey] for the limited purpose and duration necessary for completing the preparation and installation of various work on various projects" (NY St Cts Elec Filing [NYSCEF] Doc No. 203). Although the C.M. Richey subcontract contains an indemnification provision, Parisi's submissions fail to affirmatively demonstrate that the C.M. Richey subcontract is related to construction project where the plaintiff's accident occurred. Parisi therefore failed to demonstrate that C.M. Richey intended to defend and indemnify Parisi with respect to the plaintiff's accident. This branch of Parisi's motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (*see Winegrad*, 64 NY2d at 853).

Common-law indemnification

"In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2d Dept 2015]). Summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to each party involved" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]; *see Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1163-1164 [2d Dept 2020]).

Here, Parisi's submissions are sufficient to establish prima facie entitlement to summary judgment on its cross-claim for common-law indemnification against C.M. Richey (*see Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 947 [2d Dept 2019]). The testimony of D'Agnese, Ross, and Lazaro is sufficient to demonstrate that C.M. Richey had the authority to direct, supervise, and control the electrical conduit work which led to the plaintiff's injury. Moreover, by establishing prima facie entitlement to summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims, Parisi also demonstrated that it was free from negligence.

To the extent that C.M. Richey opposes this branch of Parisi's motion, its arguments are insufficient to raise an issue of fact. Under these circumstances, Parisi is not required to establish that the piece of conduit fell on the plaintiff due to C.M. Richey's negligence. All that is required is a demonstration that C.M. Richey had the authority to control the work that gave rise to the plaintiff's injury (*see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017]). Insofar as it was neither the work of the plaintiff nor his employer which gave rise to the plaintiff's injury, the court disagrees with C.M. Richey's contention that Parisi was also required to establish that C.M. Richey had the authority to control the plaintiff's work. This branch of Parisi's motion is therefore granted.

The defendants' cross-claims against Parisi

Parisi's notice of motion seeks summary judgment dismissing the various cross-claims asserted against it by C.M. Richey and OCS. However, Parisi's motion papers are bereft of any substantive argument regarding these cross-claims. This branch of Parisi's motion is therefore denied, regardless of the sufficiency of the parties' opposition papers (*see Winegrad*, 64 NY2d at 853).

OCS's motion

In support of its separate motion, OCS submits, among other things, the pleadings, the transcripts from the depositions of the plaintiff, Belsito, Genna, D'Agnese, Madarasz, Ross, and Lazaro, the Sanitech contract, and the C.M. Richey subcontract. Based on these submissions, OCS argues that it is entitled to summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims because it did not control, supervise, or direct C.M. Richey's work and did not have actual or constructive notice of any of C.M. Richey's unsafe work practices. OCS further asserts that it is entitled to summary judgment on its third-party claim for contractual indemnification against Sanitech because the Sanitech contract requires Sanitech to indemnify and defend OCS against any and all claims that arise as a result of Sanitech's work. OCS also relies on a portion of the indemnity provision in the Sanitech contract which states that "Subcontractor shall be deemed to include anyone directly or indirectly employed by subcontractor or anyone for whose acts subcontractor may be liable for" (NY St Cts Elec Filing [NYSCEF] Doc No. 178). In OCS's view, this provision contemplates that C.M. Richey, as a subcontractor of Sanitech, is an entity that is "directly or indirectly employed" by Sanitech. Thus, OCS asserts that the plaintiff's accident, which involved a piece of conduit utilized by C.M. Richey, triggered the indemnification provision in the Sanitech contract. Finally, OCS asserts that it is entitled to summary judgment on its cross-claim for common-law indemnification against C.M. Richey because C.M. Richey was responsible for supervising the work which led to the plaintiff's injury, and OCS was not negligent.

Labor Law § 200 and common-law negligence

OCS's argument here is similar to the argument raised by Parisi on the corresponding branch of its cross-motion, and OCS relies on the same evidentiary submissions in support of its motion. Thus, for the reasons previously stated, the deposition testimony is sufficient to establish prima facie entitlement to summary judgment dismissing the Labor Law § 200 and common-law negligence asserted against OCS, as these submissions demonstrate that OCS did not supervise or control the work of either the plaintiff or C.M. Richey (*see Argueta*, 223 AD3d at 864-865). To the extent that the plaintiff opposes this branch of OCS's motion, his moving papers do not raise an issue of fact as to whether OCS supervised or controlled the work. This branch of OCS's motion is therefore granted.

