

Olivera v Evergreen Gardens I LLC

2025 NY Slip Op 34589(U)

November 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 517572/18

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 24th day of November, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
ZENOBIO OLIVERA,

Plaintiff,

-against-

Index No. 517572/18

Mot. Seq. Nos. 5-6

EVERGREEN GARDENS I LLC,
EVERGREEN GARDENS II LLC,
ALL YEAR MANAGEMENT LLC,
ALL YEAR MANAGEMENT NY INC., and
BROOKLYN GC LLC,

Defendants.

DECISION AND ORDER

-----X

EVERGREEN GARDENS I LLC,
EVERGREEN GARDENS II LLC, and
BROOKLYN GC, LLC,

Third-Party Plaintiffs,

- against -

EXTREME BUILDING LLC,

Third-Party Defendant.

-----X

EVERGREEN GARDENS I LLC,
EVERGREEN GARDENS II LLC, and
BROOKLYN GC, LLC,

Second Third-Party Plaintiffs,

- against -

MAGELLAN CONCRETE STRUCTURES CORP.,

Second Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion and Affidavits (Affirmations) Annexed____
Opposing Affidavits (Affirmations)_____
Affidavits/Affirmations in Reply_____

144-167; 191-208
173; 175-179; 209-232, 236-237
181-182, 184-185; 238

Upon the foregoing papers in this action to recover damages for personal injuries, plaintiff Zenobio Olivera (plaintiff) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability under Labor Law § 240 (1) and, separately, under Labor Law § 241 (6), to the extent predicated on the alleged violations of Industrial Code §§ 23-1.7 (b) (1) (i), 23-1.11 (a), and 23-1.28 (b), against defendants/first third-party defendants/second third-party defendants Evergreen Gardens I, LLC and Evergreen Gardens II, LLC (collectively, Evergreen), as well as against defendant/third-party defendant/second third-party defendant Brooklyn GC LLC (Brooklyn GC and collectively with Evergreen, the Evergreen Defendants) (Seq. No. 5). In opposition, Evergreen Defendants move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all of plaintiff's claims against them, or, in the alternative, granting them summary judgment on their second third-party claims against Magellan Concrete Structures Corp. (Magellan) for contractual indemnification, contribution, and common-law indemnification (Seq. No. 6).¹

On April 24, 2017 at approximately 10:30 a.m.,² plaintiff allegedly was injured while working inside the seventh floor of a construction site at 54 Noll Street in Brooklyn, New York,³ as an employee of third-party defendant Extreme Building LLC (EBL).⁴ EBL was a carpentry subcontractor which was hired by second third-party defendant Magellan, a concrete structure contractor. Magellan, in turn, was hired by defendant/third-party plaintiff/second third-party plaintiff Brooklyn GC, the general contractor

¹ The Evergreen Defendants' Notice of Motion for Summary Judgment, dated June 9, 2025, specifies that the relief they seek against Magellan is limited to the "contractual indemnification, contribution and common law indemnification" claims (NYSCEF No. 191). Similarly limited (by way of the requested relief against Magellan) is the Evergreen Defendants' Affirmation in Support of Motion for Summary Judgment, also dated June 9, 2025 (¶ 3 at NYSCEF Doc No. 192). The Evergreen Defendants' remaining second third-party claim against Magellan for the alleged breach of contract to procure insurance (although addressed by Magellan in Point IV of its Affirmation in Partial Opposition to the Evergreen Defendants' Motion for Summary Judgment, dated September 9, 2025 at NYSCEF Doc No. 236), is irrelevant at this stage of litigation because the Evergreen Defendants never sought summary judgment on that claim.

² The weather was "[g]ood [and] fair." Plaintiff's September 18, 2019 EBT transcript (plaintiff's first EBT session), page 83, lines 20-24.

³ The underlying property at 54 Noll Street was owned by defendant Evergreen Gardens II LLC (Evergreen II), whereas a nearby building was owned by defendant Evergreen Gardens I LLC. Both Evergreen entities are owned by the same individuals. The underlying property, which was completed in 2019, was a newly constructed eight-story residential building with more than 400 apartments. Although Evergreen II (not Evergreen I) owned the underlying property, the parties have made no distinction between the two entities and are proceeding on the assumption (which is accepted by the Court for purposes of these motions) that both Evergreen II and I owned the underlying property.

