At an IAS Term, Part 9 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 23 day of December, 2025.

PRESENT:

HON. STEVEN Z. MOSTOFSKY,
Justice.

LACINA SANGANOU,

Plaintiff,

-against-

DOMINO A LLC, DOMINO B LLC, and 260 KENT CONSTRUCTION LLC,

Defendants.

DOMINO A LLC, DOMINO B LLC, and 260 KENT CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

ARO CONSTRUCTION GROUP, INC.,

Third-Party Defendant.

DOMINO A LLC, DOMINO B LLC, and 260 KENT CONSTRUCTION LLC,

Second Third-Party Plaintiffs,

-against-

ARO CONTRACTING CORP.,

Second Third-Party Defendant.

DECISION AND ORDER

Index No. 509046/19

Mot. Seq. Nos. 6-8

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	79-90; 91-105; 106-119
Opposing Memoranda of Law and Exhibits Annexed	123-139; 140-153; 155; 156-172; 173-175
Reply Memoranda of Law and Exhibits Annexed	154; 176; 177; 178

[* 1]

In this action to recover damages for personal injuries, the following motions have been consolidated for disposition and, upon consolidation and after oral argument held on November 20, 2025, are decided as follows:

In Seq. No. 6, the motion of plaintiff Lacina Sanganou ("plaintiff") 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 defendants/third-party defendants/second third-party defendants Domino A LLC, Domino B LLC, and 260 Kent Construction LLC (collectively, the "Domino defendants"), is *granted* against the Domino defendants, jointly and separately;

In Seq. No. 7, the Domino defendants' joint motion for an order, pursuant to CPLR 3212, granting them summary judgment on their third-party claims for contractual and common-law indemnification against third-party defendant ARO Construction Group, Inc. ("ACG") is *denied in its entirety*; and

In Seq. No. 8, ACG's motion for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the entirety of the Domino defendants' third-party complaint against it is *denied in its entirety*.

Background

On January 19, 2019, plaintiff, age 37, a laborer with nonparty IBK Construction Group, LLC ("IBK"), was working in a building under construction when a portion (or

the entirety) of the #11 rebar[1] rolled through a floor/deck opening in the floor immediately above him, fell five-to-six feet to the floor below on which plaintiff was working, struck him on his hard hat, and knocked him to the ground (the "accident").[2] At the time of the accident, Domino A LLC and Domino B LLC were the project owners, whereas 260 Kent Construction LLC ("Kent") (a related entity) acted as their general contractor.[3] Approximately one year before the accident, Kent had retained plaintiff's employer IBK as the contractor to erect the building's concrete and steel superstructure (concrete and rebar). Approximately six months before the accident on July 15, 2018, IBK subcontracted the rebar portion of its contract with Kent to second third-party defendant ARO Contracting Corp. ("ACC"), pursuant to ACC's proposal to IBK, dated June 28, 2018 (the "IBK subcontract"). Sometime between July 15, 2018 and January 1, 2019, ACC transferred its rights and obligations under the IBK subcontract to ACG.[4] According to Sean Aronsen ("Aronsen"), who owned both the active ACG and the since-dissolved ACC, the corporate transfer (together with the IBK subcontract) was prompted by some vaguely described insurance-coverage issues, as more fully set forth in the

[1] Each piece of #11 rebar is a ribbed steel rod that is 1-1/2 inches thick, 30 feet long, with the weight of 159.39 pounds (or 5.313 pounds per linear foot) (Sean Aronsen's [ACG's] EBT transcript, page 41, line 6 to page 42, line 4). At the time of the incident, only ACG (but no other trade) was working with the rebar, and ACG was in full and exclusive control of the rebar while installing it (Spencer Evans's [ACG's] EBT transcript, page 47, lines 12-15; page 32, lines 10-15; Sean Aronsen's [ACG's] EBT transcript, page 28, lines 19-23; page 29, lines 6-9).

[2] Plaintiff's September 24, 2021 EBT transcript ("Plaintiff's first EBT session"), page 68, line 7 to page 71, line 5; page 79, line 3 to page 81, line 11; page 82, lines 11-14; page 84, line 20 to page 86, line 3; page 90, line 4 to page 91, line 15. Plaintiff's May 25, 2022 EBT transcript ("Plaintiff's second EBT session"), page 49, line 8 to page 52, line 6.

[3] Domino defendants' joint verified answer, dated September 19, 2019, ¶ 6 (admitting that Domino A LLC and Domino B LLC owned the subject building), ¶ 11 (admitting that Kent was the general contractor at the subject building) (NYSCEF Doc No. 110). The admissions corresponded to the allegations in plaintiff's verified complaint, dated April 22, 2019, ¶¶ 6 and 11, respectively (NYSCEF Doc No. 109).

[4] Sean Aronsen's (ACG's) EBT transcript, page 19, lines 17-22 (testifying that ACC worked under the IBK contract through December 31, 2018 and that ACG took over ACC and starting working in place of ACC under the IBK contract from January 1, 2019).

margin.[5] Notwithstanding the corporate transfer, neither an amended proposal nor an amended sub contract were executed between ACG and IBK for the purpose of substituting ACG for ACC under the IBK subcontract as the responsible party for indemnification (among other contractual obligations under the IBK subcontract).

Shortly before plaintiff's accident on January 19, 2019, a truck crane deposited a bundle of rebars on the floor on which the laborers (now with ACG) were working. The bundle contained 18 rebars weighing a total of 2,869 pounds (with each rebar, as noted, weighing 159.39 pounds). The bundle was tied (and held together) by a nine-gauge (or the thickest of the gauges) wire with the thickness of 0.11. One or more ACG workers snipped the wire to open the bundle. When the bundle was thus opened, the 18 bundled bars, no longer held together by the wire, became loose. One of the loosened rebars rolled down into the opening between the higher floor separating ACG from the immediately lower floor on which plaintiff was working, struck him on his hard hat and knocked him to the floor causing his alleged injuries.

ACG's owner Aronsen testified as to the two (alternative and complementary) methods by which plaintiff's accident could have been avoided: either by the installation of a toe board and handrails on the floor on which the ACG workers were then untying the rebar, or the installation of a controlled access (roped off or taped off) area on the

[5] Sean Aronsen's (ACG's) EBT transcript, page 13, line 14 to page 14, line 8 of (testifying that the insurance policies which ACC had at the time of its roll-over into ACG were "taken over from another company [PMG Contracting]," and that he (Aronsen) "didn't want any affiliations with [PMG Contracting]. [Aronsen] wanted a clean break, a clean start. So that was the cause of closing [ACC] and opening [ACG]."). When quoting from the record, the court corrected typographical errors.

lower floor where plaintiff was working, or both.[6] Neither method was implemented, however. To reiterate: there was neither fall protection on the floor immediately above plaintiff where ACG was working, nor a controlled access area on the lower floor where plaintiff was working.

In April 2019 (or three months after the accident), plaintiff commenced the instant action against the Domino defendants, alleging (among other theories) a violation of Labor Law § 240 (1). The Domino defendants impleaded initially ACG and subsequently ACC, in each instance, for (among other things) contractual and common-law indemnification. In January 2025, discovery was completed and a note of issue was filed. In March 2025, plaintiff and defendants timely moved for the aforementioned relief. The recitation of the well-established standard of review in the summary-judgment context is omitted from this Decision and Order in the interest of brevity (*see e.g. Flanders v Goodfellow*, 44 NY3d 57, 62 [2025]). For the sake of completeness, two (non-discovery-related) developments in this action (and in the related action) are summarized in the margin.[7]

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[6] Sean Aronsen's (ACG's) EBT transcript, page 20, line 2 to page 21, line 11; page 23, lines 8-13; page 48, lines 8-11 ("If the job was properly safeguarded [on the floor/deck on which ACG was working], [the accident] wouldn't have happened. Or [if ACG was] working [on the floor/deck] where it wasn't safeguarded, [IBK and/or Kent] should have had it quarantined off [on the floor/deck] below [ACG]."); page 55, lines 14-23 ("Q. . . . [T]he [ACG] workers who were opening up the bundles of rebar and then taking the bundles to the work site, they're in control of that rebar, correct? A. They were in control of the rebar they picked up. The bar that rolled, it should have been stopped by a handrail, a toe board. There [are] multiple safety options that could have been put in place to stop that. But they were not touching the bar that was rolling. . . . [M]y answer is no."); page 68, line 23 to page 69, line 5 (testifying from his experience in the trade that "there could have been handrails put in place, toe boards, even orange netting. If [those protective methods weren't] in place [on the floor on which ACG was working], then it should have been roped off down below [*i.e.*, on plaintiff's floor below] with controlled access because there [were] people working above [plaintiff's floor].").

[7] The first non-discovery-related development arose from the Domino defendants' failed attempts at obtaining leave to enter a default judgment against ACC. In December 2022, the Domino defendants moved (in Seq. No. 3) for leave

Plaintiff's Labor Law § 240 (1) Claim Against Domino Defendants

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

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

"To prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Allan v DHL Exp. [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]). "Once a plaintiff makes a prima facie showing[,] the burden then shifts to the defendant, who may defeat the plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident"

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to enter a default judgment against ACC. Although the motion against ACC was unopposed, the court (Silber, J.) declined to enter a default judgment against ACC, noting that the Domino defendants "failed to submit admissible proof of the facts constituting the claim," as required by CPLR 3215 (f) (Decision/Order, dated January 27, 2023, page 2 at NYSCEF Doc No. 48). In February 2023, the Domino defendants once again moved (in Seq. No. 4) for leave to enter a default judgment against ACC. Once again, the court (Silber, J.) declined to enter a default judgment, reiterating the same reasons which supported her prior denial (Decision/Order, dated March 16, 2023, page 2 at NYSCEF Doc No. 67). To date, the Domino defendants have made no further attempts at obtaining leave to enter a default judgment against ACC.

The second non-discovery-related development arose from the Domino defendants' initiation and pursuit of a declaratory-judgment action against ACG and its insurers from August 2021 to September 2022 (*see Domino A LLC, et al. v State Natl. Ins. Co., Endurance Amn. Ins. Co., Navigators Ins. Co., ARO Constr. Group, Inc., et al.*, index No. 520009/2021 [Sup Ct, Kings County]). In September 2022, the Domino defendants withdrew (without explanation on the record) their motion for partial summary judgment on the issue of coverage (NYSCEF Doc No. 48 at index No. 520009/21). Since then, there has been no substantive activity in the declaratory-judgment action.

(*Aguilar v 58 Gerry St, LLC*, ___ AD3d ___, 2025 NY Slip Op 06838 [2d Dept 2025] [internal quotation marks and alterations omitted]).

On a macro level, the single decisive question in determining the applicability (or not) of Labor Law § 240 (1) is "whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]). In a falling object case (as is the instance here), for Labor Law § 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to him or her. In particular, "[a] plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Nonetheless, "falling object liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Construct. Corp.*, 11 NY3d 757, 758-759 [2008] [internal quotation marks omitted]). "Rather, liability may be imposed where an object or material that fell, causing injury, was a load that required securing for the purposes of the undertaking at the time it fell" (*Sung Kyu-To v Triangle Equities, LLC*, 84 AD3d 1058, 1060 [2d Dept 2011] [internal quotation marks omitted]). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Const. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016] [internal citation omitted]).

Here, the record establishes that no safety device was placed either on the floor above on which the ACG workers were unbundling the rebars or on the floor immediately below on which he was working to prevent a loose piece of rebar from falling (or bending) down onto plaintiff. In that regard, plaintiff relies on the following:

(1) plaintiff's sworn deposition testimony that a #11 rebar (whether at one of its ends or in its entirety) fell (or bent) down onto him through the opening in the floor/deck immediately above him;[8]

(2) a sworn "Incident Report by Employee" (on IBK's form) filled out on plaintiff's behalf by his coworker Mohamadou Ceesay, stating that "[a] number '11 rebar' fell on [plaintiff's] head" and estimating the length of the fall at "4 or 5 feet" ("Mohamadou's report");[9]

(3) a sworn affidavit (also on IBK's form) from plaintiff's ACG coworker Harrison Jarvis, stating that the "[ACG] guys work[ing] on [one] level above [IBK] . . . accidentally dropped #11 rebar sheet ([a] 6 [foot] drop)[,] . . . hit[ting] [plaintiff] on [the] head";[10] and

(4) a sworn affidavit (again on IBK's form) of ACG employee Sierra Williams, then working on the floor immediately above plaintiff's floor, stating that a "piece of rebar rolled towards an opening (gap) and the edge of [the] rebar fell down on the level below."[11]

By way of the foregoing, plaintiff established, prima facie, his entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim against the Domino defendants, in that a piece of rebar (either at one of its ends or in whole) fell (or bent) down through an opening in the deck/floor immediately above him, and that no safety devices were employed to protect him from its fall (*see Lahoz-Vargas v Bop Ne, LLC*,

[8] Plaintiff's first EBT session, page 68, lines 7-12; page 69, line 3 to page 71, line 5; page 80, lines 13-15; page 85, lines 8-12; page 86, lines 2-3; page 88, lines 20-23; page 90, line 14 to page 91, line 15.

[9] Two-Page Incident Report by Employee, filled out and signed on plaintiff's behalf by ACG coworker Mohamadou Ceesay, dated and sworn to on January 19, 2019 (part of NYSCEF Doc No. 104).

[10] Harrison Jarvison's One-Page Affidavit, dated and sworn to on January 19, 2019 (part of NYSCEF Doc No. 104).

[11] Sierra Williams's One-Page Affidavit, dated and sworn to on January 19, 2019 (part of NYSCEF Doc No. 104).

241 AD3d 812, 813 [2d Dept 2025]; *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708 [2d Dept 2019]).

In opposition, the Domino defendants, joined by ACG (collectively with the Domino defendants, "defendants"), failed to raise a triable issue of fact. At first, defendants rely on the sworn "Incident Report by [IBK's] Supervisor" by site foreman Vyacheslav ("Slava")[12] Barakhtyanskyy, which report was handwritten, completed, and notarized for Slava by ACG's safety manager Timur Pozhidaev ("Timur's report").[13] Timur's report stated that the rebar at issue "rolled towards the edge [at] about 6 [inches, and that the] rebar ben[t] [, but] it did not fall."[14] Timur's report, however, is at odds with the other extant version of the "Incident Report by [IBK's] Supervisor" which was separately completed for Slava by his administrative assistant Carolina Mendez ("Carolina's report").[15] Unlike Timur's report, Carolina's report described the incident as "a number 11 [ ] rebar [falling] on [plaintiff's] head."[16] In line with Carolina's report (as well as with Mohamadou's employee-incident report), the Domino defendants prepared

[12] Plaintiff characterized Slava (or "Slava" or "Slaver" as he was known by plaintiff at the work site), the site foreman for IBK, as "a big boss" (Plaintiff's first EBT session, page 33, lines 2-15; Plaintiff's second EBT session, page 19, lines 13-23).

[13] Two-Page Incident Report by IBK's Supervisor, dated January 23, 2019, but sworn to on January 22, 2019 (part of NYSCEF Doc No. 104). Timur's report was completed and *pre-sworn* for Slava *three days after the accident* (January 22, 2019) and was signed by Slava on *the following day* (January 23, 2019).

[14] *Id.* Slava did not witness the accident (*see* Slava's Affidavit, dated January 28, 2022, ¶ 3 ["I learned of (plaintiff's) incident from . . . (IBK's) concrete safety manager, Andriy (Shtybel)."]). Plaintiff characterized Andriy Shtybel (or "Andre" as he was known to plaintiff at the work site) as the "number two [after Slava], he's the one who supervise[s] the work, [which people] are working, and [which people] are not working" (Plaintiff's first EBT session, page 33, lines 15-18). Like Slava, his subordinate Andriy Shtybel did not witness the accident.

[15] The first page of the Two-Page Incident Report by Supervisor, which was completed by administrative assistant Carolina Mendez, is attached as an exhibit to the Domino defendants' Incident Report, dated January 23, 2019 (part of NYSCEF Doc No. 101). The court notes that the second page of Carolina's report is not included in the motion record.

[16] Carolina's report, page 1, ¶ 11 (part of NYSCEF Doc No. 101).

an "Incident Report" ("Domino's report").[17] The latter report described the incident as "[plaintiff] was installing metal forms when a number eleven rebar fell striking his head."[18]

In addition to Timur's handwritten report, defendants placed great reliance on the description of the incident in the sworn affidavit of ACG's supervisor Fernando Castro Apolinar ("Fernando's report").[19] Fernando's report was handwritten, completed, and notarized for him (on the IBK form) by none other than Timur, even though Timur worked for IBK, whereas Fernando worked for ACG. In his report, Fernando averred that although he did not witness the accident itself, he did see a "rebar #11 hanging from the floor," and that "[the rebar] didn't fall."[20] Contrary to defendants' contention, however, plaintiff need not show the exact circumstances of how a piece of rebar came to strike him (*i.e.*, whether one of its ends bent down sufficiently from the floor immediately above him to strike him on the floor immediately below, or whether the entire rebar fell on him from the floor immediately above him) because either scenario of the accident implicated the protections of Labor Law § 240 (1) (*see Rivera v 454 W. 57th St. Holding LLC*, 236 AD3d 477, 478 [1st Dept 2025]; *Pados v City of New York*, 192 AD3d 596 [1st Dept 2021]). Stated otherwise, "the record evidence does not reveal differing versions of the accident, one under which defendants would be liable and another under which they

[17] Domino's report (which is part of NYSCEF Doc No. 101) was authenticated at the pretrial deposition of Joe Barnes, the sole site-safety manager for the Domino defendants' affiliate Two Trees Management (Joe Barnes's [Domino defendants' site-safety manager's] EBT transcript, page 61, line 14 to page 62, line 17; page 77, lines 17-21; page 81, lines 21-25).

[18] Domino's report (part of NYSCEF Doc No. 101).

[19] One-Page Affidavit of Fernando Castro Apolinar, dated and sworn to on January 19, 2019 (part of NYSCEF Doc No. 104).

[20] Fernando's report (part of NYSCEF Doc No. 104).

would not" (*Buzzetta v NYU Hosps. Ctr.*, 241 AD3d 628, 629 [2d Dept 2025] [internal quotation marks omitted]).

Defendants' next contention – that the rebar did not need to be "secured for the purposes of the undertaking" – fares no better. A loose piece of rebar near an opening in the deck/floor of the higher floor on which ACG's workers were laying the rebar clearly required to be secured to avoid its fall (either partial or full) to the floor immediately below on which plaintiff was working (*see Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 708 [2d Dept 2019]; *Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]).[21]

Defendants' final contention – that plaintiff was recalcitrant because he was working inside a controlled access area at the time/place of the accident – was factually unsupported. In that regard, defendants submitted Slava's typewritten, post-litigation affidavit in which he averred that a roped-off controlled access area with a sign "Do Not Enter – Danger" had been erected on plaintiff's floor and at the location at issue before the accident ("Slava's affidavit").[22] Slava's averment in his affidavit of the existence of the controlled access area on plaintiff's floor at the time and place of the accident is completely devoid of a credible evidentiary basis, for the following reasons:

[21] Defendants' reliance on *Molina v Brooklyn GC LLC*, 2022 NY Slip Op 30540(U) (Sup Ct, Kings County 2022, Joseph, J.), is misplaced because a hammer "which slipped out of [a coworker's] glove [while in use] and fell down on the plaintiff striking him," obviously did not need to be secured for the purposes of the undertaking (*see Molina*, 2022 NY Slip Op 30540[U], *3 and *7).

[22] Slava's Typewritten Affidavit, dated January 28, 2022, ¶¶ 5-12 (NYSCEF Doc No. 138).

(1) Plaintiff testified that, at the time/place of the accident, he did not observe any barriers, ropes, and/or tapes which (in any way, shape, or form) established (or even suggested) an off-limits controlled access area where he was working;[23]

(2) Not one of the aforementioned accident reports (including Timur's report which he prepared for, and which was signed by, Slava himself) mentioned anything about plaintiff working in the controlled access area or otherwise "being out of place" at the time of the accident; and

(3) ACG's field foreman Spencer Evans explained that it was the responsibility of IBK (and no one else) to install and maintain controlled access areas both at the upper floor where ACG worked, and at the floor immediately below where IBK worked, but, more fundamentally, that he could not "recall seeing any" controlled access areas either on the upper or on the lower floors at the work site.[24]

In sum, defendants failed to raise a triable issue of fact as to whether plaintiff was a recalcitrant worker. Defendants offered no evidence indicating that a controlled access area (either on his floor where he was working or on the floor immediately above him where the rebar work was ongoing) was established and maintained on the date and place of the accident, that he was specifically instructed not to breach the controlled access area, but that he chose for no good reason to disregard the instruction (*see Amaro v New York City School Constr. Auth.*, 229 AD3d 746, 748 [2d Dept 2024]; *Garbett v Wappingers Cent. School Dist.*, 160 AD3d 812, 815 [2d Dept 2018]; *Carrion v City of New York*, 111 AD3d 872, 874 [2d Dept 2013]; *see also Albuquerque v City of New York*, 188 AD3d 515 [1st Dept 2020]).[25] Accordingly, plaintiff's motion for partial summary

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[23] Plaintiff's September 24, 2021 EBT transcript, page 49, line 11 to page 50, line 10; page 53, lines 15-21; page 55, lines 8-19; page 71, line 24 to page 72, line 5; page 88, lines 10-19.

[24] Spencer Evans's (ACG's) EBT transcript, page 39, line 14 to page 42, line 13; page 65, lines 18-20; page 66, line 18 to page 67, line 10.

[25] Defendants' citation to *Ahmad v 540 W. 26th St. Prop. Inv. IIA, LLC*, 2020 NY Slip Op 31915(U) (Sup Ct, Kings County 2020, Knipel, J.), *rearg denied* 2020 NY Slip Op 33450(U) (Sup Ct, Kings County 2020, Knipel, J.), is unavailing. Unlike the instance here, *Ahmad* involved an accident that happened "in an area which was designated as controlled access zone . . . , which had been barricaded with yellow caution tape on its top and bottom to specifically

judgment on the issue of liability on his Labor Law § 240 (1) claim is *granted* against the Domino defendants, jointly and separately.

Domino Defendants' Third-Party Claims Against ACG

As noted, the Domino defendants move for summary judgment on their common-law and contractual indemnification third-party claims against ACG, whereas ACG moves for summary judgment dismissing the entirety of the Domino defendants' third-party complaint, including the additional third-party claim for contribution.[26]

Common-Law Indemnification

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*Curreri v Heritage Prop. Inv. Tr., Inc.*, 48 AD3d 505, 507 [2d Dept 2008]). "If, in fact, an injury can be attributed *solely to negligent performance or nonperformance of an act solely within the province of the contractor*, then the contractor may be held liable for indemnification to an owner" (*Curreri*, 48 AD3d at 507 [emphasis added]).

Here, the Domino defendants failed to make a prima facie showing of entitlement to summary judgment on their common-law indemnification third-party claim against ACG because they failed to eliminate a triable issue of fact as to whether ACG was *entirely* at fault for the accident. The record raises a triable issue of fact as to whether

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prevent access and usage" (*Ahmad*, 2020 NY Slip Op 31915[U], *5). In contrast to *Ahmad*, defendants made no similar showing here (*Ahmad*, 2020 NY Slip Op 31915[U], *11).

[26] Third-Party Complaint, dated August 3, 2020, First, Second, and Third Causes of Action, respectively (NYSCEF Doc No. 111).

general contractor Kent was partially at fault for the accident by failing to ensure that the floor on which ACG was laying rebar was adequately protected to prevent objects from falling on the floor immediately below where plaintiff was working. To reiterate and to emphasize Sean Aronsen's pretrial testimony (as quoted in footnote 6 above): if, as was the instance here, ACG was working "where it wasn't safeguarded, *they* should have had it quarantined off below [ACG]." According to Sean Aronsen, the word "they" meant "*[e]ither the site safety for the GC [Kent]* or the CSM [certified safety manager] for the concrete company which would be IBK."[27] Sean Aronsen's pretrial testimony dovetails that of the Domino defendants' site-safety manager Joe Barnes who conceded that Kent was responsible for ensuring that IBK put up a controlled access zone on plaintiff's floor, as more fully set forth in the margin.[28] Thus, it would be unfair to shift the *entire* responsibility for the accident from the Domino defendants to ACG, considering their

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[27] Sean Aronsen's (ACG's) EBT transcript, page 48, lines 9-14 (emphasis added).

[28] Joe Barnes's (Domino defendants' site-safety manager's) EBT transcript, page 37, lines 15-24 ("Q. Who was responsible for putting these controlled access zones up? A. The concrete safety manager [IBK] is ultimately the first line of defense for [IBK]. *Q. And you and your team are responsible for confirming that they're [IBK] doing what they're supposed to do; is that correct? A. Kinda, yes.*"). *Compare with* Joe Barnes's later pretrial testimony at page 89, lines 11-15 (testifying that he was *not* required "to inspect [a] controlled access zone to make sure that it was acceptable"). *Contrast with* Joe Barnes's still later pretrial testimony at page 92, lines 22-25 (acknowledging that *if there was an opening on the floor above, "there has to be a controlled access location directly underneath [that opening]"*) (emphasis added). To the same effect is Sean Aronsen's (ACG's) EBT transcript, page 35, lines 5-10 (testifying that "[i]f [ACG is] released to go onto a floor, . . . all safeguarding should be done . . . either [by] IBK or *[Kent]*.") (emphasis added).

See generally Joe Barnes's (Domino defendants' site-safety manager's) EBT transcript, page 22, lines 6-23 (testifying that as a licensed site-safety inspector, he conducted inspection of the building at issue, that his inspections "start[ed] out with concrete guys [IBK], and that there [are] different [contractors] for the building and [that] [he] inspect[ed] them all"); page 23, line 6 to page 24, line 11 (testifying that he or his assistants were inspecting the building daily starting from "the top of the building and . . . walking down and inspecting things," and that "[e]verything [in the building] need[ed] attention"); page 25, lines 3-7 (testifying that the owner required "a full inspection of the building . . . on a daily basis"); page 36, lines 2-6 (testifying that he "perform[ed] inspections of those floors as they were being built to make sure that there [were] . . . controlled access zones"); page 49, lines 4-16 ("We walk through the building. I'm responsible to walk through. At the time I'm there and I see [the controlled access zones] and they're good, there's no follow-up [with IBK]. If something needs to be addressed when I'm there, we address it. Every time I pass through, [IBK] had [the controlled access zones] up. . . I don't recall ever [IBK] not having [the controlled access zones] in place as needed."); page 94, lines 3-5 ("We try to walk the entire building at least two to three times a day, from top to bottom.").

agent's (Kent's) alleged failure to ensure that a controlled access zone was established on plaintiff's floor while ACG was working on the floor immediately above him. Thus, the respective branches of the Domino defendants' and ACG's respective motions with respect to the common-law indemnification third-party claim are denied (*see Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 621 [2d Dept 2024]; *Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2023]).

Contribution

"[A] a party moving for summary judgment dismissing a claim for contribution must make a prima facie showing that it did not owe a duty of reasonable care independent of its contractual obligations, or a duty of reasonable care to the plaintiff" (*Keller v Rippowam Cisqua School*, 208 AD3d 654, 655 [2d Dept 2022]). Contrary to ACG's contention, it failed to established that it did not cause or contribute to plaintiff's accident (see *Keller*, 208 AD3d at 655). Irrespective of whether (or not) IBK was required to install a controlled access zone on plaintiff's floor, ACG's owner Sean Aronsen conceded that ACG's workers were responsible for not letting pieces of rebar "roll and fall into" the openings on their (ACG's) floor.[29]

Contractual Indemnification

The record presents a triable issue of fact as to whether ACG was a "mere continuation" of ACC; namely, whether the Domino defendants became the beneficiaries of – and ACG, in turn, became the obligor under – the indemnification provisions of the

[29] Sean Aronsen's (ACG's) EBT transcript, page 39, lines 10-17; page 40, lines 10-14; page 54, lines 19-22 ("If you're asking me if the job should have been safeguarded – [t]he accident wouldn't have occurred.").

IBK subcontract (which, as noted, was originally with ACC and was not amended). As Justice Dianne T. Renwick (then sitting in Supreme Court, Bronx County, and now is Presiding Justice of the Appellate Division, First Department) explained in a scholarly opinion:

> "Under New York law, the mere continuation exception refers to corporate reorganization, . . . where only one corporation survives the transaction; the predecessor corporation must be extinguished. The successor-buyer is not in existence prior to the purchase of the predecessor's assets, and the predecessor-seller does not survive the sale of the assets. Other factors considered by New York courts to be indicative of the mere continuation exception are that the business of the successor is the same as the business of the predecessor, the business employs the same work force, and the predecessor's officers and directors become the officers and directors of the successor.
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> * * *
>
> [T]he mere continuation exception refers to a continuation of the selling corporation in a different form, and not merely . . . to a continuation of the seller's business. It applies where a purported asset sale is in effect a form of corporate reorganization. For this exception to come into operation the purchasing corporation must represent merely a new hat for the seller. That is, it is not simply . . . the business of the original corporation that continues, but the corporate entity itself. What it accomplishes is something in the nature of a corporate reorganization, rather than a mere sale."

(*Alvarado v Dreis & Krump Mfg. Co.*, 1 Misc 3d 912(A), 2004 NY Slip Op 50048[U], *3-4 [Sup Ct, Bronx County 2004] [internal quotation marks and citations omitted]).

Here, the motion record is conflicting as to whether ACG is a mere continuation of ACC. According to Sean Aronsen's *pre-deposition* affidavit, ACG and ACC "are separate and distinct corporate entities. There is no corporate affiliation between the two corporation and *[ACG] is not a corporate successor to [ACC].* [ACC] had separate insurance coverage effective May 10, 2018, which was canceled on 1/3/2019 [before

plaintiff's accident] once it ceased operating."[30] Approximately 20 months after executing this affidavit, however, Sean Aronsen testified at his pretrial deposition that ACC was, in effect, "rolled into" ACG, and that ACG took over all of ACC's contracts.[31] Where, as here, "credibility is at issue, summary judgment should not be granted" (*Webster v City of New York*, 181 AD3d 756, 757 [2d Dept 2020]).

The court considered the parties' remaining contentions and found them either unavailing or moot in light of its determination. The court denies any relief not expressly granted herein.

Plaintiff's counsel must electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and electronically file an affidavit thereof with the Kings County Clerk.

The above is the court's Decision and Order.

ENTER:

Hon. Steven Z. Mostofsky
Justice, Supreme Court

[30] Sean Aronsen's Affidavit, dated September 15, 2022, ¶ 6 (emphasis added) (NYSCEF Doc No. 108).
[31] Sean Aronsen's (ACG's) EBT transcript, page 9, line 20 to page 10, line 3.