

Morocho v LRC Maintenance, LLC
2025 NY Slip Op 35494(U)
January 21, 2025
Supreme Court, Westchester County
Docket Number: Index No: 55824/2022
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
JAIRO MOROCHO,

DECISION & ORDER

Plaintiff,

Index No: 55824/2022

-against-

Motion Sequence Nos. 4 and 5

LRC MAINTENANCE, LLC, LRC
CONSTRUCTION LLC, FULLER DEVELOPMENT
COMPANY, INC., LMV II MMP HOLDING, L.P.,
PHOENIX HMA INC, and FULLER MARQUISE,
LLC,

Defendants.

-----X

LRC CONSTRUCTION, LLC and FULLER
DEVELOPMENT COMPANY, INC.,

Third-Party Plaintiffs,

-against-

PHOENIX HMA, INC.,

Third-Party Defendant.

-----X

LMV II MMP HOLDINGS, L.P.,

Second Third-Party Plaintiff,

-against-

PHOENIX HMA, INC. and LRC MAINTENANCE,
LLC,

Second Third-Party Defendants.

-----X

PHOENIX HMA, INC.,

Third Third-Party Plaintiff,

-against-

N & Z CONSTRUCTION, LLC,

Third Third-Party Defendant.

-----X

The following electronically filed papers (NYSCEF Doc Nos. 152-176; 187-222) were read on (1) the motion by the plaintiff, Jairo Morocho (plaintiff), for an order: (a) granting plaintiff partial summary judgment on the issue of liability for the claim predicated upon common law negligence against the defendant, LRC Maintenance, LLC; (b) granting plaintiff partial summary judgment on the issue of liability for the claims predicated upon Labor Law §§ 200 and 241 (6) against the defendants, LRC Construction LLC, Fuller Development Company, Inc., LMV II MMP Holding, L.P., Phoenix HMA Inc. and Fuller Marquise, LLC; and (c) granting such other and further relief as the court may deem just and proper (sequence no. 4); and (2) the cross-motion by the defendant/third-party plaintiff, LMV II MMP Holdings, L.P. (LMV), for an order: (a) granting LMV summary judgment dismissing plaintiff's Labor Law §§ 200/common law negligence and 241 (6) claims; (b) granting LMV summary judgment against the defendant/third-party plaintiff, LRC Maintenance, LLC, for common law indemnification and contribution; (c) granting LMV summary judgment against the defendant/third-party defendant/third third-party plaintiff, Phoenix HMA, Inc., for contractual indemnification, contractual contribution, common law indemnity, common law contribution and breach of contract; (d) denying plaintiff's motion for summary judgment; and (e) granting such other and further relief as the court may deem just and proper (sequence no. 5).

Motion Sequence No. 4

Notice of Motion-Affirmation in Support-Statement of Facts-Exhibits (1-15)

Affirmation in Opp. (by LRC Maintenance, LRC Construction, Fuller Development Co. and Fuller Marquise)-Exhibits (A-B)-Memo of Law

Affirmation in Opp. (by Phoenix HMA)-Response to Statement of Facts-Exhibits (A-H)

Reply Affirmation

Motion Sequence No. 5

Notice of Cross-Motion-Affirmation in Support & in Opp.-Exhibits (A-D)-Memo of Law

Affirmation in Opp. (by plaintiff)-Response to Statement of Facts-Exhibits (1-2)

Affirmation in Opp. (by LRC Maintenance, LRC Construction, Fuller Development Co. and Fuller Marquise)-Exhibits (A-B)

Affirmation in Opp. (by Phoenix HMA)-Response to Statement of Facts-Exhibits (A-I)

Reply Affirmation

Upon reading the foregoing papers, the motions are determined as follows:

