

Penafiel v DNA Contr. LLC
2025 NY Slip Op 35334(U)
September 29, 2025
Supreme Court, Queens County
Docket Number: Index No. 722178/2020
Judge: Karen Lin
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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: HON. KAREN LIN PART 24

Justice

-----X

FRANCISCO PENAFIEL,

Plaintiff,

-against-

DNA CONTRACTING LLC, HUDSON WATERFRONT COMPANY C, LLC, ORSID REALTY CORP., ULTIMATE SAFETY ASSOCIATES, INC., 200 RIVERSIDE BOULEVARD AT TRUMP PLACE, and BOARD OF MANAGERS OF 200 RIVERSIDE BOULEVARD AT TRUMP PLACE,

Defendants.

-----X

DNA CONTRACTING LLC,

Third-Party Plaintiff,

-against-

ANAAR CONSTRUCTION & CONTRACTING CORP.,

Third-Party Defendant.

-----X

ORSID REALTY CORP., 200 RIVERSIDE BOULEVARD AT TRUMP PLACE, and BOARD OF MANAGERS OF 200 RIVERSIDE BOULEVARD AT TRUMP PLACE,

Second Third-Party Plaintiffs,

-against-

ANAAR CONSTRUCTION & CONTRACTING CORP.,

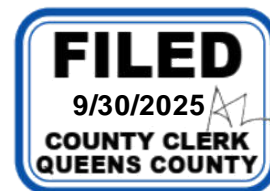
Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 239, 242, 248, 249, 252, 253, 254, 278, 279, 280, 281, 282, 293, 294, 358

were read on this motion and cross-motion for JUDGMENT - SUMMARY

DECISION AND ORDER



The following e-filed documents, listed by NYSCEF document number (Motion 005) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 240, 243, 245, 250, 251, 283, 284, 285, 286, 287, 295, 339, 340, 341, 342, 355, 356, 357, 359

were read on this motion and cross-motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 241, 244, 246, 247, 255, 256, 257, 258, 288, 289, 290, 291, 292, 296, 343, 344, 360, 361, 362

were read on this motion and cross-motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the motions and cross-motions are determined below.

Background

On November 18, 2020, plaintiff commenced this action to recover damages for personal injuries sustained on September 14, 2020, when he slipped and fell on a building roof while carrying equipment as part of a construction project on the premises. The complaint alleged that the defendants owned, leased, managed, and controlled the premises and performed the construction work. The complaint alleged causes of action for common law negligence and violations of Labor Law §§ 200, 240, 241, and 241-a. In an answer filed January 7, 2021, DNA asserted cross-claims against parties including Orsid defendants for contribution, contractual indemnification, and breach of contract to procure insurance. On March 29, 2021, Orsid defendants filed an answer to the complaint which asserted cross-claims for contribution, common-law and contractual indemnification, and breach of contract to procure insurance against, among other parties, DNA. On February 25, 2021, DNA commenced a third-party action against Anaar for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. On April 15, 2021, Orsid defendants commenced a second third-party action against Anaar for common-law and contractual indemnification, contribution and breach of contract to procure insurance. In its answers to the third-party complaints, Anaar alleged counterclaims against DNA and Orsid defendants for contribution, contractual indemnification, and breach of contract to procure insurance.

Instant Motions and Cross-Motions

Anaar now moves for summary judgment dismissing plaintiff's claims against defendants and dismissing all claims against it (Motion Seq. No 4). DNA moves for summary judgment

dismissing plaintiff's claims and all cross-claims and counterclaims against it and on its third-party claims for contractual indemnification and breach of contract to procure insurance against Anaar (Motion Seq. No. 5). Orsid defendants move for summary judgment dismissing plaintiff's claims against them and on their cross-claims for common-law and contractual indemnification against DNA and their third-party claims for common-law and contractual indemnification against Anaar (Motion Seq. No. 6). Against each of the motions, plaintiff separately cross-moves for summary judgment on his claims against Orsid defendants and DNA based on common-law negligence and violations of Labor Law §§ 200 and 241 (6).