Contractual indemnification

OCS's submissions are sufficient to establish prima facie entitlement to summary judgment on its third-party claim for contractual indemnification asserted against Sanitech. As is relevant here, the Sanitech contract contains an indemnification provision, which sets forth the following:

"To the fullest extent permitted by law, subcontractor (Sanitech) shall indemnify and hold harmless the Owner, the Architect and the General Contractor (OCS), and all of their agents and employees from and against all claims, damages, losses, and expenses, including but not limited to attorney fees, arising out of or resulting from the performance of the Subcontractor's work under this contract, or any breach by Subcontractor, in performing its obligations under this contract, or any negligent act or omission of Subcontractor, including but not limited to any claim, damage, loss or expense resulting from the bodily injury, sickness, disease, injury, or death, or from destruction of tangible property including the loss of use resulting therefrom. For purposes of this section 6, Subcontractor shall be deemed to include anyone directly or indirectly employed by subcontractor or anyone for whose acts subcontractor may be liable for, regardless of whether the event giving rise to the claim for indemnification is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, nor abridge, or otherwise reduce any other right or obligation of indemnity, which would otherwise exist as to any party or person described in this section" (NY St Cts Elec Filing [NYSCEF] Doc No. 178).

Based on the language of the Sanitech contract, the court agrees with OCS's contention that C.M. Richey, as a subcontractor of Sanitech, is "directly or indirectly employed" by Sanitech. In addition, OCS's submissions are sufficient to demonstrate that the indemnification clause was triggered by the plaintiff's accident (*see Skerrett v LIC Site B2 Owner, LLC*, 199 AD3d 956, 959 [2d Dept 2021]). Moreover, by demonstrating prima facie entitlement to summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims, OCS also demonstrated that it is free from negligence.

Sanitech does not oppose this branch of OCS's motion, and thus, it is granted.

Common-law indemnification

OCS's submissions are sufficient to establish prima facie entitlement to summary judgment on its cross-claim for common-law indemnification against C.M. Richey (*see Rizo*, 169 AD3d at 947). As stated previously, the deposition testimony is sufficient to demonstrate that C.M. Richey had the authority to direct, supervise, and control the work which led to the plaintiff's injury. In addition, dismissal of the plaintiff's Labor Law § 200 and common-law negligence claims asserted against it is sufficient to demonstrate that OCS was free from negligence.

C.M. Richey opposes this branch of OCS's motion. However, its arguments are essentially identical to the arguments it raised in opposition to the corresponding branch of Parisi's motion.

Thus, for the reasons previously stated, these contentions are insufficient to raise an issue of fact. This branch of OCS's motion is therefore granted.

Sanitech's motion

In support of its separate motion, Sanitech submits, among other things, the pleadings, the transcripts from the depositions of the plaintiff, Belsito, Genna, D'Agnese, Madarasz, Ross, and Lazaro, the Sanitech contract, the C.M. Richey subcontract, and a certificate of insurance. Based on these submissions, Sanitech asserts that it is entitled to summary judgment dismissing OCS's third-party claim for contractual indemnification because Sanitech subcontracted all of its work under this project to C.M. Richey, and therefore, the plaintiff's injuries did not arise out of Sanitech's work. Sanitech also argues that it is entitled to summary judgment dismissing OCS's third-party claims for common-law indemnification and contribution because its employees were never present at the job site, and therefore, it did not direct or supervise the work that led to the plaintiff's injury. Sanitech further asserts that it is entitled to summary judgment dismissing OCS's third-party claim for breach of contract for failure to procure insurance because the certificate of insurance demonstrates that the insurance requirements in the Sanitech contract were complied with.

In addition, Sanitech argues that it is entitled to summary judgment on its cross-claim for common-law indemnification asserted against C.M. Richey because C.M. Richey controlled the work that caused to the plaintiff's accident, and Sanitech's lack of presence at the job site demonstrates that it was not negligent. Sanitech also contends that it is entitled to summary judgment on its cross-claim for contractual indemnification asserted against C.M. Richey because the plaintiff's accident triggered the indemnification provision in the C.M. Richey subcontract.

OCS's contractual indemnification claim

To establish prima facie entitlement to summary judgment dismissing a claim for contractual indemnification, a moving party must show that it was not contractually obligated to indemnify the party asserting the indemnification claim (*see Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 558 [2d Dept 2015]). This may be accomplished by showing that the indemnification clause at issue was not triggered or is otherwise inapplicable under the circumstances (*see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 756 [2d Dept 2015]; *cf. Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2d Dept 2009]).

On this branch of its motion, Sanitech relies on the terms of the indemnification provision in the Sanitech contract to assert that this provision was not triggered because Sanitech was not actually working at the job site where the plaintiff was injured. However, Sanitech's argument omits the portion of the indemnification provision which states that "Subcontractor shall be deemed to include anyone directly or indirectly employed by subcontractor or anyone for whose acts subcontractor may be liable for" (NY St Cts Elec Filing [NYSCEF] Doc No. 107). Therefore, for the reasons stated previously, Sanitech's submissions fail to establish prima facie entitlement to summary judgment dismissing this claim. This branch of Sanitech's motion is therefore denied, regardless of the sufficiency of OCS's opposition papers (*see Winegrad*, 64 NY2d at 853).