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained on December 8, 2021, at approximately 3:00 p.m., when he was purportedly struck by a forklift during the course of his employment as a carpenter with the third third-party defendant, N & Z Construction, LLC (N&Z), at a construction site located at 131 Mamaroneck Avenue, White Plains, New York also known as 9 Mitchell Place, White Plains, New York (site). On the day of the accident, plaintiff was working in building number 2 of the site in the parking garage. Plaintiff and his three co-workers were tasked with covering openings in the garage with plywood to insulate the garage space from the cold weather outside. More specifically, plaintiff was tasked with cutting plywood and his three co-workers were tasked with covering the openings of the garage with the plywood. Plaintiff testified at deposition that he received his work tasks directly from Jairo Nunez (Nunez), his foreman/boss at N&Z. Nunez received the work tasks for N&Z from an individual named Frank, who was associated with the defendant/third-party defendant/second third-party defendant/third third-party plaintiff, Phoenix HMA, Inc. (Phoenix). The accident occurred on a ramp inside the garage. At the time of the accident, plaintiff was in the process of cutting the plywood with an electric saw. As plaintiff was bent over cutting the plywood on the garage ramp, his foot and leg were run over by a forklift.

The forklift was driven by Jerome Maffatt (Maffatt), an employee of the defendant/second third-party defendant, LRC Maintenance, LLC (LRC Maintenance). LRC Construction, LLC (LRC Construction) supplied the forklift at the site which it rented. Maffatt was using the forklift to transport debris from the site. The debris was contained in two mini dumpsters that were being transported on top of the forks in front of the forklift. Maffatt testified at deposition that each mini dumpster was about five by five (wide) and about three feet tall. Maffatt further testified that while transporting the mini dumpsters with the forklift, his front view from the seat of the forklift was obstructed due to the garbage and debris contained within the mini dumpsters. Maffatt was provided with a flagman also known as a flagger, who was a laborer on the site, to help navigate the forklift but Maffatt testified that he would only use the flagger when driving the forklift outside of the buildings. Peter Zabroski (Zabroski), an assistant superintendent employed by LRC Construction, testified at deposition that Maffatt had a flagger assigned to him and that flaggers were available to Maffatt on the day of the accident. Zabroski further testified that Maffatt was provided with a flagger for use inside the buildings on site and that he (Zabroski) previously observed a flagger assisting Maffatt inside the site building. At the time of the subject accident, Maffatt was driving the forklift without the use of a flagger.

On the day of the accident, Maffatt testified that he had traversed the path where the accident occurred around 10-15 times. The ramp was approximately 15-20 feet wide. One side of the ramp was lined with construction materials, thereby limiting Maffatt's pathway.

Maffatt further testified that he observed the carpenters working on the coverings in the garage approximately four times prior to the accident.

Just prior to the happening of the accident, Maffatt made a right turn with the forklift and was headed towards the ramp. He testified that as he made the right turn, he observed two of plaintiff's co-workers on the side of his intended path, about four feet from the wall of the garage into the pathway, further limiting his travel space. Maffatt testified that the two workers were standing and looking towards him. Maffatt testified that kept his eye on the two co-workers to ensure that they did not walk in front of his travel path. Maffatt testified that as he made the right turn, he sounded the horn four times and he also testified that the hazard light on top of the forklift was engaged. He testified that the forklift was loud and that he was proceeding slowly. He further testified that his front view was obstructed by the mini dumpsters and that he did not see the plaintiff because plaintiff was kneeling down in the intended travel path of the forklift. Maffatt testified that he became aware of the accident as soon as the forklift ran over the plaintiff's foot.

The defendant/second third-party plaintiff, LMV II MMP Holdings, L.P. (LMV), owned the site. The defendant/third-party plaintiff, LRC Construction, was the general contractor at the site. The defendant/second third-party defendant, LRC Maintenance, a division of LRC Construction, was responsible for maintenance and cleaning at the site including, the removal of garbage and debris from the site. The defendant, Fuller Marquise, LLC (Fuller Marquise), was a contractor at the site and subcontracted the carpentry work to Phoenix. Phoenix, in turn, subcontracted a portion of its carpentry work to plaintiff's employer, N&Z.