At the outset, the Court notes that Anaar, DNA, and Orsid defendants seek summary judgment dismissing the Labor Law § 240 (1) claim and that DNA and Orsid defendants seek summary judgment dismissing the Labor Law § 241-a claim. In his affirmations supporting the cross-motions, plaintiff expressly does not oppose dismissal of the Labor Law §§ 240 (1) and 241-a claims. Therefore, dismissal of those causes of action is appropriate (*see Delgado v All-Safe, Inc.*, 119 AD3d 515, 516 [2d Dept 2014]; *Vella v One Bryant Park, LLC*, 90 AD3d 645, 647 [2d Dept 2011]; *Fumo v NAB Constr. Corp.*, 19 AD3d 446, 448 [2d Dept 2005]).

The Court first addresses the arguments of DNA and Orsid defendants that the Court should not consider plaintiff's cross-motions because they are untimely. A preliminary conference order dated November 15, 2021 provided that "any motion for summary judgment shall be made within one hundred twenty (120) days of the filing of the Note of Issue" (NY St Cts Elec Filing [NYSCEF] Doc No. 83 at 3). Here, plaintiff filed a note of issue on April 2, 2024. Anaar, DNA, and Orsid defendants timely filed their summary judgment motions on July 31, 2024, which was the deadline for making the motions. Although plaintiff's cross-motions for summary judgment filed on October 31, 2024 were untimely, courts may consider untimely cross-motions for summary judgment where a timely summary judgment motion on nearly identical grounds has been made (*see Dojce v 1302 Realty Co., LLC*, 199 AD3d 647, 649-50 [2d Dept 2021]; *Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]; *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]). Since the separate summary judgment motions of Anaar, DNA, and Orsid defendants seek, among other things, dismissal of the complaint, including the claims upon which plaintiff seeks summary judgment, they are nearly identical to plaintiff's summary judgment cross-motions (*see Cruz*, 192 AD3d at 863; *Sikorjak*, 168 AD3d at 780). Therefore, the Court will consider plaintiff's untimely cross-motions.

Next, regarding the branch of Anaar's motion for summary judgment dismissing the complaint, Anaar is a third-party defendant against which plaintiff asserted no claims. However, since Anaar asserted affirmative defenses against plaintiff in its third-party answers, Anaar has standing to move for summary judgment dismissing the complaint (*see* CPLR 1008; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009]).

Labor Law § 241 (6)

Regarding the merits of the motions and cross-motions, the Court begins by addressing the Labor Law § 241 (6) claim. To establish liability for violating that statute, plaintiff must show that a violation of an applicable Industrial Code proximately caused his injuries (*see Ochoa v JEM Real Estate Co., LLC*, 223 AD3d 747, 749 [2d Dept 2024]; *Guoxing Song v CA Plaza, LLC*, 208 AD3d 760, 761 [2d Dept 2022]). To state a Labor Law § 241 (6) claim, plaintiff must allege defendants' violation of an Industrial Code regulation requiring a specific standard of conduct (*see Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94-95 [2022]; *Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1005 [2d Dept 2021]). Here, in the bill of particulars dated March 6, 2021, plaintiff asserted violations of Industrial Code sections 12 NYCRR §§ 23-1.5; 23-1.7 (a) (2), (b), (d), (e), (f); 23-1.8 (c); 23-1.11; 23-1.15; 23-1.16; 23-1.22 (c); 23-1.28, 23-1.30; 23-2.1 (a) (1) and (2); 23-3.3 (b), (c) (1); 23-6.1 (j) (2); 23-5.1; and 23-5.3 (d), (e), and various Occupational Safety and Health Administration (OSHA) regulations. It is well settled that liability under Labor Law § 241 (6) cannot be based on OSHA violations (*see Wetter v Northville Indus. Corp.*, 185 AD3d 874, 876 [2d Dept 2020]; *Marl v Liro Engrs., Inc.*, 159 AD3d 688, 689 [2d Dept 2018]). Regarding the Industrial Code sections, Anaar, DNA, and Orsid defendants generally contend that the sections lack specific standards or are inapplicable. Since plaintiff does not address the Industrial Code sections alleged in his bill of particulars other than 12 NYCRR §§ 23-1.7 (d), (e) (2) in opposition to the summary judgment motions, he abandons reliance on them (*see Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). Thus, the Court discusses the Labor Law § 241 (6) claim insofar as it is based on 12 NYCRR §§ 23-1.7 (d), (e) (2).