In 2021, Evergreen II (together with Evergreen I and one of their affiliates) filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (Individual Case No. 21-11610). By Stipulation that was "so ordered" on January 19, 2023 (NYSCEF Doc No. 157), the bankruptcy court permitted this action to proceed in this court notwithstanding the pendency of the automatic stay in Evergreen II's bankruptcy case, with the condition that any recovery from Evergreen II be limited to the proceeds available under certain insurance policies and/or excess insurance policies. See *Matter of Evergreen Gardens II LLC*, Consolidated Case No. 21-10335, Docket No. 502 (which is the original document source for the aforementioned stipulation).

⁴ EBL failed to appear or otherwise respond in the third-party action commenced by the Evergreen Defendants against it, and an order of default, dated February 5, 2020 (Joseph, J.), was issued against EBL (NYSCEF Doc No. 154).

for the construction project.⁵ Plaintiff was supervised by, and received all of his assigned work from, Joao Bueno (Bueno),⁶ who acted as the project manager for EBL at the time of the accident.⁷

At the time of and place of the accident, a metal cart⁸ (manufactured by nonparty Titan and supplied by it to Magellan⁹) (the cart), with four vertical metal columns (one at each corner of the cart), was loaded with approximately 40 pieces of plywood¹⁰ (with each piece of plywood measuring “eight feet by four feet”¹¹) that were placed horizontally on top of its columns, but which were not strapped or otherwise secured to the cart.¹² With the estimated weight of each piece of plywood “[b]etween 20 and 30 pounds,” and the estimated weight of the cart at “50 to 75 pounds approximately,”¹³ the combined weight of the loaded cart was approximately 850 pounds. According to plaintiff, the total height of the loaded cart was between 5 and 8 feet.¹⁴ By Magellan’s calculation, however, the height of the cart with the plywood loaded on top of it would have reached only “five and [one-] half feet.”¹⁵ Plaintiff’s height was 5 feet 7 inches.¹⁶

The bottom of the cart was equipped with four wheels; two in the front and two in the back; the front wheels were capable of changing direction, whereas the rear wheels were fixed in the forward direction. At the time and place of the accident, plaintiff and several of his coworkers were moving the

⁵ Plaintiff’s first EBT session, page 24, line 24 to page 25, line 9; page 27, line 23 to page 28, line 2; page 30, lines 14-21. Plaintiff’s April 19, 2021 transcript (plaintiff’s second EBT session), page 22, lines 13-15.

⁶ Site superintendent Moshe Blum knew Joao Bueno as “Joel.” Moshe Blum’s September 25, 2019 EBT transcript (Blum’s first EBT session), page 23, line 25 to page 24, line 14; page 26, line 3; page 67, lines 21-23. Moshe Blum, though produced as a witness in this action on behalf of Brooklyn GC, actually worked for nonparty APT Developers which (according to Moshe Blum) was the same company as Brooklyn GC. Moshe Blum’s first EBT session, page 28, line 5 to page 29, line 24.

⁷ Plaintiff’s first EBT session, page 28, line 11 to page 29, line 10; page 61, lines 9-10; page 62, lines 3-12; page 65, line 3 to page 66, line 19; page 67, lines 19-23; page 68, lines 5-21. Plaintiff’s second EBT session, page 20, lines 19-25; page 25, lines 3-8. Jonathan Rocchio’s (Magellan’s) EBT transcript, page 17, line 25 to page 18, line 18; page 20, lines 4-6; page 20, line 19 to page 22-9 (testifying that sometime after the accident, near the end of calendar year 2017, Bueno became an employee of Magellan).

⁸ Plaintiff’s second EBT session, page 57, lines 14-20.

⁹ Plaintiff’s first EBT session, page 96, lines 9-13. Jonathan Rocchio’s EBT transcript, page 39, lines 2-3.

¹⁰ Plaintiff’s first EBT session, page 98, lines 15-16. Plaintiff’s second EBT session, page 50, lines 21-24 (estimating the number of pieces of plywood on the cart “[b]etween 40 and 50”).

¹¹ Plaintiff’s second EBT session, page 50, line 25 to page 51, line 3.