Plaintiff's complaint alleges causes of action sounding in common law negligence as well as violations of the New York State Labor Law. Following the completion of discovery, plaintiff now moves (sequence no. 4) for an order, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability on his common law negligence claim against LRC Maintenance and for partial summary judgment on the issue of liability on his Labor Law §§ 200 and 241 (6) claims against the defendants, LRC Construction, Fuller Development Company, Inc., LMV, Phoenix and Fuller Marquise. LMV cross-moves (sequence no. 5) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's Labor Law § 200/common law negligence and Labor Law § 241 (6) claims as well as for summary judgment in its favor on its cross claims for common law and contractual indemnification and contribution and breach of contract. The motions are consolidated for joint disposition and are decided as follows.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the

nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the prima facie burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

Guided by the foregoing standard, the court addresses each of the motions. For clarity purposes, the court addresses the motion (no. 4) and the cross-motion (no. 5) in reverse order.

I. Cross-Motion by LMV
Sequence No. 5

In support of the motion, LMV contends, among other things, that because the plaintiff's accident arose from the manner in which the work was performed and because it did not direct or control the injury-producing work, it cannot be held liable under Labor Law § 200/common law negligence. LMV further argues that it is also entitled to dismissal of the Labor Law § 241 (6) claim asserted against it because one of the Industrial Code sections allegedly violated by it (12 NYCRR § 23-2.1[b]) lacks the requisite specificity to support a claim under Labor Law § 241 (6) and the evidence is otherwise insufficient to sustain a claim under the other Industrial Code section allegedly violated by it (12 NYCRR § 23-9.8[j]). LMV also asserts that it is entitled to judgment as a matter of law on its claims for common law contribution and indemnification from LRC Maintenance and Phoenix since it was free from negligence in the happening of the accident. Lastly, LMV contends that it is entitled to judgment as a matter of law on its claims for contractual indemnification/contribution from Phoenix in accordance with the indemnification provision of the contract as well as on its claim for breach of contract because of Phoenix's failure to procure insurance coverage and name LMV as an additional insured as required by the terms of the contract between Phoenix and Fuller Marquise. Based thereon, LMV submits that its motion should be granted.

In opposition to the cross-motion, plaintiff argues, among other things, that the accident did not arise from the method of the work but rather from a dangerous condition on the site (i.e., the operation of the forklift with an obstructed front view and without the use of a flagger that persisted at the site for two months prior to the happening of the subject accident). Consequently, plaintiff submits that LMV failed to demonstrate its entitlement

to judgment as a matter of law since it failed to submit competent evidence establishing that it did not have actual or constructive notice of the dangerous condition at the site. Regarding the Labor Law § 241 (6) claim, plaintiff submits that LMV failed to establish its prima facie entitlement to judgment as a matter of law dismissing this claim. Consequently, plaintiff submits that the cross-motion should be denied.

In opposition to the cross-motion, LRC Maintenance, LRC Construction, Fuller Development and Fuller Marquise argue, among other things, that, to the extent the court determines that the accident arose as a result of a dangerous condition on the premises, questions of fact exist as to whether LMV had notice of the alleged dangerous condition, thus precluding the grant of summary judgment in LMV's favor dismissing the plaintiff's Labor Law § 200/common law negligence claim. Regarding that branch of the cross-motion seeking judgment on the common law contribution/indemnification claim from LRC Maintenance, opponents contend that LMV has failed to demonstrate that it was free from negligent in the happening of the accident or that, even if it did meet its prima facie burden, questions of fact exist as to the happening of the accident thereby precluding an award of summary judgment in its favor on these claims.

In further opposition to the cross-motion, Phoenix contends, among other things, that LMV failed to establish that the relevant indemnification provision of the contract was triggered and/or that any act or omission on behalf of Phoenix or N&Z caused the plaintiff's accident. Based thereon, Phoenix submits that those branches of the cross-motion seeking contractual indemnification/contribution, damages based on breach of contract and common law indemnification/contribution against it should be denied.