Industrial Code § 23-1.7 (d) provides “[e]mployers 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” (12 NYCRR § 23-1.7 [d]). Here, plaintiff testified at his deposition on February 23, 2022, that he was injured while transporting scaffolding cables to an area on the roof, which was composed of little rocks or gravel. Immediately before his injury, he walked four to six feet then could not “step well” (NYSCEF Doc No. 163 at 84). When his “foot slipped or it went into something” (*id.*), he fell and injured his hand while trying to brace his fall. Plaintiff testified that his foot went in because the rocks moved. Plaintiff differs from Anaar, DNA, and Orsid defendants as to whether the rocks constituted a slippery condition to which 12 NYCRR § 23-1.7 (d) would apply. Even assuming that the rocks or gravel created a slippery condition, given that they were part of the roof, they were not a foreign substance (*cf. Ruisech v Structure Tone Inc.*, 42 NY3d 1061, 1065 [2024]; *see also Bazdaric v Almah Partners LLC*, 41 NY3d 310, 319-20 [2024]). Since the rocks or gravel were not ice, snow, water, grease or a foreign substance, 12 NYCRR § 23-1.7 (d) does not apply (*see Villa v East 85th Realty, LLC*, 189 AD3d 1661, 1662 [2d Dept 2020]; *Kane v Peter M. Moore Constr. Co.*, 145 AD3d 864, 869 [2d Dept 2016]; *cf. Bravo v 609 W 56th St. Prop., LLC*, 234 AD3d 735, 737 [2d Dept 2025]).

Industrial Code § 23-1.7 (e) (2) provides “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed” (12 NYCRR § 23-1.7 [e] [2]). Anaar, DNA, and Orsid defendants contend that this regulation does not apply because the rocks or gravel were not dirt, debris, scattered tools or materials. Plaintiff maintains that the regulation applies because the rocks or gravel were materials which were also not integral to the work of transporting cables. Similar to the above analysis, the rocks or gravel were integral to the building’s roof so do not fall under the category of items from which specified areas must be kept free (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 12-13 [1st Dept 2011]; *Santo v Scro*, 43 AD3d 897, 899 [2d Dept 2007]; *Parker v Ariel Assoc. Corp.*, 19 AD3d 670, 672 [2d Dept 2005]; *cf. Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577, 578 [1st Dept 2017]).

Since the Industrial Code provisions upon which plaintiff bases the Labor Law § 241 (6) claim do not apply, granting Anaar, DNA, and Orsid defendants summary judgment dismissal of the Labor Law § 241 (6) claim and denying plaintiff’s cross-motions for summary judgment on

that claim are appropriate (*see Magistro v New York City Hous. Auth.*, 235 AD3d 733, 736-37 [2d Dept 2025]; *Verdi v SP Irving Owner, LLC*, 227 AD3d 932, 936-37 [2d Dept 2024]).

Labor Law § 200

Labor Law § 200 codifies the duty of owners and general contractors of a construction site and their agents to maintain site safety (*see Rizzuto v L.A. Wegner Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-78 [1993]). If plaintiff's injuries arose from the manner of the work performed, owners and general contractors are liable for a Labor Law § 200 violation and common-law negligence upon a showing that they had authority to supervise and control that work (*see Hamm v Review Assoc., LLC*, 202 AD3d 934, 938 [2d Dept 2022]; *Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 950 [2d Dept 2021]). To demonstrate entitlement to summary judgment dismissing the Labor Law § 200 and common-law negligence claims arising from an alleged defective condition, a defendant must prove "that it neither created the dangerous condition nor had actual or constructive notice of it" (*Alexandridis v Van Gogh Contr. Co.*, 180 AD3d 969, 972 [2d Dept 2020]; *see Tomlinson v Demco Props. NY, LLC*, 189 AD3d 1294, 1295 [2d Dept 2020]). If both a premises defect and the manner of work were involved in the accident, a defendant seeking summary dismissal must address both liability standards (*see Hamm*, 202 AD3d at 938; *Salgado v Rubin*, 183 AD3d 617, 619 [2d Dept 2020]). Here, since plaintiff's bill of particulars dated March 6, 2021, alleged liability for both the manner of work and a defective condition, defendants and Anaar were required to address both standards. Here, Anaar, DNA, and Orsid defendants generally contend that no defective condition exists and that if one did exist, DNA and Orsid defendants did not create it or have notice of it. Anaar raises only conclusory arguments that defendants did not create or have notice of any defective condition which are insufficient to show entitlement to dismissal of the Labor Law § 200 and common-law negligence claims.

Turning to DNA's motion, DNA first contends that there was no evidence that plaintiff's injury arose from the method and manner of work. However, a defendant seeking summary judgment dismissing a complaint cannot meet its burden by pointing to gaps in plaintiff's evidence (*see Maharaj v Kreidenweis*, 214 AD3d 717, 719-20 [2d Dept 2023]; *Padel v Nisanov*, 203 AD3d 1058, 1058-59 [2d Dept 2022]; *St. Paul Travelers Cos, Inc. v Joseph Mauro & Son, Inc.*, 93 AD3d 658, 661 [2d Dept 2012]). DNA also contends that it received no complaints

regarding the means and methods of work, but points to no evidence supporting that contention. Although DNA presents the deposition of its project superintendent Jose Galarza, he denied receiving complaints about the gravel roof but did not testify regarding the manner in which the work was performed. DNA also presents the deposition of plaintiff, who testified that Galarza directed him and a co-worker to unload scaffolding wires from a truck and take them to the roof and showed them how to access the roof and where to place the wires. Although plaintiff reported to Galarza that he had difficulty walking on roof due to the rocks, Galarza directed them to continue stating that there was no other way to transport the equipment to the roof. Thus, DNA fails to eliminate fact issues whether it had authority to direct and control plaintiff's work rendering dismissal of the Labor Law § 200 and common-law negligence claims inappropriate (*see Walsh v Kenny*, 219 AD3d 1555, 1558 [2d Dept 2023]; *Venter v Cherkasky*, 200 AD3d 932, 934-35 [2d Dept 2021]; *Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 854 [2d Dept 2019]).

DNA also denies that any defective condition existed so that it could not have created or had notice of it. Determining whether a defective or dangerous condition existed depends on the particular facts and circumstances and is generally a fact question for a jury (*see Villalba v Daughney*, 214 AD3d 843, 843-44 [2d Dept 2023]; *McDermott v Santos*, 171 AD3d 1158, 1160-61 [2d Dept 2019]; *Touloupis v Sears, Roebuck & Co.*, 155 AD3d 807, 809 [2d Dept 2017]; *Quintero v Wilner*, 74 AD3d 1042, 1043 [2d Dept 2010]). Although DNA points to the deposition testimony of Galarza, Sadaf Bhatti, Anaar's owner, and Alberto Cervantes, Anaar's employee and plaintiff's co-worker that they experienced no trouble walking on the roof, DNA also presents plaintiff's deposition testimony that the rocks were slippery and would move which fails to eliminate factual issues regarding the existence of a defective condition (*see Seem v Premier Camp Co., LLC*, 200 AD3d 921, 926 [2d Dept 2021]; *McDermott*, 171 AD3d at 1160-61; *Quintero*, 74 AD3d at 1043). DNA also presents the expert affidavit of Yoandy Interian, PE. Although Interian inspected the premises roof on August 22, 2023, almost three years after plaintiff's injury, he attested that comparison of photographs plaintiff identified during his deposition rendered the roof's condition during his inspection a fair representation of its condition at the time of plaintiff's injury. Since the photographs only establish that the appearance of the roof was the same, rather than the stability of the rocks, Interian's conclusion regarding the consistency of the roof's condition is conclusory and speculative (*see generally Santos v Monadnock Constr. Inc.*, 209 AD3d 598, 599 [1st Dept 2022]; *Hlenski v City of New*