¹² Plaintiff’s first EBT session, page 97, lines 4-5; plaintiff’s second EBT session, page 51, lines 8-12. It appears that the cart was pre-loaded with plywood some time before the accident. Plaintiff’s second EBT session, page 32, lines 7-8 (“the plywood that is on the cart[,] you just have to take it over [to the portion of the seventh floor] where the guys need it”); page 32, lines 20-22 (“[t]he carts were already on top of the [floor] deck already with the plywood [loaded] on top of [them]”); page 35, lines 9-10 (“[t]he plywood was already on top of the cart, other people already placed it there”); page 61, lines 15-18 (confirming that “the plywood was already stacked on the cart before [plaintiff and his coworkers were] instructed to move it”); page 62, lines 2-3 (“the plywood is already stacked on top of the cart”). Moshe Blum’s June 3, 2021 EBT transcript (Blum’s second EBT session), page 22, line 21 to page 23, line 2 (“the plywood is sitting on top of the four posts [of the cart]. . . . [lying] horizontally on top of the four posts”).

¹³ Moshe Blum’s first EBT session, page 34, lines 2-7; page 103, line 25 to page 104, line 4. Moshe Blum’s second EBT session, page 25, lines 14-16 (estimating the weight of each piece of plywood at “35 pounds,” rather than at “[b]etween 20 and 30 pounds” as he did in his earlier deposition testimony).

¹⁴ Plaintiff’s first EBT session, page 92, line 23 to page 93, line 4. Plaintiff’s second EBT session, page 59, lines 7-11.

¹⁵ Jonathan Rocchio’s EBT transcript, page 89, line 22 to page 90, line 5.

¹⁶ Plaintiff’s first EBT session, page 8, lines 4-9.

cart from one location on the seventh floor to another location on the same floor, as instructed by Bueno,¹⁷ for a distance of approximately 150 feet.¹⁸ There was “only one clear pathway that could be used because there was material on one side [of the seventh floor] and material on the other side [of the seventh floor].”¹⁹ The deck of the seventh floor, which was made of concrete, was covered with plywood (the floor deck). The floor deck contained numerous cutouts for, among other things, the HVAC ducts. The cutouts for the HVAC ducts were constructed of plywood (akin to square boxes) and internally reinforced by one or more two-by-four planks.²⁰ At least one of those cutouts for the HVAC ducts – and, in particular, the one that was involved in plaintiff’s accident – measured “about one foot two or one foot four by one foot four”²¹ and was eight inches in depth²² (the HVAC cutout). The HVAC cutout was constructed by Magellan.²³ The HVAC cutout was covered by plywood that was nailed to the floor deck (the cutout cover). The record is silent as to whether the HVAC cutout was internally reinforced by one or more two-by-four planks. Further, the cutout cover was not marked by orange spray paint by Magellan, even though Brooklyn GC required that all cutout covers be so marked.²⁴

While plaintiff and his coworkers were moving the cart as he was walking alongside on the right, the cart got stuck on the nailed²⁵ but unmarked cutout cover.²⁶ This particular cutout cover was larger than others over which plaintiff and his coworkers had previously traveled over with their loaded carts earlier on the day of the accident.²⁷ Once the cart got stuck on the cutout cover, the latter either broke or bent underneath the weight of the cart causing a depression in the cutout cover; in turn, the right front side of the cart tilted into the resulting depression and the right front wheel of the cart fell off, and, thereupon, the stack of the plywood on top of the cart’s four posts collapsed onto plaintiff.²⁸ He was

¹⁷ Plaintiff’s second EBT session, page 26, line 15 to page 27, line 4; page 27, line 25 to page 30, line 2; page 34, lines 16-19.

¹⁸ Plaintiff’s second EBT session, page 33, lines 3-5.

¹⁹ Plaintiff’s second EBT session, page 36, lines 9-13.

²⁰ Moshe Blum’s first EBT session, page 75, lines 3-9.

²¹ Plaintiff’s second EBT session, page 38, lines 2-6; page 39, lines 16-17 (estimating the size of the HVAC cutout at issue at “[o]ne foot four by one foot four . . . about 14 square inches”).

²² Moshe Blum’s first EBT session, page 62, lines 8-10.

²³ Moshe Blum’s first EBT session, page 59, lines 12-18.

²⁴ Moshe Blum’s first EBT session, page 76, line 12 to page 78, line 2.

²⁵ Plaintiff’s second EBT session, page 47, lines 16-25.

²⁶ Plaintiff’s first EBT session, page 100, line 11 to page 101, line 24; plaintiff’s second EBT session, page 40, lines 19-24; page 50, lines 5-11. Plaintiff’s second EBT session, page 40, lines 17-18 (estimating the thickness of the cutout cover at “[f]ive eighths”).

²⁷ Plaintiff’s second EBT session, page 41, lines 17-21 (“[w]e did transport the cart over . . . other [cutout covers]” but “[they] . . . were smaller [cutout covers,] so the plywood [cutout covers] had more resistance [to the weight of the cart]”).

²⁸ Plaintiff’s first EBT session, page 91, lines 21-25; page 98, lines 6-23; page 99, lines 18-25; page 102, line 16 to page 105, line 13; page 106, lines 12-20; page 107, lines 10-11; page 108, lines 6-23. Plaintiff’s second EBT session, page 37, line 16 to page 38, line 11; page 49, lines 12-24; page 52, lines 10-14; page 53, lines 19-24; page 54, line 13 to page 55, line 16; page 59, line 15 to page 60, line 8.

transported to Woodhull, a nearby medical center, where he was hospitalized for a period of four days with, among other claimed injuries, a fracture of his left hip.²⁹

Plaintiff's foreman Bueno (though informed of the accident) did not summon an ambulance for fear that the work site would be closed.³⁰ Neither Magellan on-site manager Jonthan Rocchio nor Brooklyn GC's site superintendent Moshe Blum either witnessed or were informed about plaintiff's accident until after the inception of this action.³¹

In June-August 2017 or approximately three months after the accident, plaintiff, at Bueno's urging, returned to work at the construction site, albeit now assigned to lighter tasks.³² Near the end of calendar year 2017, Bueno, at Magellan's request, transferred himself, plaintiff, and other employees of EBL on board of Magellan.³³ After plaintiff worked at the construction site for approximately one year

²⁹ Plaintiff's first EBT session, page 111, line 12 to page 112, line 22; page 113, lines 16-20; page 118, lines 2-18; page 120, line 24 to page 121, line 6. Plaintiff's second EBT session, page 39, lines 2-11; page 65, line 24 to page 66, line 11.

³⁰ Plaintiff's first EBT session, page 113, line 21 to page 114, line 21. Plaintiff's second EBT session, page 38, line 21 to page 39, line 2.

³¹ Jonathan Rocchio's EBT transcript, page 24, lines 9-22 (although Rocchio was present at the work site two-three times per week, he "couldn't tell" whether he was present at the work site on the day of the accident); page 30, lines 12-22 ("[w]e [Magellan] were unaware of the accident"); page 37, lines 19-20 ("we [Magellan] do not have any incident report"). Moshe Blum's first EBT session, page 75, lines 10-13 (testifying that he learned of plaintiff's accident "[w]hen [Evergreen] got a lawsuit." Moshe Blum's second EBT session, page 30, lines 10-12 (same).

Furthermore, neither Magellan's Jonathan Rocchio nor Brooklyn GC's Moshe Blum was aware (before their respective depositions) that the daily log for the day of the accident included the following description of the accident: "at approx[imately] 11:45 am[,] 2 employees of MCS [Magellan] were hurt when a hors[e]y [*i.e.*, cart] carrying ply[wood] tipped over[;] the injuries were minor[;] both gentlem[e]n were taken off site by [a] private vehicle[;] names: [plaintiff's name and date of birth, and one] Santos Javier Cruz [date of birth]" (daily log at NYSCEF Doc No. 166). The daily log was inaccurate, in that: (1) only one employee – plaintiff – was hurt in the accident; (2) plaintiff's injuries were significant, not minor; and (3) the time of the accident was post-dated by approximately one hour. The daily log was signed by C. Mike Altman (Altman), a colleague of Moshe Blum, both of whom acted as Brooklyn GC's site superintendents. At the time of this action, Altman was no longer working for Brooklyn GC and was not deposed. Moshe Blum described Altman as a "halfway site super . . . [who] was only there [at the site] for a short period of time," and that he did not speak to Altman about the accident. Moshe Blum's second EBT session, page 33, line 21 to page 34, line 14; page 45, lines 14-18. Moshe Blum denied ever seeing the aforementioned summary of the accident in the daily log until after his preparation for the depositions in this action, and further suggested that Magellan "[m]ost probably" typed it into the daily log, even though Magellan "was not allowed to make entries" into the daily reports. Moshe Blum's second EBT session, page 38, line 9 to page 39, line 21; page 47, lines 5-10; page 48, lines 5-19. After further questioning at his second pretrial deposition, however, Moshe Blum leaned toward the position that Altman "[m]ost probably" made the aforementioned entry. Moshe Blum's second EBT session, page 48, line 20 to page 49, line 2. Moshe Blum conceded (at page 60, lines 3-18 of his second EBT session) that "there [was no] reason why [he] would have missed the fact that an accident occurred that was recorded in [Brooklyn GC's] daily job record." His later concession was at odds with his earlier declaration that "there was no rock being touched [at the construction site] without me knowing about it" (Moshe Blum's first EBT session, page 80, lines 20-21).

³² Plaintiff's first EBT session, page 135, lines 11-12; page 139, lines 10-13; page 143, lines 15-17. Plaintiff's second EBT session, page 15, lines 10-23; page 71, lines 12-14. Bueno paid plaintiff for the three months he was out of work and for his physical therapy. Plaintiff's second EBT session, page 75, line 22 to page 76, line 11. Bueno also paid plaintiff for the treatment from the day of his accident until July 2018. Plaintiff's second EBT session, page 96, lines 19-22. The workers' compensation (provided by Magellan, not by EBL) took over plaintiff's medical bills in July 2018. Plaintiff's second EBT session, page 96, lines 23-25. Magellan's president and deposition witness, Jonathan Rocchio, testified (at page 49, line 5 to page 50, line 22; and page 51, lines 9-21 of his pretrial deposition) that he was unaware that: (1) plaintiff had an accident at the work site; (2) he was hurt in the accident; (3) Bueno was paying plaintiff for approximately three months while he was recuperating at home; and (4) plaintiff's duties were changed to lighter tasks when he resumed working three months after the accident.

³³ Jonathan Rocchio's EBT transcript, page 21, line 25 to page 22, line 21.

(now formally as an employee of Magellan, rather than of EBL), he stopped working altogether in July 2018 when he was 45 years of age, and has not worked since.

In August 2018, plaintiff commenced this action against the Evergreen Defendants, among others,³⁴ asserting a violation of Labor Law § 240 (1) and Labor Law 241 (6) (the latter to the extent predicated on, among other provisions, the alleged violations of Industrial Code §§ 23-1.7 [b] [1] [i], 23-1.11 [a], and 23-1.28 [b]), as well as under Labor Law § 200 and in common-law negligence.³⁵ In October 2019, the Evergreen Defendants impleaded Magellan for, inter alia, contractual indemnification, contribution, and common-law indemnification. After the completion of discovery, plaintiff and the Evergreen Defendants served their respective motions.

“[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] [internal quotation marks omitted]). “[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 Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [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] [internal quotation marks omitted]). “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).

“Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). “The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

³⁴ All claims against codefendants All Year Management LLC and All Year Management NY Inc. were discontinued by stipulation, dated June 7, 2021 (NYSCEF Doc No. 155).

³⁵ Plaintiff also asserted a claim under Labor Law § 241-a which protects “workmen in or at elevator shaftways, hatchways and stairwells.” Plaintiff’s Amended Complaint, dated August 27, 2018, ¶ 131 (l); Plaintiff’s Bill of Particulars, dated November 26, 2018, ¶ 9, page 2. Because Labor Law § 241-a is obviously not applicable to the facts of this case, neither side addressed it in motion papers, and plaintiff is considered to have abandoned it (*see Nichols v Deer Run Investors L.P.*, 204 AD2d 929, 930 n 1 [3d Dept 1994]; *Ferreira v Magellan Concrete Structures Corp.*, 2021 WL 4427371, *5 [Sup Ct, Kings County 2021, Rothenberg, J.]).

“To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]). “Falling object liability under Labor Law § 240 (1)” includes a situation “where the plaintiff demonstrates that, at the time the object fell, it required securing for the purposes of the undertaking” (*Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017] [citations and internal quotation marks omitted]).

Here, plaintiff established, prima facie, that he was entitled to partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim against the Evergreen Defendants. Considering the height of the loaded cart of “five and [one-] half feet” (by Magellan’s calculation) and the weight of the loaded cart of approximately 850 pounds, the accident fell within the protections of the statute (*see Hernandez v Port Auth. of NY & NJ*, 241 AD3d 1069, 1071 [1st Dept 2025]; *Nyanteh v 590 Madison Ave., LLC*, 238 AD3d 643, 643 [1st Dept 2025]; *Bain v 50 W. Dev., LLC*, 191 AD3d 496, 497 [1st Dept 2021]; *Touray v HFZ 11 Beach St. LLC*, 180 AD3d 507, 507 [1st Dept 2020]; *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *see also Laliashvili v Kadmia Tenth Ave. SPE, LLC*, 221 AD3d 988, 991 [2d Dept 2023] [competing motions for summary judgment on the Labor Law § 240 (1) claim were properly denied “(t)here is no evidence in the record as to the height of the cart, or the height of the glass panels once loaded onto the cart”]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928 [2d Dept 2012] [granting plaintiff summary judgment on the issue of liability where a slight drop of a scaffold constituted an elevation hazard in light of its weight and the force generated by the drop, even though the scaffold was being lifted at the time of the fall]).³⁶

³⁶ The Second Judicial Department’s recent decision in *Ramos v Kent & Wythe Owners, LLC*, 236 AD3d 693 (March 5, 2025), is not to the contrary. There, the plaintiff was using an A-frame cart to move seven pieces of sheetrock across an unfinished concrete floor at the construction site. The plaintiff allegedly was injured when the A-frame cart turned over and fell, along with the sheetrock, trapping his legs and waist (*see Ramos v Kent & Wythe Owners, LLC*, Sup Ct, Kings County, June 2, 2020, Velasquez, J., index No. 517552/16, NY St Cts Elec Filing [NYSCEF] Doc No. 218, Decision and Order at 12-14, *affd* 236 AD3d 693 [2d Dept 2025]). The Second Judicial Department tersely affirmed, ruling (at page 695) that the defendants “established, prima facie, that the plaintiff’s injuries were not caused by an elevation-related or gravity-related risk within the scope of Labor Law § 240 (1),” and that “[i]n opposition, the plaintiff failed to raise a triable issue of fact” (internal citations omitted). Similarly inapposite is *Ortega v Fourtrax Contr. Corp.*, 214 AD3d 666 (2d Dept 2023), on which *Ramos* relied. In *Ortega*, the plaintiff and his coworkers were using an A-frame cart to transport 12 sheets of 4x6 sheetrock; the sheetrock, which was stacked vertically (rather than horizontally) in order to fit into an elevator, leaned against a horizontal bar of the cart which was approximately four feet above the base of the cart; and the base of the cart was approximately one foot from the floor. On exiting the elevator, the plaintiff’s coworkers let go of the cart without warning. Unknowingly, the plaintiff kept moving the cart by himself for a few seconds before the cart tipped and fell, together with the sheetrock, onto him (*see Ortega v Fourtrax Contr. Corp.*, Sup Ct, Nassau County, June 29, 2020, Steinman, J., index No. 606814/18, NY St Cts Elec Filing [NYSCEF] Doc No. 71, Decision and Order at 2-3, *affd* 214 AD3d 666 [2d Dept 2023]). On appeal, the Second Judicial Department summarily affirmed, holding (at page 668) that “the defendants established, prima facie, that the plaintiff’s injuries were not caused by an elevation-related or gravity-related risk within the scope of Labor Law § 240 (1),” and that “[i]n opposition, the plaintiff failed to raise a triable issue of fact” (internal citations omitted). To the same effect is *Chuqui v Amna, LLC*, 2019 WL 4917835, *2 (Sup Ct, Queens County 2022), *affd* 203 AD3d 1018 (2d Dept 2022) (dismissing the plaintiff’s Labor Law § 240 [1] claim where “[t]he metal sheets [which injured the plaintiff] fell from a dolly platform that was approximately one foot from the ground”).

In opposition, the Evergreen Defendants failed to raise a triable issue of fact. Based on the weight and height of the plywood sheets on the cart, the elevation differential was within the purview of Labor Law § 240 (1) (*see Touray*, 180 AD3d at 507). Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim against the Evergreen Defendants. Conversely, the Evergreen Defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

“Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (*Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 733 [2d Dept 2024] [internal quotation marks omitted]). A sustainable Labor Law § 241 (6) claim requires the plaintiff to demonstrate that defendants violated a provision of the Industrial Code that contains “concrete specifications” (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012]) and “mandates a distinct standard of conduct, rather than a general reiteration of common-law principles” (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 91 NY2d 343, 351 [1998]).

Here, the Evergreen Defendants established, *prima facie*, that the Industrial Code provisions relied on by plaintiff were inapplicable to the facts of this case. In particular, Industrial Code § 23-1.7 (b) (1) (i) provides that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).” The term “‘hazardous openings’ . . . does not apply to openings that are too small for a worker to completely fall through” (*Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dept 2018]). Although this provision is sufficiently specific to support a Labor Law § 241 (6) claim (*see e.g. Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 810 [2d Dept 2010]), it does not apply to the facts of this case. The cutout at issue (measuring “about one foot two or one foot four by one foot four”) was too small for a worker to completely fall through (*see Castro v Wythe Gardens, LLC*, 217 AD3d 822, 826 [2d Dept 2023]; *Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983 [2d Dept 2016]).

Next, Industrial Code § 23-1.11 (a) requires that the lumber used to “construct equipment or temporary structure shall be sound and not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.” Although this provision is sufficiently specific to support a Labor Law § 241 (6) claim, nothing in the record indicates that the plywood used in the construction of the cutout cover was defective (*see Purcell v Metlife Inc.*, 108 AD3d 431, 432-433 [1st Dept 2013]).

Lastly, Industrial Code § 23-1.28 (b) provides, in relevant part, that “[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles.” This provision is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see e.g. Freitas v New York*

City Tr. Auth., 249 AD2d 184, 185-186 [1st Dept 1998]). Nonetheless, this provision is not applicable to the facts of this case because the cart that plaintiff and his coworkers were pushing became stuck on the cutout cover underneath it, and not because of any problem with its right front wheel or with any of its other wheels (*see Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020]; *Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 344 [1st Dept 2005]).

In opposition, plaintiff failed to raise a triable issue of fact as to the applicability of any of the foregoing Industrial Code provisions on which he relied. Accordingly, the portion of the initial branch of the Evergreen Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted, whereas the remaining branch of plaintiff's motion for partial summary judgment on liability on his Labor Law § 241 (6) claim is denied.³⁷

As noted, the Evergreen Defendants also moved to dismiss plaintiff's common-law negligence and Labor Law § 200 claims. Cases involving common-law negligence and 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" (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). "When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to a cause of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards" (*Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026, 1027-1028 [2d Dept 2021]). "A defendant moving for summary judgment in such a case may prevail only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" (*Chuqui*, 203 AD3d at 1022 [internal quotation marks omitted]).

Here, Brooklyn GC failed to establish its prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it. To the extent that plaintiff's claims are based on the manner in which the work was performed, Brooklyn GC established, prima facie, that it did not have authority to supervise or control the means and method of his work (*see Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]). Conversely, however, Brooklyn GC failed to demonstrate, prima facie, that it lacked actual or constructive notice of: (1) the dangerous, unreinforced condition of the cutout cover which caused the cart to suddenly stop and tip over, since plaintiff and his coworkers were transporting the plywood from one end of the seventh floor

³⁷ Insofar as plaintiff's Labor Law § 241(6) claim asserted against the Evergreen Defendants is predicated on violations of other Industrial Code provisions, the latter are deemed abandoned because of his failure to oppose the Evergreen Defendants' motion with regard to those code provisions (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]; *Pita v Roosevelt Union Free School Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

to the other; and (2) the dangerous condition of the cart itself which was loaded with the plywood that was stacked horizontally on top of its four posts instead of having the plywood stacked vertically between its front and rear posts (*see Chuqui*, 203 AD3d at 1022; *Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 854 [2d Dept 2019]). Accordingly, dismissal of plaintiff's Labor Law § 200 and common-law negligence claims against Brooklyn GC is not warranted at this stage of litigation.

On the other hand, plaintiff failed to demonstrate the existence of a factual issue requiring denial of the initial branch of the Evergreen Defendants' motion insofar as it related to Evergreen's request for dismissal of Labor Law § 200 and common-law negligence claims. It is undisputed that Evergreen did not have representatives at the work site, and there is nothing in the record to suggest that it played any role in the coordination of the work. Accordingly, Evergreen is entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against it (*see Romero v Evergreen Gardens II LLC*, 2022 NY Slip Op 30671[U], *13-14 [Sup Ct, Kings County 2022, Joseph, J.]).

In addressing the Evergreen Defendants' alternative branch of their motion for summary judgment on their third-party claims, the Court finds that triable issues of fact preclude summary judgment on Brooklyn GC's third-party claims for contractual indemnification against Magellan. "[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" (*Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; *see Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]). Because the extent of Brooklyn GC's liability, if any, to plaintiff under Labor Law § 200 and in common-law negligence cannot be determined at this juncture, Brooklyn GC is not entitled to summary judgment on its contractual indemnification claim against Magellan.