OCS's breach of contract claim

To obtain summary judgment dismissing a claim based on an alleged failure to procure insurance naming that party as an additional insured, a moving party must demonstrate (1) that a contract provision did not require that such insurance be procured, or (2) that the moving party fully complied with the relevant contractual provision (*see Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]). Here, a comparison the insurance requirements set forth in the Sanitech contract with the limits described in Sanitech's certificate of insurance demonstrates that Sanitech fully complied with the relevant insurance requirements. In light of OCS's failure to oppose this branch of Sanitech's motion, it is granted.

OCS's common-law indemnification and contribution claims

"A party can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action for common-law indemnification, arising out of a workplace injury, asserted against it by establishing that it was not negligent, and that it did not have the authority to direct, supervise, or control the work giving rise to the injury" (*Council on Foreign Relations, Inc. v ABC Interiors Unlimited, Inc.*, 189 AD3d 1168, 1168 [2d Dept 2020]). Similarly, "[a] party moving for summary judgment dismissing a third-party cause of action for contribution establishes its prima facie entitlement to judgment as a matter of law by demonstrating that it did not owe or breach a duty of reasonable care to the plaintiff, or a duty of reasonable care independent of its contractual obligations" (*Carrillo v 457-467 Atl., LLC*, 193 AD3d 911, 913 [2d Dept 2021]).

Here, Sanitech's submissions are sufficient to establish prima facie entitlement to summary judgment dismissing OCS's third-party common-law indemnification claim (*see Quezada v Structure Tone, Inc.*, 226 AD3d 716, 719 [2d Dept 2024]). These submissions demonstrate that Sanitech subcontracted the entire scope of its work under the Sanitech contract to C.M. Richey and that it did not supervise or control C.M. Richey's work. For similar reasons, these submissions are sufficient to establish prima facie entitlement to summary judgment dismissing the OCS's third-party contribution claim (*see Carrillo*, 193 AD3d at 913). In opposition, OCS appears to assert that the delegation of authority under the C.M. Richey subcontract is insufficient to defeat OCS's common-law indemnification claim against Sanitech because Sanitech nevertheless retained the authority to control C.M. Richey's work. The court disagrees, as "[I]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [2011]). Contractual authority, standing alone, cannot support a common-law indemnification claim "if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work" (*McCarthy*, 17 NY3d at 378).

This branch of Sanitech's motion is therefore granted.

Sanitech's contractual indemnification claim

On this branch of its motion, Sanitech relies on the same copy of the C.M. Richey subcontract that was submitted by Parisi in support of its separate motion for summary judgment

(see NY St Cts Elec Filing [NYSCEF] Doc No. 108). Thus, for the same reasons as articulated previously, Sanitech's submissions fail to establish, prima facie, that the C.M. Richey subcontract is related to construction project where the plaintiff's accident occurred (see *Crutch*, 192 AD3d at 981-982). This branch of Sanitech's motion is therefore denied, regardless of the sufficiency of C.M. Richey's opposition papers (see *Winegrad*, 64 NY2d at 853).

Sanitech's common-law indemnification and contribution claims

Based on this court's factual determinations with respect to the other claims at issue here, Sanitech's submissions are also sufficient to establish prima facie entitlement to summary judgment on its cross-claims for common-law indemnification and contribution against C.M. Richey (see *Rizo*, 169 AD3d at 947). C.M. Richey's opposition papers, which raise arguments nearly identical to those raised in opposition to the respective motions of Parisi and OCS, are insufficient to raise an issue of fact.

Accordingly, it is

ORDERED that the branch of Parisi's motion for summary judgment dismissing so much of the plaintiff's Labor Law § 241 (6) claim asserted against it as is predicated on alleged violations of sections 23-1.5, 23-1.7 (a), 23-1.18, and 23-2.1 (a) is granted; and it is further,

ORDERED that the branch of Parisi's motion for summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims asserted against it is granted; and it is further,

ORDERED that the branch of Parisi's motion for summary judgment on its cross-claim for common-law indemnification asserted against C.M. Richey is granted; and it is further,

ORDERED that the branch of OCS's motion for summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence claims asserted against it is granted; and it is further,

ORDERED that the branch of OCS's motion for summary judgment on its third-party claim for contractual indemnification asserted against Sanitech is granted; and it is further,

ORDERED that the branch of OCS's motion for summary judgment on its cross-claim for common-law indemnification asserted against C.M. Richey is granted; and it is further,

ORDERED that the branch of Sanitech's motion for summary judgment dismissing OCS's third-party claims for breach of contract and common-law indemnification is granted; and it is further,

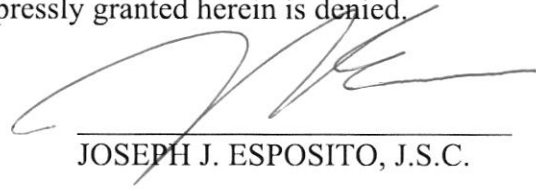
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ORDERED that the branch of Sanitech's motion for summary judgment on its cross-claims for common-law indemnification and contribution asserted against C.M. Richey is granted; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated:

JAN 03 2025



JOSEPH J. ESPOSITO, J.S.C.