York, 51 AD3d 974, 975 [2d Dept 2008]; *cf. Saab v CVS Caremark Corp.*, 144 AD3d 540, 541 [1st Dept 2016]). The failure to show that the condition of the roof at the time the expert inspected it was the same as when plaintiff was injured renders any conclusions based on that inspection speculative (*see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129-30 [2011]; *Mammaia v State*, 230 AD3d 478, 480 [2d Dept 2024]; *Bluth v Bias Yaakov Academy for Girls*, 123 AD3d 866, 867 [2d Dept 2014]). In any event, even considering the expert affidavit, it did not establish the absence of a defective condition. As DNA notes in its supporting papers, Interian only stated that the rocks were integral to the roof, used as ballast to prevent uplift resistance, and complied with industry standards. Moreover, he only attested that the “ballasted roof is intended to be walked on and reasonably safe walking surface for individuals requiring access to the main roof” (NYSCEF Doc No. 171 at 7). DNA’s failure to otherwise address the premises defect or establish that it did not create or have notice of it furnishes additional grounds for denying dismissal of the Labor Law § 200 and common-law negligence claims (*see Ricottone v PSEG Long Is., LLC*, 221 AD3d 1032, 1036 [2d Dept 2023]; *Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 842 [2d Dept 2021]; *Garcia v Market Assoc.*, 123 AD3d 661, 665 [2d Dept 2014]).

Regarding the defective premises condition, Orsid defendants also first contend that no defective or hazardous condition existed such that they cannot be liable for creating or having notice of it. To establish that no such condition existed, Orsid defendants rely on Interian’s affidavit and the deposition testimony of Miguel Tronsco, DNA’s project manager. Contrary to Orsid defendants’ contention, as noted above, Interian did not conclude that the roof was not a defective or hazardous condition. Since Tronsco only confirmed that the rocks were to provide ballast for the roof, Orsid defendants also fail to show the non-existence of a dangerous condition. Orsid defendants alternatively contend that they are not liable for a defective condition because they did not create or have notice of it. They contend that they did not create the condition because they did not install the roof. To support this contention, Orsid defendants rely solely on floor plans (*see* NYSCEF Doc No. 237) but present no evidence that the floor plans were for the premises where plaintiff was injured and do not show how they demonstrate that they did not construct the roof. Since Orsid defendants also do not raise arguments that they lacked actual or constructive notice of a defective condition, they are also not entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims against

them (*see Ricottone*, 221 AD3d at 1036; *Rodriguez*, 192 AD3d at 842; *Garcia*, 123 AD3d at 665).

With respect to plaintiff's cross-motion on the Labor Law § 200 and common-law negligence claims, plaintiff's deposition testimony that he reported having difficulty walking on the rocks to Galarza is evidence that DNA had actual notice of the condition (*see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801-02 [2d Dept 2013]). His testimony that only Galarza supervised his work and that he instructed plaintiff how to bring the materials to the roof, confirmed by Galarza's and Bhatti's testimony that Galarza supervised plaintiff's work, establish that DNA had authority to direct and control the injury-causing work (*see generally Zupan v Irwin Contracting, Inc.*, 145 AD3d 715, 717 [2d Dept 2016]; *see also Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019]; *Caban v Plaza Constr. Corp.*, 153 AD3d 488, 491 [2d Dept 2017]). Galarza's testimony that plaintiff never complained to him about the roof and did not mention slipping on rocks when he reported his injury raises fact issues regarding notice. However, since DNA presents no evidence rebutting that only Galarza supervised plaintiff's work and that he directed plaintiff how to perform the specific task that resulted in his injury, it fails to raise fact issues regarding its authority to direct and control the injury-producing work (*cf. Zupan*, 145 AD3d at 717). Therefore, granting the branch of plaintiff's cross-motion for summary judgment on the Labor Law § 200 and common-law negligence claims is appropriate (*cf. Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1017 [2d Dept 2023]; *Fried v Always Green, LLC*, 77 AD3d 788, 789 [2d Dept 2010]; *Harris v Arnell Constr. Corp.*, 47 AD3d 768, 768-69 [2d Dept 2008]).

Indemnification and Contribution

Turning to the branch of Anaar's motion seeking dismissal of third-party claims, the parties do not dispute that plaintiff was an employee of Anaar on the date he was injured because plaintiff and Orsid defendants admitted that fact (*see* 22 NYCRR § 202.8-g [c]) and DNA did not respond to Anaar's statement of material facts (*see* 22 NYCRR § 202.8-g [e]). Anaar correctly contends that common law indemnification and contribution claims may only be asserted against plaintiff's employer when plaintiff sustains a grave injury (*see Fleming v Graham*, 10 NY3d 296, 299 [2d Dept 2008]; *Maxwell v Rockland County Community Coll.*, 78 AD3d 793, 794 [2d Dept 2010]). Grave injury is defined as "death, permanent and total loss of use or amputation of an

arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability” (Workers’ Compensation Law § 11[1]; *see Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006]). “Grave injuries are those injuries that are listed in the statute and are determined to be permanent” (*Grech v HRC Corp.*, 150 AD3d 829, 830 [2d Dept 2017], quoting *Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 832 [2d Dept 2012]). Since Anaar presents plaintiff’s bill of particulars and deposition testimony which do not demonstrate that plaintiff sustained a grave injury, and DNA and Orsid defendants do not raise factual issues in opposition, summary judgment dismissing the third-party claims for contribution and common-law indemnification is warranted (*see Skrok v Grand Loft Corp.*, 218 AD3d 702, 705 [2d Dept 2023]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 951 [2d Dept 2015]).

Regarding the remaining branches of Anaar’s motions to dismiss the third-party claims, a party seeking summary judgment dismissing a contractual indemnification claim must demonstrate that it had no contractual obligation to indemnify the party seeking indemnification against it (*see Dow v Consolidated Edison Co. of N.Y., Inc.*, 226 AD3d 648, 649 [2d Dept 2024]; *Meadowbrook Pointe Dev. Corp. v F&G Concrete & Brick Indus., Inc.*, 214 AD3d 965, 970 [2d Dept 2023]). This may be established by evidence that the indemnification provision upon which the claim is based has not been triggered or is unenforceable (*see English v Wainco Goshen 1031, LLC*, 218 AD3d 444, 445 [2d Dept 2023]). Section 4.6.1 of the subcontract between DNA and Anaar requires Anaar to indemnify Orsid defendants and DNA, among other parties, for injury claims arising from performance of its work, “but only to the extent caused by the negligent acts or omissions of [Anaar] ... anyone directly or indirectly employed by [it] or anyone for whose acts [it] may be liable ... (*see* NYSCEF Doc No. 162 at 5). Anaar contends that its obligation to indemnify was not triggered because plaintiff’s failure to assert any claims against it established that it was not negligent in causing plaintiff’s injury. However, since Anaar does not eliminate fact issues regarding any negligent acts or omissions of plaintiff, its employee, dismissal of the contractual indemnification claim against it is inappropriate (*see Flossos v Waterside Redevelopment Co., L.P.*, 108 AD3d 647, 650 [2d Dept 2013]).

Failure to Procure Insurance

Summary judgment dismissing a breach of contract to procure insurance claim requires evidence that the party against which the claim is asserted procured the required insurance (*see Rogers v Peter Scalamandre & Sons, Inc.*, 231 AD3d 1174, 1180 [2d Dept 2024]; *Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 619 [2d Dept 2024]; *Meadowbrook Pointe Dev. Corp.*, 214 AD3d at 969). Anaar contends that it complied with the requirements to purchase insurance. However, Anaar fails to present a copy of the insurance policy showing that it purchased the required insurance (*see Harrison v Consolidated Edison Co. of N.Y., Inc.*, 232 AD3d 587, 589 [2d Dept 2024]). Although Anaar relies on Bhatti's testimony regarding the insurance required and Anaar's compliance with that requirement without presenting the policy or the proof of compliance, Bhatti's testimony is inadmissible hearsay (*see Bank of N.Y. v Levy*, 231 AD3d 917, 919 [2d Dept 2024]; *Wells Fargo Bank, N.A. v Carrington*, 221 AD3d 746, 748-49 [2d Dept 2023]). Since Anaar fails to present evidence demonstrating it purchased the insurance required as a matter of law, dismissal of the third-party claims for breach of contract to procure insurance is unwarranted (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 755-56 [2d Dept 2014]).

Turning to the branch of DNA's motion seeking dismissal of the cross-claims and counterclaims against it, Orsid defendants and Anaar asserted claims for contribution, contractual indemnification, and breach of contract to procure insurance against DNA. Orsid defendants also asserted common-law indemnification cross-claim against DNA. With respect to the contractual indemnification claims against DNA, section 4.3.4 of DNA's subcontract with Anaar required DNA to indemnify Anaar for claims resulting from the work as long as the loss was not due to the sole negligence of the party seeking indemnification (*see* NYSCEF Doc No. 203 at 4). Section 9.15.1 of the contract between Orsid and DNA required DNA to indemnify Orsid defendants for claims arising from, among other things, DNA's negligent acts or omissions (*see* NYSCEF Doc No. 202 at 5-6). Since DNA fails to establish that it was not contractually obligated to indemnify Anaar due to fact issues regarding Anaar's and DNA's negligence as noted above, dismissal of Anaar's contractual indemnification claim against DNA is unwarranted (*see Meadowbrook Pointe Dev. Corp.*, 214 AD3d at 970). Contrary to DNA's arguments, fact issues exist regarding DNA's negligence, which renders dismissal of Orsid defendants' contractual indemnification against it inappropriate (*see Barcliff v Schindler El. Corp.*, 197

AD3d 1228, 1230 [2d Dept 2021]; *State of New York v Defoe Corp.*, 149 AD3d 889, 890 [2d Dept 2017]; *Simon*, 114 AD3d at 755; *cf. Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013]).

Orsid defendants' cross-claim against DNA for breach of contract to procure insurance was based on the alleged failure to procure commercial general liability insurance required by contract. Section 17.1.1 of the contract between Orsid and DNA required DNA to procure various insurance naming Orsid defendants as additional insureds. Section 17.1.2 specified the commercial general liability insurance and amounts DNA was required to purchase, including \$300,000.00 for fire damage, \$10,000.00 for medical expenses, and \$300,000.00 for damage to rented premises. Although DNA's insurance declaration page showed it obtained insurance exceeding the required amounts for certain items, it showed coverage of \$5,000.00 for medical expenses and \$100,000.00 for damage to rented premises and did not indicate coverage for fire damage. Since DNA fails to demonstrate it procured the insurance required by its contract with Orsid, dismissal of the breach of contract claim is unwarranted (*see Ginter*, 121 AD3d at 844; *Simon*, 114 AD3d at 755-56). Anaar's counterclaim for breach of contract alleged DNA failed to obtain liability insurance naming it as additional insured. Since DNA does not address this counterclaim, its dismissal is unwarranted (*see generally Smith v City of New York*, 288 AD2d 369, 370 [2d Dept 2001]).

To demonstrate entitlement to summary judgment dismissing a contribution claim, a defendant must show that its work did not cause or contribute to plaintiff's injury or that it did not owe a duty of reasonable care independent of a contractual obligation or such duty to plaintiff at all (*see Flood v Ahern Painting Contrs., Inc.*, 219 AD3d 1408, 1409-10 [2d Dept 2023]; *Calle v 16th Ave. Grocery, Inc.*, 219 AD3d 450, 452 [2d Dept 2023]; *English*, 218 AD3d at 445; *Keller v Rippowam Cisca Sch.*, 208 AD3d 654, 655-56 [2d Dept 2022]). Since DNA did not eliminate fact issues regarding its authority to supervise plaintiff's work, dismissal of the contribution claim is unwarranted (*see Daeira v Genting N.Y., LLC*, 173 AD3d 831, 835-36 [2d Dept 2019]). A party may establish entitlement to summary judgment dismissing a common-law indemnification claim with proof it was not negligent and did not have authority to supervise, direct, or control the injury-causing work (*see Flood*, 219 AD3d at 1409; *Calle*, 219 AD3d at 452; *Keller*, 208 AD3d at 655). Since DNA fails to demonstrate it was not negligent, dismissal of

the common-law indemnification claim against it is inappropriate (*see Keller*, 208 AD3d at 655; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1159-60 [2d Dept 2016]).

Finally, regarding the branches of the summary judgment motions by DNA and Orsid defendants on their cross-claims and third-party claims, DNA seeks judgment on its contractual indemnification and breach of contract to procure insurance claims against Anaar. Orsid defendants seek summary judgment on their common-law and contractual indemnification claims against DNA and Anaar. Since a party seeking contractual indemnification must demonstrate its freedom from negligence and that it is subject to only statutory or vicarious liability, DNA's and Orsid defendants' failure to demonstrate entitlement to dismissal of the common law negligence and Labor Law § 200 claim against them constitutes a failure to show entitlement to contractual indemnification as well (*see Chuqui v Amna, LLC*, 203 AD3d 1018, 1022-23 [2d Dept 2022]; *Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1102 [2d Dept 2020]). For the same reason, Orsid defendants are not entitled to common-law indemnification against DNA or Anaar (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1098 [2d Dept 2018]; *Ginter*, 121 AD3d at 845).

To recover damages on its claim for breach of contract to procure insurance, DNA must show Anaar's noncompliance with a contract provision requiring Anaar to procure insurance naming DNA as an additional insured (*see Titov*, 230 AD3d at 619; *Meadowbrook Pointe Dev. Corp.*, 214 AD3d at 969; *Breland-Marrows v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2d Dept 2016]; *Ginter*, 121 AD3d at 844). DNA contends that section 13.1 of its contract with Anaar required Anaar to procure commercial general liability insurance with limits of \$1,000,000.00 per occurrence and \$2,000,000.00 aggregate (*see* NYSCEF Doc No. 203 at 9-10). DNA's presentation of its subcontract with Anaar requiring Anaar to procure specific insurance naming DNA as an additional insured and the letter from Anaar's insurer denying tender on the ground DNA was not an additional insured sufficiently demonstrates entitlement to summary judgment on DNA's breach of contract claim (*see City of New York v Evanston Ins. Co.*, 129 AD3d 760, 760-61 [2d Dept 2015]; *DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). As addressed above, Bhatti's testimony is insufficient to establish Anaar's compliance with the insurance procurement provision. Thus, considering the evidence that Anaar failed to procure the insurance required by its subcontract with DNA and Anaar's failure to raise fact issues, summary judgment

on DNA's third-party claim for breach of contract to procure insurance is appropriate (*see Georges v Resorts World Casino N.Y. City*, 189 AD3d 1549, 1551 [2d Dept 2020]; *Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 935 [2d Dept 2015]; *City of New York v Evanston Ins. Co.*, 129 AD3d at 760-61; *Beharovic v 18 E. 41st St. Partners, Inc.*, 123 AD3d 953, 956 [2d Dept 2014]; *Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 689 [2d Dept 2012]).

Conclusion

Accordingly, the branches of the separate motions by Anaar, DNA, and Orsid defendants for summary judgment dismissing the Labor Law §§ 241 (6) and 240 (1) claims, the branches of the separate motions by DNA and Orsid defendants for summary judgment dismissing the Labor Law § 241-a claim, the branch of plaintiff's cross-motion for summary judgment on the Labor Law § 200 and common-law negligence claim against DNA, and the branch of DNA's motion for summary judgment on its third-party claim for breach of contract to procure insurance are granted. The remaining branches of the motions and cross-motions are denied.

For all the foregoing reasons, it is hereby

ORDERED that the branches of the separate motions by Anaar, DNA, and Orsid defendants for summary judgment dismissing plaintiff's claims pursuant to Labor Law §§ 241 (6) and 240 (1) are granted, and said claims are hereby dismissed; and it is further

ORDERED that the branches of the separate motions by DNA and Orsid defendants for summary judgment dismissing plaintiff's claim pursuant to Labor Law § 241-a are granted, and said claim is hereby dismissed; and it is further

ORDERED that the branch of plaintiff's cross-motion for summary judgment on his claims against DNA pursuant to Labor Law § 200 and for common-law negligence is granted; and it is further

ORDERED that the branch of Anaar's motion for summary judgment dismissing the third-party claims for contribution and common-law indemnification asserted against it is granted, and said claims are hereby dismissed; and it is further

ORDERED that the branch of DNA's motion for summary judgment on its third-party claim against Anaar for breach of contract to procure insurance is granted; and it is further

ORDERED that all remaining branches of the motions and cross-motions are denied; and it is further

ORDERED that DNA shall serve this Decision and Order with Notice of Entry upon all parties within twenty (20) days of the date of entry.

Dated: September 29, 2025
Long Island City, New York



HON. KAREN LIN
JUSTICE OF THE SUPREME COURT