Unlike Brooklyn GC, however, Evergreen is entitled to summary judgment on its contractual indemnification claim against Magellan. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted], *motion to amend dismissed* 70 NY2d 999 [1988]). Here, the applicable written agreement demonstrates that Magellan must indemnify and hold harmless Evergreen for all personal injury claims arising out of or resulting from the superstructure work to the extent such work was performed by or contracted through Magellan or by anyone for whose acts Magellan may be held liable, "excluding only liability created by the sole and exclusive negligence of the [i]ndemnified [p]arties."³⁸ Here, plaintiff's claims arose either from EBL's and/or Magellan's

³⁸ Brooklyn GC's Subcontract Agreement with Magellan, dated September 15, 2016, ¶ 1 (part of NYSCEF Doc No. 161).

superstructure work. Because the indemnity provision was in effect at the time of the accident and because there is no indication that Evergreen is attempting to have Magellan indemnify it for its own negligence, Evergreen is entitled to summary judgment on its contractual indemnification claim against Magellan (*see Moreira v Brooklyn GC LLC*, 2023 NY Slip Op 32052[U], *15-16 [Sup Ct, Kings County 2023, Silber, J.]; *Ferreira v Magellan Concrete Structures Corp.*, 2021 WL 4427371, *7-8 [Sup Ct, Kings County 2021, Rothenberg, J.] [each of which construed the identical contractual indemnification provision for the same construction project]).

On the final note, while not expressly argued by the parties, nor raised as an affirmative defense by Magellan in its third-party answer, the court notes that the Evergreen Defendants' common-law indemnification and contribution claims against Magellan are barred by the exclusive remedy provision of Workers' Compensation Law § 11, unless they can show that plaintiff suffered a statutorily defined "grave injury" (*see Galeno v Everest Scaffolding, Inc.*, 202 AD3d 433, 435 [1st Dept 2022]; *Derosas*, 148 AD3d at 990; *Romero*, 2022 NY Slip Op 30671[U], *15-16). The record before the Court strongly indicates that Magellan was plaintiff's actual employer on the day of the accident, and further that he received workers' compensation benefits from Magellan's insurance carrier with respect to the accident, including a lump-sum payment of \$119,000 at the conclusion of his workers' compensation case.³⁹

The parties' remaining contentions have been considered and found to be either without merit or moot in light of the court's determination.

Accordingly, it is hereby

ORDERED that in Seq. No. 5, the initial branch of plaintiff's motion for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim against the Evergreen Defendants is granted; and it is further

ORDERED that in Seq. No. 5, the remaining branch of plaintiff's motion for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability on his Labor Law § 241 (6) claim, to the extent predicated on the alleged violations of Industrial Code §§ 23-1.7 (b) (1) (i), 23-1.11 (a), and 23-1.28 (b), is denied; and it is further

ORDERED that in Seq. No. 6, the initial branch of the Evergreen Defendants' motion for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint against them is granted to the extent that: (1) plaintiff's Labor Law § 241 (6) claims are dismissed against the Evergreen Defendants; and (2) plaintiff's claims under Labor Law § 200 and in common-law negligence

³⁹ Magellan's Jobsite Sign-in Sheet for the Day of the Accident, listing plaintiff as one of its 44 employees on site, part of Exhibit C to Magellan's Response, dated September 21, 2020, to Notice for Discovery and Inspection, dated September 14, 2020 (NYSCEF Doc No. 200). Jonathan Rocchio's EBT transcript, page 20, line 25 to page 22, line 6; page 75, lines 11-23. Plaintiff's April 26, 2024 (third EBT session) transcript, page 33, line 14 to page 34, line 23.

are dismissed against Evergreen; and the remainder of the initial branch the Evergreen Defendants' motion is denied; and it is further

ORDERED that in Seq. No. 6, the alternative branch of the Evergreen Defendants' motion for an order, pursuant to CPLR 3212, granting it summary judgment on their second third-party claims against Magellan for contractual indemnification, contribution, and common-law indemnification is granted to the extent that Evergreen is granted contractual indemnification against Magellan, and the remainder of the alternative branch of the Evergreen Defendants' motion is denied; and it is further

ORDERED that to reflect the prior stipulated dismissal of defendants All Year Management LLC and All Year Management NY Inc., the caption of the principal action is amended to read in its entirety as follows:

-----X

ZENOBIO OLIVERA,

Plaintiff,

-against-

Index No. 517572/18

EVERGREEN GARDENS I LLC,
EVERGREEN GARDENS II LLC, and
BROOKLYN GC LLC,

Defendants.

-----X

; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the parties are reminded of their next scheduled, in-person appearance in JCP-1 for a settlement conference on December 17, 2025 at 10 a.m.

This constitutes the decision and order of the court.

E N T E R,



Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice