

**Ordonez v ICL Nevins St. Hous. Dev. Fund Corp.**

2025 NY Slip Op 35094(U)

July 2, 2025

Supreme Court, Bronx County

Docket Number: Index No. 20852-2020E

Judge: Myrna Socorro

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E#002, E#003,  
E#004, & E#005

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

-----X  
Brayan Ordonez,

Plaintiff

Index No. 20852-2020E  
Motion seq #2, 3, 4 and 5

-against-

ICL Nevins Street Housing Development Fund Corp.,  
ICL Nevins Street Apartments L.P., Institute for  
Community Living Inc., Mega Contracting Group LLC  
Celtic Services NYC Inc., and Republic Scaffold  
& Hoist Corp.,

Defendants  
-----X

**DECISION & ORDER**  
Hon. Myrna Socorro, J.S.C.

Celtic Services NYC Inc.,

Third Party Plaintiff

-against-

Republic Scaffold & Hoist Corp.,

Third Party Defendant  
-----X

ICL Nevins Street Housing Development Fund Corp.,  
ICL Nevins Street Apartment L.P., and Institute for  
Community Living Inc.,

Second Third Party Plaintiffs,

-against-

Republic Scaffold & Hoist Corp.,

Second Third Party Defendant  
-----X

Mega Contracting Group LLC,

Third Third-Party Plaintiff

-against-

Celtic Services NYC Inc.,

Third Third-Party Defendant  
-----X

Mega Contracting Group LLC

Fourth Third Party Plaintiff

-against-

Republic Scaffold & Hoist Corp.,

Fourth Third Party Defendant  
-----X

The following papers were read on the motion by ICL Nevins Street Housing Development Fund Corp., ICL Nevins Street Apartments L.P., and the Institute for Community Living, Inc. (ICL) (collectively, the ICL defendants) (Seq. #2) for **Summary Judgment**; on the motion by Republic Scaffold & Hoist Corp. (Republic) (Seq. #3) for **Summary Judgment**; on the motion by Celtic Services NYC, Inc. (Celtic) (Seq. #4) for **Summary Judgment**; on the motion by Mega Contracting Group LLC (Mega) (Seq. #5) for **Summary Judgment**; and all motion seqs #2, 3, 4 and #5 having cross motions by plaintiff Brayan Ordonez for summary judgment, all orally argued and marked submitted on May 28, 2024.

Papers	NYSCEF Doc #
<b>Motion Seq. No. 2</b>	
Notice of Motion by the ICL Defendants, Affirmation and Exhibits Annexed	#123-131
Affirmation in Opposition by Celtic	#273-275
Affirmation in Opposition by Republic	#279-284
Affirmation in Opposition by Mega	#309-328
Reply to Mega	#348
Reply to Celtic	#349
Reply to Republic	#350
Notice of Cross-Motion by Plaintiff, Affirmation and Exhibits Annexed	#259-262
Affirmation in Partial Opposition by the ICL Defendants	#351-352
Affirmation in Reply	#394
<b>Motion Seq. No. 3</b>	#132-158
Notice of Motion by Republic, Affirmation and Exhibits Annexed	
Affirmation in Opposition by the ICL Defendants	#272
Affirmation in Opposition by Celtic	#276
Affirmation in Opposition by Mega	#329-347
Reply to Celtic	#366
Reply to the ICL Defendants	#367
Reply to Mega	#368
Notice of Cross-Motion by Plaintiff, Affirmation and Exhibits Annexed	#263-266
Affirmation in Opposition by Republic	#369-370
Affirmation in Reply	#395
<b>Motion Seq. No. 4</b>	#159-192
Notice of Motion by Celtic, Affirmation and Exhibits Annexed	
Affirmation in Opposition by the ICL Defendants	#270
Affirmation in Opposition by Republic	#285-287
Affirmation in Opposition by Mega	#292-308
Reply to the ICL Defendants	#363
Reply to Republic	#364
Reply to Mega	#365
Notice of Cross-Motion by Plaintiff, Affirmation and Exhibits Annexed	#267-269
Affirmation in Opposition by Celtic	#362
Affirmation in Reply	#396

<b>Motion Seq. No. 5</b>	#193-210
Notice of Motion by Mega, Affirmation and Exhibits Annexed	
Affirmation in Opposition by the ICL Defendants	#271
Affirmation in Opposition by Celtic	#277-278
Affirmation in Opposition by Republic	#288-291
Reply to Celtic	#391
Reply to the ICL Defendants	#392
Reply to Republic	#393
Notice of Cross-Motion by Plaintiff, Affirmation and Exhibits Annexed	#220-258
Affirmation in Opposition by Mega	#371-390
Affirmation in Reply	#397

The ICL defendants move pursuant to CPLR §3212 (Seq. #2) to dismiss the complaint and the cross-claims against it, and for indemnification from Mega, Celtic, and Republic. Republic moves pursuant to CPLR §3212 (Seq. #3) to dismiss the first and third-party complaints and all cross-claims against Republic. Celtic moves pursuant to CPLR §3212 (Seq. #4) to dismiss the complaint and cross-claims against it, and for indemnification from Republic. Mega moves pursuant to CPLR §3212 (Seq. #5) to dismiss the complaint and cross-claims against it, for indemnification from Celtic and Republic, and for a summary judgment on its claims against Celtic and Republic for the breach of an agreement to procure liability insurance. Plaintiff cross-moves pursuant to CPLR §3212 (Seq. # 2, 3, 4, and 5) for summary judgment with respect to liability on Labor Law §240(1) and §241(6) against the ICL defendants, Mega, Celtic and Republic, and on Labor Law §200 against Mega, Celtic, and Republic. These motions are consolidated for disposition and decided as follows:

This action stems from a December 12, 2019 construction accident at 50 Nevins Street in Kings County (NYSCEF Doc #243, Plaintiff TR: 8-9). Plaintiff alleges he was injured on a scaffold that shifted beneath him while he was operating a jackhammer. The project involved the gut renovation and addition of two new floors on top of an existing building (NYSCEF Doc #247, Ohri TR: 8-9).

ICL owns the premises (Ohri TR:8-9). ICL created multiple affiliated corporate entities specifically for the project, including ICL Nevins Street Housing Development Fund Corp. and ICL Nevins Street Apartments, L.P. (Ohri TR: 11-12). ICL hired Mega as the general contractor for the project (Ohri TR:13). Mega subcontracted Celtic to perform demolition (NYSCEF Doc #248, Bizarro TR: 49, 64). Plaintiff testified at his deposition that he was an employee of a non-party company called White Star at the time of the accident (Plaintiff TR:7). White Star was “like a mini company that Celtic had” (NYSCEF Doc #249, Argueta TR:19). Mega also subcontracted Republic to erect scaffolding on the exterior of the building (Bizarro TR:64-65). Celtic was responsible for removing the scaffolding (Bizarro TR:84.).

Celtic's foreman, Johnny Argueta, instructed Plaintiff to demolish an exterior brick wall on the sixth or seventh floor (Plaintiff TR:9-10, 12; Argueta TR:8-9). Mega would tell Argueta what work to do, and Argueta would instruct Celtic's workers in turn (Argueta TR:43). The demolition crew told Argueta that the scaffold was not secure because it was not affixed to the wall (Plaintiff TR:13, 17-18). The scaffold's platform was comprised of wood planks that were not secured in any way (Plaintiff TR:86-87). The scaffold was required to be attached to the building, which was done with masonry anchors drilled into the building's façade (NYSCEF Doc #250, Hama TR:20). Removing those anchors would render the scaffold unstable (Hama TR:26-27). Plaintiff testified that, the day before the accident, an employee of non-party White Star had removed the expansion screws affixing the scaffold to the wall (Plaintiff TR:18-19). Plaintiff was not personally involved in removing the screws (Plaintiff TR:19). On the day of the accident, the scaffold did not have bicycle supports (Bizarro TR:106). Argueta instructed the crew to take precautions, but that the main objective was demolishing the wall (Plaintiff TR:20).

Plaintiff testified that he was wearing a safety harness provided by White Star at the time of the accident (Plaintiff TR:22). Argueta had attached Plaintiff's harness to beams above the scaffold, but Plaintiff considered it too loose to be effective (Plaintiff TR:23-24). Plaintiff was also wearing a hard hat and work boots (Plaintiff TR:25). He was holding a jackhammer weighing between 45 and 50 pounds (Plaintiff TR:26). The scaffold platform was slippery due to demolition debris falling on it, but Plaintiff did not know whether the slipperiness contributed to the accident (Plaintiff TR:38, 102-103). After about 15 minutes of jackhammering, the scaffold moved away from the wall, causing Plaintiff to fall to his knees on the platform and sustain injuries (Plaintiff TR:32-35, 43). Argueta did not see the accident (Argueta TR:30).

The court declines to consider Celtic's accident report, which presents a different version of events (NYSCEF Doc #257). The report states that it was filled out by Argueta, but his signature line is blank. Argueta testified that it was his job to fill out the report, but he was unable to do so because he could not write in English (Argueta TR:22-23). Instead, the report was filled out by a different Celtic employee, Derrick Mendoza, who did not witness the accident (Argueta TR:21-24). Argueta testified that Mendoza translated the report from English to Spanish to help Plaintiff understand it (Argueta TR:23-24). However, the report is not accompanied by a translator's attestation, and Plaintiff testified that the person who filled out the form did not tell him what he wrote (Plaintiff TR:68). Accordingly, the report is not considered (*see 501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494 [1st Dept 2013] [declining to consider affidavit translated into English without accompanying affidavit from translator], *compare Ortiz v Food Mach. of Am., Inc.*, 125 AD3d 507 [1st Dept 2015] [accepting English affidavit with foreign translation, despite absence of translator's affidavit, where witness provided his sworn statement in English and foreign translation was provided for benefit

of foreign notary)).

Plaintiff argues that he is entitled to summary judgment on his Labor Law §240(1), §241(6), and §200 claims because he was injured when a defective scaffold shifted beneath him, and he was not provided with adequate safety devices to prevent his fall.

The ICL defendants, Celtic, Mega, and Republic argue that Plaintiff's Labor Law §240(1) claim should be dismissed because the scaffold was not defective, and because Plaintiff was a recalcitrant worker who was the sole proximate cause of his injuries. Defendants further argue that Plaintiff's Labor Law §241(6) claim should be dismissed because it is predicated upon Industrial Code provisions which are insufficiently specific or inapplicable, or which Defendants did not violate. Finally, Defendants argue that Plaintiff's Labor Law §200 claim should be dismissed because Defendants and Alpine did not supervise the means and methods of the injury-producing work.

The ICL defendants seek summary judgment on their indemnification claim against Mega, Celtic, and Republic. Celtic seeks summary judgment on its indemnification claim against Republic. Mega seeks summary judgment on its claims for indemnification and failure to procure insurance against Celtic and Republic.

### **Summary Judgment Review**

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility (*Genesis Merchant Partners L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]; *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [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 (CPLR 3212 [b]; *Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [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] [citation omitted]). If the movant fails to make such prima facie showing then the motion must be denied regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [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 requiring a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 383-384 [2004]).

### **Plaintiff's Labor Law §240(1) Claim**

The ICL defendants, Republic, Celtic, and Mega move to dismiss Plaintiff's Labor Law §240(1) claim. Plaintiff moves for summary judgment on the issue of liability with respect to Labor Law §240(1) against all defendants. Labor Law §240(1) applies to workers employed in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Stoneham v Joseph Barsuk, Inc.*, 41 NY3d 217, 220 [2023], citing *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521 [2012]). If an employee is engaged in an activity covered by §240 (1), "contractors and owners" must "furnish or erect" enumerated safety devices "to give proper protection" to the employee. 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]).

However, "[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]). While Labor Law § 240(1) applies to both "falling worker" and "falling object" cases, the hazard from one type of case cannot be transferred to give rise to liability for the other, because the different risks arise from different construction practices (*Narducci*, 96 NY2d at 268). The hazard posed by working at an elevation is that, without adequate safety devices such as ladders and scaffolds, a worker could be injured in a fall (*id.*). By contrast, falling objects are associated with the failure to use a different type of safety device, such as a rope or pulley, to secure the object (*id.*).

Therefore, to prevail in a "falling worker" case, "a plaintiff must establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall" (*Cutaia v Bd. of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037, 1038 [2022], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011] [internal quotations omitted]). Liability may only be imposed where "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential"

(*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [internal quotations omitted]).

On the other hand, to prevail in a “falling object” case, “the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured” (*Narducci*, 96 NY2d at 268) or “required securing for the purposes of the undertaking” (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). A plaintiff must also show that a lack of overhead protection failed to shield the plaintiff against the falling object, and therefore proximately caused an injury (*Torres Quito v 1711 LLC*, 227 AD3d 113, 116 [1st Dept 2024]).

There can be no liability under §240(1) when the worker’s actions are the sole proximate cause of the accident (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003]). It is “conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation” (*id.*).

Here, Plaintiff establishes prima facie that he suffered a “falling worker” injury. A plaintiff worker establishes a statutory violation “if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker” (*Castillo v TRM Contr. 626, LLC*, 211 AD3d 430, 430 [1st Dept 2022], citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]). Plaintiff testified that he fell and was injured because the scaffold shifted away from the wall.

Conversely, Defendants fail to demonstrate their prima facie entitlement to dismissal of Plaintiff’s Labor Law § 240 (1) claim. Since Defendants do not rule out the possibility that a statutory violation was a proximate cause of the accident, Defendants necessarily fail to prove that Plaintiff was the sole proximate cause of the accident (*see Blake*, 1 NY3d at 290; *see Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]). Further, Plaintiff’s safety harness was inadequate because, despite wearing it, he experienced the “falling worker” accident it was intended to prevent (*see Viruet v Purvis Holdings LLC*, 198 AD3d 587, 588 [1st Dept 2021] [finding that elevation-related safety device was inadequate under Labor Law § 240 (1) where accident it was intended to protect against nevertheless occurred]).

Defendants also do not establish that Plaintiff was a recalcitrant worker. The recalcitrant worker defense requires a showing that the injured worker was specifically instructed to use a particular safety device and explicitly refused to do so (*see White v 31-01 Steinway, LLC*, 165 AD3d 449 [1st

Dept 2018]). Here, no evidence exists in the record to show that Plaintiff refused to use a particular safety device. On the contrary, Plaintiff testified that was wearing safety equipment and ascended the scaffold as directed by his supervisor. Accordingly, branches of motions in seq #2, 3, 4 and 5 by defendants to dismiss Plaintiff's Labor Law §240(1) claim is **denied** and upon Plaintiff's cross motion in motion seq #2, 3, 4 and 5 against defendants , said branch of cross motion for summary judgment as to Plaintiff's Labor Law §240(1) is **granted**.

### **Labor Law §241(6) claim**

The ICL defendants, Republic, and Celtic move to dismiss Plaintiff's Labor Law §241(6) claim. Plaintiff cross-moves for summary judgment on the issue of liability with respect to Labor Law §241(6) against all defendants. Labor Law §241(6) imposes on owners and contractors a nondelegable duty to provide "reasonable and adequate protection and safety to persons employed [in] or lawfully frequenting" areas in which construction, excavation, or demolition work is being performed. As a predicate to a cause of action under this section, a plaintiff must allege that the accident was proximately caused by a violation of an Industrial Code regulation "that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles" (*Toussaint v Port Auth. of New York and New Jersey*, 38 NY3d 89, 94 [2022] [internal quotation and citations omitted]). Where a plaintiff establishes that the violation of a specific and applicable Industrial Code regulation was a proximate cause of the accident, an owner or general contractor "is vicariously liable without regard to [their] fault . . . even in the absence of control or supervision of the worksite" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 317 [2024] [internal quotations and citations omitted]).

Plaintiff predicates his Labor Law §241(6) cause of action on seven industrial code sections: 12 NYCRR §23-1.7(d), §3.3(1), §1.5[c](3), §3.3(b)(5), §5.3(h)(1), §5.6[c], and §5.6(e). All other predicates not raised in Plaintiff's legal arguments are deemed abandoned and are dismissed to that extent (*see Burgos v Premier Props. Inc.*, 145 AD3d 506, 508 [1st Dept 2006]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 542 [1st Dept 2014]). Republic does not prevail on its argument that Plaintiff failed to plead Industrial Codes §23-1.5 [c](3), §23-5.6 [c], and §23-5.6(e), because these are subsections of code sections that Plaintiff already identified in his bills of particulars.

Issues of fact preclude summary judgment in any movant's favor on the claim predicated on a violation of 12 NYCRR §23-1.7(d). This section requires that employers "shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." This

section is sufficiently concrete to support a Labor Law §241(6) claim (*see Potenzo v City of New York*, 189 AD3d 705 [1st Dept 2020]). A plaintiff's testimony that he slipped on debris raises a triable issue as to whether "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard" (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499 [1st Dept 2011]). Here, Plaintiff testified that the scaffold platform was slippery due to debris, but he did not know whether it contributed to his fall. This triable issue precludes summary judgment.

No party is entitled to summary judgment predicated on a violation of 12 NYCRR §23-3.3 (1). This section requires that "[a]ny person working above the first floor or ground level in the demolition of any building or other structure shall not be suffered or permitted to use accumulated debris or piled materials as a footing in the performance of his work." No party has cited any authority regarding whether this subsection is sufficiently concrete to support a Labor Law §241(6) claim. This Court is not aware of any cases in which the appellate courts have addressed the issue. Therefore, there exists a triable issue of fact whether this subsection is sufficiently concrete to support a Labor Law §241(6) claim.

Plaintiff is entitled to summary judgment predicated on a violation of 12 NYCRR §23-1.5[c](3). This section requires that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." This section is sufficiently concrete to support a Labor Law §241(6) claim (*Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Plaintiff demonstrates that the scaffold was rendered unsound when its anchors were removed, causing it to shift under Plaintiff and precipitate his fall.

Plaintiff is also entitled to summary judgment on the remaining sections. §23-3.3(b)(5) provides that "[i]n the demolition by hand of exterior walls, all persons performing such work shall be provided with safe footing in the form of sound flooring or scaffolds constructed and installed in compliance with this Part [rule]." §23-5.3 (h) (1) provides that "[e]very metal scaffold shall be securely tied into the building or other structure at intervals not to exceed 30 feet horizontally and 26 feet vertically." §23-5.6[c] provides that "[e]very pole scaffold shall be braced or attached to the building or other structure to prevent movement of the scaffold away from such building or other structure..." §23-5.6(e) provides that "[w]here planking is lapped on a pole scaffold... the ends of the planks shall be secured to prevent their dislodgment." There is no dispute in the record that the scaffold was detached from the wall at the time of the accident, or that the planks comprising the scaffold's platform were not secured in any way.

Accordingly, Plaintiff's cross-motion for summary judgment on the issue of liability with respect to Labor Law §241(6) is granted to the extent that it is predicated on violations of Industrial Codes 12 NYCRR §23-1.5[c] (3), 12 NYCRR §23-3.3(b)(5), 12 NYCRR §23-5.3(h)(1), 12 NYCRR §23-5.6[c], and 12 NYCRR §23-5.6(e), and the cross-motion is otherwise denied. All other parties' motions for summary judgment on Labor Law §241(6) are denied.

### **Plaintiff's Labor Law §200 Claim**

The ICL defendants, Republic, Celtic, and Mega move to dismiss Plaintiff's Labor Law §200 claim. Plaintiff moves for summary judgment on the issue of liability with respect to Labor Law §200 only against Republic, Celtic, and Mega. Labor Law §200 codifies landowners' and general contractors' common-law duty to maintain a safe workplace. Claims under Labor Law §200 fall under two categories: those arising from an alleged defect or dangerous condition existing on the premises, and those arising from the manner in which the work was performed (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor either created the condition or had actual or constructive notice of the condition (*Mendoza v Highpoint Assocs., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). On the other hand, where the injury was caused by the manner of the work, liability attaches where the owner or general contractor had "authority to control the activity bringing about the injury to enable [a defendant] to avoid or correct an unsafe condition" (*Cappabianca*, 99 AD3d at 145; *Foley v Consol. Edison Co. of New York, Inc.*, 84 AD3 476, 477-478 [1st Dept 2011]).

Here, an issue of fact exists as to Defendants' liability under the dangerous condition theory (*see Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421, 421 [1st Dept 2021] [holding that issue of fact about whether general contractor had actual or notice of defective scaffold on construction site precluded summary judgment]). Defendants do not demonstrate that they did not have actual or constructive notice that the scaffold had been detached from the wall prior to the accident because they either maintained a physical presence on the work site or were periodically informed about the project's progress. Mega's foreman was onsite every day (Bizarro TR:32). Mega had a shanty on the premises (Bizarro TR:30-31). Celtic's foreman was onsite on the day of the accident. Republic inspected the scaffold periodically, but it is unclear from the testimony whether the period was every six months or once a day (Hama TR:24). ICL hired non-party Olive Branch Consulting as an owner's representative to keep ICL informed about the project's progress (Ohri TR:16). Therefore, there remains an issue of fact whether Defendants had constructive notice that the scaffold had been detached from the wall prior to the accident (*see Jackson v Hunter Roberts Construction, L.L.C.*, 205 AD3d 542 [1st Dept 2022] [finding issue of fact whether owner or general contractor had constructive notice of defective plywood ramp, where owner and general contractor had trailers on

worksite]). Accordingly, all parties' summary judgment motions under Labor Law §200 are denied.

### **Contractual and Common-Law Indemnification**

The ICL defendants seek summary judgment on their indemnification claim against Mega, Celtic, and Republic. Celtic seeks summary judgment on its indemnification claim against Republic. Mega seeks summary judgment on its indemnification claim against Celtic and Republic.

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] [internal quotations and citations omitted]). To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity must establish that it was free from any negligence and may be held liable solely by virtue of statutory or vicarious liability (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]). Conversely, "where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (*id.* [internal quotations and citation omitted]). Since there remain questions of fact as to the extent of Defendants' negligence, the question of indemnity is premature (*see Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]).

To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*id.* [internal quotations and citation omitted]). A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-78 [2011]).

The contract between ICL and Mega requires Mega to indemnify ICL to the fullest extent permitted by law for damages arising from the work, but only to the extent caused by the negligence of Mega or its subcontractors (NYSCEF Doc #251 at 19). The contract between Mega and Celtic (NYSCEF Doc #252 at 14-15) requires Celtic to indemnify Mega and the ICL defendants to the fullest extent permitted by law for damages arising from the work, except for damages caused or contributed to by the negligence of the indemnitees. The contract between Mega and Republic contains an identical provision (NYSCEF Doc #253 at 14-15). Because there remain questions of fact as to the extent of Defendants' negligence, the question of common-law indemnity is premature (*see Pena*, 194 AD3d at 578). Accordingly, the parties' motions for contractual and common-law indemnification are denied.

### Failure to Procure Insurance

Mega seeks summary judgment on its claim that Celtic and Republic failed to procure liability insurance as required by their contracts. A movant makes a prima facie showing of failure to procure insurance by establishing that the party in opposition failed to comply with a contract provision requiring the procurement of insurance (*Benedetto v Hyatt Corp.*, 203 AD3d 505, 506 [1st Dept 2022]). The burden then shifts to the opposing party, which may raise an issue of fact by tendering its procured insurance policy (*Crespo v Triad, Inc.*, 294 AD2d 145, 148 [1st Dept 2002]).

Here, Mega's contracts with Celtic and Republic each require umbrella limits of at least \$10,000,000 for subcontractors working from scaffolds (NYSCEF Doc #32 at 16; NYSCEF Doc #204 at 17). Celtic's umbrella policy in effect on the date of the accident declares only \$5,000,000 in coverage (NYSCEF Doc #205 at 2). Republic's umbrella policy in effect on the date of the accident declares only \$3,000,000 in coverage (NYSCEF Doc No. 206 at 7). In opposition, neither Celtic nor Republic address this discrepancy. Accordingly, Mega's motion for summary judgment is granted against Celtic and Republic for failure to procure insurance (*see Benedetto*, 203 AD3d at 506 [awarding summary judgment where subcontractor was contractually obligated to procure \$3,000,000 of commercial general liability coverage but procured only \$2,000,000.]).

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

**ORDERED** that the motion by the ICL defendants (Seq. #2) is **DENIED**; and that Plaintiff's summary judgment cross-motion is **GRANTED TO AN EXTENT**, such that summary judgment on liability under Labor Law §240(1) is **GRANTED**; and summary judgment on liability under Labor Law §241(6) is **GRANTED** as predicated on violations of Industrial Codes 12 NYCRR §23-1.5[c](3), 12 NYCRR §23-3.3(b)(5), 12 NYCRR §23-5.3(h)(1), 12 NYCRR §23-5.6[c], and 12 NYCRR §23-5.6(e), and **DENIED** as predicated on all other Industrial Codes; and summary judgment on the issue of liability with respect to Labor Law §200 is **DENIED**; and it is further

**ORDERED** that the motion by Republic (Seq. #3) is **DENIED**; and that Plaintiff's summary judgment cross-motion is **GRANTED TO AN EXTENT**, such that summary judgment on liability under Labor Law §240(1) is **GRANTED**; and summary judgment on liability under Labor Law §241(6) is **GRANTED** as predicated on violations of Industrial Codes 12 NYCRR §23-1.5 [c](3), 12 NYCRR §23-3.3(b)(5), 12 NYCRR §23-5.3(h)(1), 12 NYCRR §23-5.6[c], and 12 NYCRR §23-5.6(e), and **DENIED** as predicated on all other Industrial Codes; and summary judgment on the issue of liability with respect to Labor Law §200 is **DENIED**; and it is further

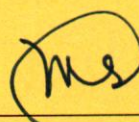
**ORDERED** that the motion by Celtic (Seq. #4) is **DENIED**; and that Plaintiff's summary judgment cross-motion is **GRANTED TO AN EXTENT**, such that summary judgment on liability under Labor Law §240(1) is **GRANTED**; and summary judgment on liability under Labor Law §241(6) is **GRANTED** as predicated on violations of Industrial Codes 12 NYCRR §23-1.5[c](3), 12 NYCRR §23-3.3(b)(5), 12 NYCRR §23-5.3(h)(1), 12 NYCRR §23-5.6[c], and 12 NYCRR §23-5.6(e), and **DENIED** as predicated on all other Industrial Codes; and summary judgment on the issue of liability with respect to Labor Law §200 is **DENIED**; and it is further

**ORDERED** that the motion by Mega (Seq. #5) is **GRANTED TO AN EXTENT**, such that summary judgment on Celtic and Republic's failure to procure insurance is **GRANTED**; and otherwise **DENIED**; and that Plaintiff's summary judgment cross-motion is **GRANTED TO AN EXTENT**, such that summary judgment on liability under Labor Law § 240 (1) is **GRANTED**; and summary judgment on liability under Labor Law §241(6) is **GRANTED** as predicated on violations of Industrial Codes 12 NYCRR §23-1.5[c](3), 12 NYCRR §23-3.3(b)(5), 12 NYCRR §23-5.3(h)(1), 12 NYCRR §23-5.6[c], and 12 NYCRR §23-5.6 (e), and **DENIED** as predicated on all other Industrial Codes; and summary judgment on the issue of liability with respect to Labor Law §200 is **DENIED**; and it is further

**ORDERED** that counsel for Plaintiff 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 decision constitutes the Order of the Court.

Dated: July 2, 2025



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HON. MYRNA SOCORRO, J.S.C.