In reply, LMV, among other things, emphasizes that this case clearly falls into a means and methods analysis of a Labor Law § 200 analysis. LMV notes that plaintiff has conceded that it (LMV) did not direct or control or supervise the injury-producing work. Consequently, LMV submits that it cannot be held liable as a matter of law under Labor Law § 200/common law negligence. LMV further argues that because it was not negligent in the happening of the accident, it is entitled to common law contribution/indemnification from LRC Maintenance. LMV points to the deposition testimony of its witness to establish that it was not involved in the control, supervision and/or manner in which work at the site was performed. LMV further notes the absence of other evidence from any other party demonstrating that their tasks or directions were conveyed by LMV. In sum, LMV reasserts that because it was not negligent and that the accident occurred as a result of Maffatt's operation of the forklift, it is entitled to common law indemnification/contribution from LRC Maintenance. Lastly, LMV argues that it has established entitlement to contractual indemnification from Phoenix or at the very least, has demonstrated entitlement to common law indemnification from Phoenix.

a. *Labor Law § 200/Common Law Negligence*

“Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where “a plaintiff’s injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property,...a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, only when the owner created the complained-of condition, or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice” (*Martinez v City of New York*, 73 AD3d 993, 997 [2d Dept 2010]). By contrast, where a plaintiff’s injuries arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had “unless it is shown that the party to be charged exercised some supervisory control over the operation” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). “[N]o liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed” (*Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]). Consequently, “[t]o be held liable under Labor Law § 200 and for common-law negligence arising from the manner in which work is performed at a work site, a general contractor must have actually exercised supervision and control over the work performed at the site. General supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability. In order to impose liability upon it, a general contractor must have had the authority to control the activity bringing about the injury so as to enable it to avoid or correct an unsafe condition” (*McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 798 [2d Dept 2007] [internal citations omitted]). “If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]).

Here, a means and methods analysis is proper since the subject accident stems not from a dangerous condition on the premises but from the manner in which the work was being performed (*see McLeod*, 41 AD3d at 797-798). While plaintiff argues that the allegedly unsafe operation of the forklift created a dangerous condition at the site, “[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing in the premises” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]). Accordingly, in order to meet its prima facie burden dismissing the claims predicated upon a violation of Labor Law § 200/common law negligence, it was

incumbent upon LMV to establish that it did not exercise supervisory control over the injury producing work. LMV satisfied this burden. The evidence tendered including, the deposition testimony of its witness, William Cannon, establishes, *prima facie*, that LMV did not exercise any control over the injury-producing work. Accordingly, the burden of going forward shifted to the opponents of the motion to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, plaintiff and LRC Maintenance, LRC Construction, Fuller Development and Fuller Marquise failed to raise a triable issue of fact (*see* CPLR 3212 [b]). Accordingly, that branch of the cross-motion seeking summary judgment dismissing the plaintiff's claim against LMV alleging a violation of Labor Law § 200/common law negligence is granted, and this claim is dismissed.

b. Labor Law § 241 (6)

