E#003 & #004

Supreme Court of the State of New York
County of Bronx Part IA-9

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Salvatore Zambuto
Plaintiff

-against-

Rockaway Seagirt Housing Development Fund Corp., Rockaway Seagirt Limited Partnership, Chateau GC LLC, The Arker Companies, LLC,
Defendants

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Rockaway Seagirt Housing Development Fund Corp., Rockaway Seagirt Limited Partnership, Chateau GC LLC, The Arker Companies, LLC,
Third Party Plaintiffs

-against-

Alpha/Omega Building Corp.,
Third Party Defendant

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Index No. 21247-2019E
Motion seq #3 and #4

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

The following e-filed documents, listed by NYSCEF Doc. Nos. 77-87; 91-107; 109-128, were read on these motions for summary judgment and orally argued on June 10, 2024.

According to the plaintiff, at the time of the accident: he was employed with third-party defendant Alpha/Omega Building Corp. ("Alpha") as a mason tender; his foreman, Sal Rasizzi, an Alpha employee, instructed him to bring work materials to masons working on the scaffold's second level; while plaintiff was walking on the scaffold, the floor planking broke, causing him to fall 6 to 12 feet below to the courtyard; he was wearing a harness but did not have a lanyard or tie-off point.

Defendants Rockaway Seagirt Limited Partnership and Rockaway Seagirt Housing Development Fund Corp. (collectively "Rockaway") owned the subject premises. Defendant Chateau GC LLC ("Chateau") was the general contractor to the subject construction project. Chateau hired Alpha to perform masonry work.

In motion sequence no. 3, plaintiff moves for summary judgment on his Labor Law §240(1) and §241(6) claims. Plaintiff argues that he is entitled to judgment on his Labor Law § 240(1) claim as the scaffold he was walking on collapsed. As to his Labor Law §241(6) claim, plaintiff argues he is entitled to judgment as predicated on Industrial Code §23-5.1(g) and (h).

Defendants Rockaway, Chateau, and The Arker Companies, LLC (collectively "defendants") oppose plaintiff's motion. As to Labor Law §240(1), defendants argue that "there are material issues on plaintiff's credibility as to whether the accident occurred as he claims it did that require jury determination." Defendants note that pursuant to plaintiff's testimony, at the time of the accident, plaintiff was walking on the scaffold's platform to assist masons. However, defendants note that pursuant to the testimony of Mr. Gorgijanidze, Chateau's construction superintendent, Alpha was in the process of dismantling the scaffold or portions of the scaffold when plaintiff fell. Thus, it is defendants' position that plaintiff's motion for summary judgment on his Labor Law §240(1) claim must be denied because there is conflicting testimony as to how the accident occurred. Further, defendants argue that the motion as to his Labor Law § 241(6) claim must be denied because plaintiff failed to plead a violation of a sufficiently specific and factually applicable section of the Industrial Code.

Third-Party defendant Alpha opposes plaintiff's motion for summary judgment and adopts the arguments in defendants' opposition papers.

In motion sequence no. 4, defendants move for summary judgment to dismiss plaintiff's Labor Law §241(6) and §200/common law negligence claims and for judgment on its claims as against Alpha. As to Labor Law §200/common law negligence, defendants argue that it did not create or have notice of the claimed conditions and did not direct or control the means and methods of plaintiff's work. As to Labor Law §241(6), defendants argue that it must be dismissed because they are inapplicable and/or not violated and because plaintiff failed to particularize a violation of a sufficiently specific Industrial Code section. Lastly, defendants seek summary judgment on its indemnification claims against Alpha as they argue that plaintiff's accident arose from the performance of his work with Alpha.

Alpha partially opposes defendants' motion to the extent it seeks judgment against them. Alpha argues that the indemnification provisions in their contract violate the General Obligations Law and are not enforceable, as the provisions attempt to improperly require Alpha to indemnify the indemnified parties for their own negligence. Alpha further argues that, at a minimum, there is a question of fact as to whether Chateau was negligent. Alpha also notes that the Chateau/Alpha contract does not name defendant The Arker Companies, LLC ("Arker") as an indemnitee and therefore regardless of whether the subject indemnity is held enforceable or not, the contract does not require Alpha to indemnify Arker.

As to defendants' motion to dismiss plaintiff's Labor Law §200 and common law negligence claims, plaintiff only opposes it to the extent that it pertains to Chateau. Accordingly, plaintiff's Labor Law

§200 and common law negligence claims as against Rockaway and Arker is **granted** without opposition.

Summary Judgment

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC,* 157 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st Dept. 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b];Friends of Thayer Lake LLC v. Brown,* 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 (1985)

Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.,* 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

Labor Law §240(1)

Labor Law §240(1) provides in part: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building 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."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners

and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

"Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate." *Ellerbe v Port Auth. of New York and New Jersey*, 91 AD3d 441, 442 [1st Dept 2012].

This court finds the plaintiff established his *prima facie* burden of a Labor Law §240(1) violation by showing that his injuries resulted from a gravity-related fall stemming from the failure of defendant to provide an adequate safety device to protect the plaintiff against the hazards associated with the performance of elevated work, a failure of which proximately caused his accident. *See Ordonez v One City Block, LLC*, 191 AD3d 412 [1st Dept 2021]; *see also Deschaine v Tricon Constr., LLC*, 187 AD3d 599 [1st Dept 2020]; *Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478 [1st Dept 2019]. "It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker." *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

In opposition, defendant has failed to raise a triable issue of fact or otherwise demonstrate *prima facie* that they provided the plaintiff with an adequate safety device to protect him from falling to comport with the statute. As indicated above, plaintiff testified that he was walking on the subject scaffold to bring work materials to Alpha masons. In opposition, defendants note that Mr. Gorgijanidze, Chateau's construction superintendent who did not witness the accident, testified that at the time of the accident, Alpha was in the process of dismantling the scaffold or portions of the scaffold. Defendants argue that this is contrary to plaintiff's testimony that he was there bringing materials to mason workers. However, regardless of the reason as to why plaintiff was walking on the subject scaffold at the time of the accident (that is, whether he was there to bring materials to mason workers or whether he was assisting in the dismantling of the scaffold), it is uncontroverted that plaintiff was working at the construction site at the time of the accident and that the subject

plank came broke and caused the scaffold to collapse and the plaintiff fall. Thus, this Court agrees with plaintiff that whether the scaffold was being dismantled at the time of the incident is immaterial in analyzing liability. *See Romanczuk v Metropolitan Ins. and Annuity Co.*, 72 AD3d 592 (1st Dept. 2010) wherein the Court found that Labor Law § 240(1) was violated under either version of the accident.

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim is **granted.**

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law 241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law § 241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

Plaintiff claims numerous violations of safety regulations in his bill of particulars. In their moving papers, defendants went through all the alleged Industrial Code provisions in plaintiff's bill of particulars. In his partial opposition, plaintiff notes that he only opposes this branch of the motion as it seeks to dismiss his Labor Law § 241(6) claim as predicated on Industrial Code Sections 5.1(g) and (h). Therefore, plaintiff has abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

As to Industrial Code §23-5.1(g) and (h), it is defendants' position that this Court should not entertain the motion for summary judgment by plaintiff since he did not specifically plead these sections.

A review of plaintiff's Verified Bill of Particulars shows that he cited Industrial Code 23-5, which is the subpart of the Industrial Code titled Scaffolding, but did not specifically include the subsection in his pleadings. Industrial Code §23-5 is a broad subpart of the industrial code which includes subsections §23-5.1 through §23-5.22. Thus, this Court finds that merely pleading a violation of Industrial Code §23-5 fails to comport with Labor Law § 241(6)'s requirement that plaintiff plead

a violation of a *specific* rule or regulation. *See Arizaga v. Lew Gardens II TP4 Housing Development Fund Company, Inc.*, 78 Misc.3d 1216(A), 185 N.Y.S.3d 646 (2023). The Court notes that plaintiff has not moved to amend his pleadings.

Accordingly, plaintiff's branch of motion seeking summary judgment on his Labor Law §241(6) claim as predicated on Industrial Code §23-5.1(g) and (h) is **denied** and defendants' motion to dismiss plaintiff's Labor Law §241(6) claim is **granted**.

Labor Law §200/Common Law Negligence

Labor Law §200 applies to owners, general contractors, and their statutory agents (*Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 234AD3d 623 [1st Dept. 2025]). A subcontractor will be found to be statutory agent where they have been "delegated the supervision and control over the specific work area involved or the work which [gave] rise to the injury (*id*, quoting *Nascimiento v Bridgehampton Constr. Corp.*, 86 AD3d 189 [1st Dept. 2011]).

Labor Law §200 is a "codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Jackson v Hunter Roberts Constr. LLC*, 205 AD3d 542 [1st Dept. 2022]). There are two branches of claims that can be made pursuant to Labor Law §200/common law negligence. Those two branches are those "arising from an alleged defect or dangerous condition existing on the premises or those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg Inc.* 99 AD3d 139 [1st Dept. 2012]).

As stated above, plaintiff only opposes this branch of defendants' motion as it pertains to Chateau. Plaintiff argues that there is a question of fact as to whether Chateau had the authority to supervise or control the injury-producing work.

"General supervisory authority is insufficient to constitute supervisory control." *Hughes v Tishman Const. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]. During his deposition, plaintiff testified that he only received instructions from Alpha. Further, it is uncontroverted that Alpha erected the subject scaffold. Thus, upon a review of the motion papers, this Court finds that Chateau has established prima facie that it did not control the manner in which plaintiff performed his work. In opposition, plaintiff has failed to raise an issue of fact.

If a claim is based upon an "existing defect or dangerous condition . . .liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." *Cappabianca*, at 144. Proof is not required as to defendant's supervision and control over plaintiff's work. *See*

Licata v AB Green Bansevoort, LLC, 158 AD3d 487 [1st Dept. 2018]. Moving defendants may still be held liable if they either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *Williams v McAlpine Contr. Co.*, 235 AD3d 521 [1st Dept. 2025]. Here, there is no evidence of any alleged notice or complaint regarding the subject scaffold/plank.

Accordingly, defendants' motion seeking summary judgment to dismiss plaintiff's Labor Law §200/common law negligence claim is **granted.**

Indemnification

"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., Inc.*, 70 NY2d 774, 777 [1987]. "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999].

Pursuant to General Obligations Law §5-322.1, a clause in a construction, repair or maintenance contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy. *See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]. However, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable. *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002].

Section 4.6.1 of the contract between Chateau and Alpha provides as follows:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not

such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

Further, in the "Insurance and Hold Harmless Agreement/Contract Rider," it states that:

This rider is a supplement to the master agreement between Contractor and the SubContractor at the below referenced project. It is agreed between the parties that this rider shall take precedence over any conflicting requirement under the master agreement…

INDEMNITY: To the fullest extent permitted by law, Subcontractor shall, at its sole expense, indemnify, defend and hold harmless: Chateau GC LLC
Rockaway Seagirt Limited Partnership
Rockaway Seagirt HDFC
Northeast Brooklyn Housing Development Corp.
Rockaway Seagirt GP LLC
Beach Channel Senior Partners LLC
Progressive Management of NY V LLC
Alex Arker
Allan Arker
Sol Arker
Daniel Moritz
Wells Fargo, N.A. and its Successors and Assigns ATIMA
together the "Owner Parties", from and against all claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from the performance or non-performance of SubContractor and any of its sub-contractors', regardless of whether or not it is caused in part by a party indemnified hereunder, excluding only liability resulting from the sole and exclusive negligence of the Indemnified Parties. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist to any party or person described in this paragraph. This indemnity agreement shall survive the completion of the work specified

Defendants argue that because there is no dispute that plaintiff was employed by Alpha at the time of the subject accident, they are entitled to contractual indemnification pursuant to their contract with Alpha. In opposition, Alpha argues that the evidence establishes that defendants were negligent or at the very least that there are questions of fact regarding whether defendants were negligent. Alpha further notes that Alpha did provide additional insured coverage on behalf of defendants and note that they are being defended and indemnified under Alpha's primary policy issued by Admiral Insurance Group. Alpha further argues that the indemnification provisions in their contract with Chateau violate the General Obligations Law and are not enforceable, "as the provisions attempt to

improperly require Alpha to indemnify the Indemnified Parties for their own negligence." Lastly, Alpha argues that regardless of whether the indemnification provisions are enforceable, defendant The Arker Companies LLC ("Arker") is not identified as an indemnitee under the contract.

As a preliminary matter, upon a review of the motion papers, this Court finds that defendant Arker is not entitled to summary judgment as it is not a named indemnitee under the agreement. Accordingly, this branch of the motion as it relates to the Arker Companies LLC is **denied.**

As indicated above, the record lacks any evidence that defendants were negligent. Moreover, the subject indemnification provision sufficiently contains the appropriate savings clause (that is, "to the fullest extent permitted by law" to avoid violation of the General Obligations Law. *See Radeljic v Certified of N.Y., Inc.,* 161 AD3d 588, 590 [1st Dept 2018]. Lastly, it is undisputed that plaintiff was working for Alpha at the time of the alleged accident and the contract between the parties specifically states that Alpha agrees to "indemnify, defend and hold harmless [owner and general contractor] from and against all claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from the performance or non-performance of SubContractor and any of its sub-contractors…" Thus, based upon the foregoing and pending the determination of negligence, if any, Rockaway and Chateau's branch of motion as to contractual indemnification against Alpha is **Granted to Extent** in that they are entitled to a conditional grant of judgment on their claim for contractual indemnification against Alpha. *See Devlin v AECOM*, 224 AD3d 437 [1st Dept 2024]; *see also Quichimbo v Vornado 640 Fifth Ave., L.L.C.*, 30 AD3d 194 [1st Dept 2006].

Accordingly, it is hereby

ORDERED, that the branch of motion seq #3 by plaintiff seeking judgment on his Labor Law §240(1) claim is **GRANTED**; and it is further

ORDERED, that the branch of motion seq #3 by plaintiff seeking judgment on his Labor Law §241(6) claim is **DENIED**; and it is further

ORDERED, that the branch of motion seq #4 by defendants seeking to dismiss plaintiff's Labor Law §241(6) and Labor Law § 200/common law negligence claims is **GRANTED**; and it is further

ORDERED, that the branch of motion seq #4 by defendant Arker seeking indemnification against Alpha is **DENIED**; and it is further

ORDERED, that the branch of motion seq #4 by Rockaway and Chateau seeking indemnification against Alpha is **GRANTED TO AN EXTENT** in that Rockaway and Chateau are awarded a conditional judgment; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED, the movants shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the date of this Decision and Order

This constitutes the decision and order of this court.

Dated: June 30, 2025

HON. MYRNA SOCORRO, J.S.C.