The court next addresses that branch of the cross-motion seeking summary judgment dismissing the plaintiff's claim alleging a violation of Labor Law § 241 (6). In his bill of particulars, plaintiff alleges that his Labor Law § 241 (6) claim is predicated upon the following Industrial Code violations: "12 NYCRR § 23-1.4; 12 NYCRR § 23-1.5(c)(1)-(3); 12 NYCRR § 23-1.7(a), (b), (d), (e)(1)-(2); 12 NYCRR § 23-1.8(c); 12 NYCRR § 23-1.11(a), (c); 12 NYCRR § 23-1.12(c); 12 NYCRR § 23-1.13(b)(1-5, 8), (c); 12 NYCRR § 23-1.15; 12 NYCRR § 23-1.16(a), (b), (c), (d), (e), (f); 12 NYCRR § 23-1.17(b), (c), (e); 12 NYCRR § 23-1.18(b)(1)-(3), (c); 12 NYCRR § 23-1.19; 12 NYCRR § 23-1.20(a-d); 12 NYCRR § 23-1.21(b)(1)-(10), (d), (e)(2), (3), (5); 12 NYCRR § 23-1.22; 12 NYCRR § 23-1.23; 12 NYCRR § 23-1.24(a)-(c); 12 NYCRR § 23-1.25(a)-(f); 12 NYCRR § 23-1.27; 12 NYCRR § 23-1.28(a)-(e); 12 NYCRR § 23-1.30; 12 NYCRR § 23-2.1(a)(1), (2), (b); 12 NYCRR § 23-2.2(a)-(e); 12 NYCRR § 23-2.3(a)-(e); 12 NYCRR § 23-2.4; 12 NYCRR § 23-2.5(a)(1-2), (b)(1-6); 12 NYCRR § 23-2.6; 12 NYCRR § 23-2.7; 12 NYCRR § 23-3.2(a)(1-3), (b); 12 NYCRR § 23-3.3(b)(2-5), (c), (d), (e)(1-3), (f), (g), (h), (i), (j), (k), (l), (m); 12 NYCRR § 23-3.4; 12 NYCRR § 23-4.1 (a-b); 12 NYCRR § 23-4.2(a)-(1); 12 NYCRR § 23-4.3; 12 NYCRR § 23-4.4(a)-(i); 12 NYCRR § 23-5.1(b), (c), (d), (e), (f), (g), (h), (i), (j), (k); 12 NYCRR § 23-5.3(c), (d), (e), (f), (g), (h); 12 NYCRR § 23-5.4(a), (b), (c), (d), (e), (f); 12 NYCRR § 23-5.5(a), (b), (c), (d), (e)(1)-(6), (f), (g), (h); 12 NYCRR § 23-5.6(a), (b), (c), (d), (e), (f), (g); 12 NYCRR § 23-5.7; 12 NYCRR § 23-5.8(a), (b), (c), (d), (e), (f), (g), (h); 12 NYCRR § 23-5.9 (a), (b), (c), (d), (e), (f), (g); 12 NYCRR § 23-5.10(a)(1)-(6), (b)(1)-(6), (c), (d), (e), (f); 12 NYCRR § 23-5.11 (a), (b), (c), (d); 12 NYCRR § 23-5.12; 12 NYCRR § 23-5.13; 12 NYCRR § 23-5.14; 12 NYCRR § 23-5.15; 12 NYCRR § 23-5.16; 12 NYCRR § 23-5.17(b), (c); 12 NYCRR § 23-5.18(a), (b), (c), (d), (e), (f), (g), (h), (i); 12 NYCRR § 23-5.19; 12 NYCRR § 23-5.20; 12 NYCRR § 23-5.21; 12 NYCRR § 23-5.22; 12 NYCRR § 23-6.1(b)-(k); 12 NYCRR § 23-6.2(a)-(d); 12 NYCRR § 23-6.3; 12 NYCRR § 23-7.1; 12 NYCRR § 23-7.2; 12 NYCRR § 23-8; 12 NYCRR § 23-8.1; 12 NYCRR § 23-8.2; 12 NYCRR § 23-8.3; 12 NYCRR § 23-9; 12 NYCRR § 23-9.1; 12 NYCRR § 23-9.2; 12 NYCRR § 23-9.2(a)-(i); 12 NYCRR § 23-9.3;

12 NYCRR § 23-9.4; 12 NYCRR § 23-9.5; 12 NYCRR § 23-9.6; 12 NYCRR § 23-9.7; 12 NYCRR § 23-9.8; 12 NYCRR § 23-9.9; 12 NYCRR § 23-9.10; 12 NYCRR § 23-9.11; as well as violations of Article 1926 of OSHA, ANSI and applicable sections of the Building Code of the State of New York” (plaintiff’s “Verified Bill of Particulars” at ¶ 37, NYSCEF Doc No. 156).

Initially, the court notes that as the movant seeking summary judgment dismissing, in its entirety, the plaintiff’s Labor Law § 241 (6) claim, it was incumbent upon LMV to address *all* of the foregoing violations as alleged in the plaintiff’s bill of particulars. Contrary to LMV’s contention, merely because the plaintiff only moved for partial summary judgment on the issue of liability in his favor on two sections of the Industrial Code does not necessarily mean that plaintiff has abandoned all of the remaining Industrial Code sections. The cases cited by LMV for the proposition that the plaintiff has abandoned his reliance on the provisions of the Industrial Code other than the two on which he moved in his motion for summary judgment are inapposite. In those cases, the plaintiff, in opposition to a motion for summary judgment dismissing the entirety of a Labor Law § 241 (6) claim, either failed to oppose the entirety of that branch of the motion (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]) or abandoned the previously pled code violations on appeal (*see Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2d Dept 2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010]). Accordingly, since LMV only addresses two of the pled Industrial Code sections, that branch of the cross-motion seeking dismissal of the entire Labor Law § 241 (6) claim is denied. The court will address the two Industrial Code sections LMV moves to dismiss, to wit: 12 NYCRR § 23-2.1(b) and 12 NYCRR § 9.8(j).

Labor Law § 241 (6) imposes upon owners and contractors a nondelegable duty “to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993] [internal quotation marks omitted]). “To prevail on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision that sets forth specific, applicable safety standards” (*Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 728 [2d Dept 2012]). Moreover, plaintiff must demonstrate that a defendant’s alleged violation of the specific regulation was a proximate cause of the accident (*see Creese v Long Is. Light. Co.*, 98 AD3d 708, 710 [2d Dept 2012]).

Regarding 12 NYCRR § 23-2.1(b), the Second Department has explained that this code section “lacks the specificity required to support a cause of action under Labor Law § 241 (6)” (*Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014]; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008]). Accordingly, LMV has demonstrated prima facie entitlement to summary judgment dismissing so much of the Labor Law § 241 (6) claim predicated upon a violation of 12 NYCRR § 23-2.1(b).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). As such, so much of the Labor Law § 241 (6) claim predicated upon a violation of 12 NYCRR § 23-2.1(b) is dismissed.

Regarding 12 NYCRR § 23-9.8(j), LMV failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing so much of the Labor Law § 241 (6) claim predicated upon a violation of 12 NYCRR § 23-9.8 (j). In support of this branch of its cross-motion, LMV contends, among other things, that plaintiff “has not proven that the forks were raised higher than necessary....” (memorandum of law in support at ¶ 33, NYSCEF Doc No. 176). However, as movant, LMV had the burden of establishing, prima facie, the inapplicability of this code provision. LMV cannot affirmatively meet its prima facie burden by pointing to gaps in plaintiff’s case (*see Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 837 [2d Dept 2011]). Accordingly, so much of the Labor Law § 241 (6) claim predicated upon a violation of 12 NYCRR § 23-9.8(j) is denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324).

c. Common Law Indemnification from LRC Maintenance

The court next addresses that branch of the cross-motion seeking common law indemnification and contribution from LRC Maintenance. “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. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision” (*Debenedetto v Chetrit*, 190 AD3d 933, 938 [2d Dept 2021] [internal quotation marks and citations omitted]). Thus, “[i]n order to establish [a] claim for common-law indemnification, [an] owner[] [is] required to prove not only that [it] w[as] not negligent, but also that the proposed indemnitor...was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury” (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2d Dept 2006]; *see also Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013] [“[t]o establish a claim for common-law indemnification, the party 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 cause of the accident.”]).

Here, LMV established its prima facie entitlement to judgment as a matter of law on its common law contribution/indemnification claim against LRC Maintenance by demonstrating that it was not negligent in the happening of the accident since it did not exercise any supervisory control over the injury-producing work and that LRC Maintenance, via Maffatt, the operator of the forklift, was responsible for at least *some* negligence that contributed to the accident (*see Mikelatos*, 105 AD3d at 824). At deposition, Maffatt testified that at the time of the accident, his front view from the seat of the forklift was obstructed by the mini dumpsters he was transporting, and that despite this

obstruction, he continued to operate the forklift despite being aware of the presence of workers in the garage on the ramp. Indeed, Maffatt testified at deposition that on the day of the accident, he observed plaintiff and plaintiff's three co-workers on the ramp approximately four times prior to the happening of the accident. In addition, Maffatt operated the forklift with the vision obstruction in spite of the availability of flaggers to assist him safely navigate the route. This evidence was sufficient to demonstrate, *prima facie*, some negligence on the part of LRC Maintenance that contributed to the accident. Accordingly, the burden of going forward shifted to LRC Maintenance to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, LRC Maintenance failed to raise a triable issue of fact (*see* CPLR 3212 [b]). Accordingly, LMV is awarded summary judgment on its claims for common law contribution/indemnification from LRC Maintenance.

d. *Common Law/Contractual Indemnification from Phoenix*

Lastly, the court addresses the remaining branches of the cross-motion seeking judgment on the claims for breach of contract, contractual indemnification, contractual contribution, common law indemnity and common law contribution against Phoenix.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2d Dept 2016] [internal quotation marks omitted]). Here, LMV failed to establish entitlement to judgment as a matter of law on this issue as it failed to demonstrate, *prima facie*, that the contractual provision was not complied with. Accordingly, this branch of the cross-motion is denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324).

"A party's right to contractual indemnification depends upon the specific language of the relevant contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Guiles v Vassar Bros. Hosp.*, 221 AD3d 666, 667 [2d Dept 2023] [internal quotation marks and citations omitted]). Here, LMV failed to establish, *prima facie*, that the indemnification provision in the contract between Fuller Marquise and Phoenix was triggered. The subject indemnification provides as follows:

"To the fullest extent permitted by law, the Subcontractor [i.e., Phoenix] shall indemnify, hold harmless and defend LMV II MMP Holdings, LP (Owner) and all of its agents and employees and the Indemnitees listed below from and against all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the Agreement, provided that any such claim, damage, loss or expense (a) is

attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including loss of use resulting therefrom, and (b) is caused in whole or in part by any act or omission of Subcontractor or anyone directly or indirectly employed by it or anyone for whose act it may be liable, regardless of whether it is caused in part by the negligent act or omission of Owner or any of its agents and employees....”

Here, the indemnification provision is only triggered for claims “arising out of or resulting from the performance of the Agreement” and which is caused “in whole or in part by any act or omission of Subcontractor or anyone directly or indirectly employed by it or anyone for whose act it may be liable.” LMV failed to demonstrate, *prima facie*, that the accident was caused by any act or omission of the subcontractor, Phoenix, or anyone employed by it (i.e., N&Z). Accordingly, this branch of the cross-motion is denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324). Lastly, while LMV demonstrated, *prima facie*, that it was free from negligence in the happening of the accident, LMV nevertheless failed to demonstrate, *prima facie*, that Phoenix was negligent and that such negligence contributed to the accident. Accordingly, that branch of the motion seeking common law indemnification/contribution from Phoenix is also denied without regard to the sufficiency of the opposing papers (*see id.*).

II. Motion by Plaintiff

Sequence No. 4

a. *Common Law Negligence*

As outlined above, plaintiff first seeks partial summary judgment on the issue of liability on his claim predicated upon common law negligence against LRC Maintenance. The motion is granted. The record evidence is sufficient to establish, *prima facie*, that LRC Maintenance possessed supervisory control over the operation of the forklift and that Maffatt’s negligence in operating the forklift with an obstructed front view was a proximate cause of the accident. Contrary to LRC Maintenance’s contention, that plaintiff may be comparatively at fault in the happening of the accident by, for example, *as alleged by the opponents of the motion*, kneeling down in the intended path of the forklift or failing to hear the horn sounded by Maffatt, is not an obstacle to obtaining partial summary judgment on the issue of liability. The issue of plaintiff’s comparative fault shall be assessed by a jury.

b. *Labor Law §§ 200 and 241 (6)*

Lastly, plaintiff seeks an order granting him partial summary judgment on the issue of liability for the claims predicated upon Labor Law §§ 200 and 241 (6) against defendants LRC Construction, Fuller Development Company, Inc., LMV, Phoenix and Fuller Marquise. Initially, with respect to the Labor Law § 200 claim, plaintiff’s motion does not

adequately address this claim and explain how LRC Construction, Fuller Development Company, Inc., LMV, Phoenix and Fuller Marquise would be liable under this provision of the Labor Law. Since plaintiff failed to adequately address these claims with respect to the foregoing parties, this portion of the motion is denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324).

Regardless, and notwithstanding the foregoing, with respect to LRC Construction, since the accident arose from the means and methods of the work, it was incumbent upon plaintiff to demonstrate that LRC Construction, as the general contractor, possessed the authority to supervise or control the injury-producing work (*see Reyes v Sligo Constr. Corp.*, 214 AD3d 1014, 1017 [2d Dept 2023]). Plaintiff failed to sustain this burden. At deposition, Zaborski testified that his daily tasks at the site essentially amounted to general supervision over the work. Specifically, Zaborski testified that his duties amounted to “looking at succession and work being done”, “keeping track of how far along each scope was” and “[l]ooking for...safety-related issues” (Zaborski deposition tr at p. 12, NYSCEF Doc No. 167). Mere general supervisory authority is insufficient to impose liability under Labor Law § 200 (*see Reyes*, 214 AD3d at 1017). Similarly, with respect to Phoenix, the present motion record is insufficient for the court to find, as a matter of law, that Phoenix, as subcontractor, controlled the injury-producing work or had ongoing control of the area in which plaintiff was injured. In addition, with respect to defendant LMV, since the court has already granted LMV summary judgment dismissing the Labor Law § 200 claim against it, this branch of the plaintiff’s motion seeking partial summary judgment in his favor against LMV on the Labor Law § 200 claim is denied.

Lastly, the court addresses the remaining branch of the motion seeking partial summary judgment on his Labor Law § 241 (6) claim. Again, plaintiff moves for summary judgment on the following two Industrial Code regulations: (1) 12 NYCRR § 23-2.1(b); and (2) 12 NYCRR § 9.8(j).

As previously outlined, regarding 12 NYCRR § 23-2.1 (b), since the Second Department has explained that this code section “lacks the specificity required to support a cause of action under Labor Law § 241 (6)” (*Longo*, 116 AD3d at 677; *Parrales*, 55 AD3d at 582), the court denies this branch of the motion.

Regarding 12 NYCRR § 9.8(j), the court denies this branch of the motion as plaintiff failed to establish, *prima facie*, that this code provision was violated and that such violation was a proximate cause of the accident.

All other arguments raised on the motions and evidence submitted by the parties in connection therewith have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is:

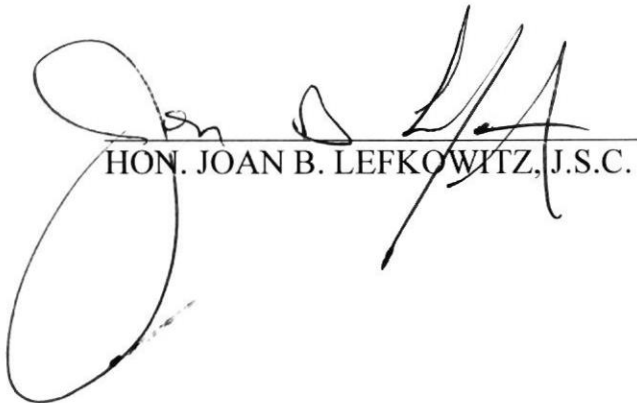
ORDERED that the motion by the plaintiff is granted to the extent set forth herein;
and it is further

ORDERED that the cross-motion by LMV is granted to the extent set forth herein;
and it is further

ORDERED that the parties shall appear for a settlement conference on a date and
time which shall be set by the clerk.

E N T E R,

Dated: White Plains, New York
January 21, 2025



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF