

Abreu v 1690-1692 Holdings, LLC
2025 NY Slip Op 35537(U)
May 21, 2025
Supreme Court, Kings County
Docket Number: Index No. 516362/2020
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of May, 2025.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X
ORLANDO PICHARDO ABREU,

Plaintiff,

-against-

Index No.: 516362/2020

1690-1692 HOLDINGS, LLC, BETTERBUILT BUILDERS INC., RESPONSIVE GROUP LLC, ROCKFORD HOLDINGS GROUP LLC, CITI SAFETY OF NY LLC, and SILVERCUP SCAFFLODING I LLC,

Defendants.

-----X
BETTERBUILT BUILDERS INC.,

Third-Party Plaintiff,

-against-

SILVERCUP SCAFFOLDING I LLC and GWT ENTERPRISES, INC.,

Third-Party Defendants.

-----X
1690-1692 HOLDINGS LLC and ROCKFORD HOLDINGS GROUP LLC,

Second Third-Party Plaintiffs,

-against-

SILVERCUP SCAFFOLDING I LLC and GWT ENTERPRISES, INC.,

Second Third-Party Defendants.

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DECISION & ORDER

Motion Seq. Nos. 6 – 10

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

132-134, 150-152,
179-181, 233-234, 237, 268-270

Opposing Affidavits (Affirmations) _____
Affidavits/ Affirmations in Reply _____

231, 232, 239-240, 243-244, 246-247, 302-303
304-305, 311, 312, 313, 315, 320, 321, 331, 332
317, 318, 319, 322, 323-324, 330, 334

Upon the foregoing papers, plaintiff Orlando Pichardo Abreu moves for an order, pursuant to CPLR 3212, granting him partial summary judgment in his favor with respect to liability on his Labor Law § 240 (1) cause of action against defendant/second third-party plaintiff 1690-1692 Holdings, LLC (1690-1692 Holdings), defendant/third-party plaintiff Betterbuilt Builders Inc. (Betterbuilt), and defendant/third-party defendant/second third-party defendant Silvercup Scaffolding I LLC (Silvercup) (motion sequence number 6). Betterbuilt moves, pursuant to CPLR 3212, for an order: (1) granting it summary judgment dismissing the complaint; and (2) granting it summary judgment on its third-party claims for contractual indemnification, common-law indemnification and breach of contract against Silvercup and third-party defendant/second third-party defendant GWT Enterprises, Inc. (GWT Enterprises) (motion sequence number 7). 1690-1692 Holdings and defendant/second third-party plaintiff Rockford Holdings Group LLC (Rockford) (collectively referred to as the Owner Defendants) move, pursuant to CPLR 3212, for an order: (1) granting them summary judgment dismissing the complaint; and (2) granting them summary judgment with respect to their contractual indemnification, common-law indemnification, breach of contract and contribution claims against Betterbuilt, Silvercup and GWT Holdings (motion sequence numbers 8 and 10).¹ Silvercup cross-moves, pursuant to CPLR 3212, for an order: (1) granting it summary judgment dismissing the complaint and all claims, cross-claims and counterclaims against Silvercup; and

¹ This court will consider the evidentiary material and arguments submitted by the Owner Defendants with their “cross-motion” filed as motion sequence number 10. The new arguments are based on the deposition testimony of non-party witness Arsenio Maldonado Calderon, a GWT Enterprises foreman, who was present on the date of the accident and, although he did not witness the accident, was the person who assigned plaintiff his work duties for the day. Calderon’s deposition did not occur until March 7, 2024, a date long after the Owner Defendants’ initial motion, and, as such, this court may consider the testimony and arguments based on this testimony whether or not the filing of a new motion was the most appropriate procedural means of presenting the evidence and arguments to the court (*see Donovan v Rizzo*, 149 AD3d 1038, 1039 [2d Dept 2017]; *Rotante v Advance Tr. Co., Inc.*, 148 AD3d 423, 424 [1st Dept 2017]; *Colantonio v Mercy Med. Ctr.*, 135 AD3d 686, 689 [2d Dept 2016]; *see also* CPLR 2001)).

(2) granting it summary judgment with respect to its contractual indemnification claim against GWT Enterprises (motion sequence number 9).

In this action, plaintiff pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he alleges he suffered on March 25, 2020, when he was struck in the eye with a nail and fell from a ladder while installing a “no parking” sign on a sidewalk bridge² located in front of a building under construction (the Building). The Building was owned by 1690-1692 Holdings, who hired Betterbuilt as the general contractor for the project involving the construction of a new building, and as relevant here, Betterbuilt hired Silvercup to erect a sidewalk bridge on the sidewalk in front of the Building. Silvercup, in turn, hired GWT Enterprises to perform the sidewalk bridge erection work. Plaintiff was a laborer involved in the erection of the scaffold. The parties, however, dispute whether plaintiff was employed by Silvercup or GWT Enterprises.³

According to plaintiff’s deposition testimony, on the date of the accident, his work mostly involved standing on the bed of Silvercup’s flatbed truck and handing out material for the erection of the sidewalk bridge to his coworkers. Arsenio Maldonado was Silvercup’s foreman at the jobsite, and he was the only person who told plaintiff what to do. When his coworkers had finished their tasks, Arsenio asked plaintiff to install three to four small no parking signs. In order for plaintiff to do this work, Arsenio also directed plaintiff to get a ladder from inside the Building’s construction area that apparently belonged to another subcontractor on the jobsite. This ladder was an extension ladder that stood approximately 14 feet tall when extended, did not appear to have any defects, and had rubber feet at its base.

Shortly before the accident, plaintiff leaned the ladder against the plywood exterior of the sidewalk bridge, felt that it was secure, and climbed up to the fourth step of the ladder from the bottom, which was approximately four feet from the ground. While he held one of the no parking signs in position on the plywood face of the sidewalk bridge with his left wrist and a nail with his fingers, plaintiff went to strike the nail with the hammer he held in his right hand. As he was doing so, the ladder moved, causing plaintiff to mishit the nail and the nail bounced into

² Also referred to as a “sidewalk shed” by various witnesses at their depositions.

³ At his deposition, plaintiff testified that he was employed by Silvercup, but that for around a year before the accident he had been receiving checks from GWT Enterprises. Of note, plaintiff’s counsel, in plaintiff’s statement of material facts, represented that plaintiff was employed by GWT Enterprises based on a Workers Compensation Board (Board) determination. Although such a Board finding would likely be determinative in this proceeding (*see Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 73-74 [2d Dept 2023]), no party has submitted a copy of the Board’s determination as part of their motion or opposition papers.

plaintiff's eye. This movement of the ladder also caused plaintiff to fall to the ground. Plaintiff emphasized that, even if he had not been struck in the eye by the nail, he would still have fallen to the ground because of the movement of the ladder.

Although plaintiff was wearing a safety harness at the time of the accident, there was no place to tie off onto the sidewalk bridge while he was installing the sign. Plaintiff also did not have anything to tie off the ladder to secure it to the sidewalk bridge and there was no one to hold the ladder. Plaintiff also asserted that he did not have safety goggles, that no one had given him safety goggles to wear, and that he had never been told to wear goggles while putting up signs. While plaintiff conceded that he had signed a "Safety Protection Plan" form, indicating that he had received eye protection among other safety devices, plaintiff only recalled receiving a safety harness and some other items at that time and did not recall receiving any eye protection.

At his deposition, Yoel Pollak testified that he was employed by GWT Enterprises as a supervisor. Although many of GWT Enterprises' employees had formerly been employed by Silvercup, he asserted that they had all transitioned to working for GWT Enterprises by March 2020. The material used to erect the sidewalk sheds was stored in Silvercup's warehouse and Pollak believed that the material was owned by Silvercup. Neither Betterbuilt nor Silvercup, however, told GWT Enterprises how to erect the sidewalk bridges. Pollak, who was present at the jobsite on the first day of GWT Enterprises' work, was not present on the day of plaintiff's accident. Pollak asserted that GWT Enterprises usually did not install no parking signs onto the sidewalk bridges, and that these were typically installed by the general contractor. In contrast to plaintiff's testimony, Pollak asserted that GWT Enterprises provided safety goggles with other safety equipment at a January 2020 meeting. Pollak also stated that the workers were instructed to wear the goggles when they were cutting or hammering stuff at the January 2020 meeting and at unspecified toolbox talks and pre-shift meetings.

Non-party Arsenio Maldonado Calderon testified at his deposition that he started working for Silvercup in 2011. Although at some point he also started working for GWT Enterprises, Calderon never knew when he was working for GWT Enterprises or for Silvercup. On the date of the accident, Calderon was the foreman at the jobsite. Calderon asserted that Silvercup/GWT Enterprises was only responsible for installing its own company signs onto the sidewalk bridge. In addition, Calderon told plaintiff that he was to stay at the truck and pass out materials and that he did not instruct plaintiff to hang any signs or to go look for a ladder. Regarding safety

goggles, Calderon stated that plaintiff was present at a safety meeting held at the jobsite at 8:00 a.m., at which the safety person at the jobsite stated that workers were required to wear goggles when cutting material or nailing anything.

Silvercup initially asserts that it is entitled to dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action because it is not an owner, general contractor or agent thereof within the meaning of those sections. However, because Silvercup had been hired to perform the sidewalk bridge work and had subcontracted this work to GWT Enterprises, Silvercup had the authority to supervise and control GWT Enterprises' work, even if it did not exercise such authority. Therefore, it acted as Betterbuilt's statutory agent with respect to the sidewalk bridge work and is thus a proper defendant for purposes of section 240 (1) and 241 (6) claims (*see Barreto v Board of Mgrs. of 545 W. 110th St. Condominium*, 234 AD3d 515 [1st Dept 2025]; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 457, 461 [2d Dept 2022]; *White v 31-01 Steinway LLC*, 165 AD3d 449, 452-453 [1st Dept 2018]; *Mitchell v T. McElligott, Inc.*, 152 AD3d 928, 930-931 [3d Dept 2017]; *Gallagher v Resnick*, 107 AD3d 942, 945 [2d Dept 2013]).

There is no dispute that 1690-1692 Holdings, the owner of the Building (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]), and Betterbuilt, the general contractor (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Rogers v Peter Scalamandre & Sons, Inc.*, 231 AD3d 1174, 1176-1178 [2d Dept 2024]), are entities that may be held liable under both Labor Law §§ 240 (1) and 241 (6).

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). With respect to falls from ladders, the Appellate Division, Second Department has emphasized that "[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *see Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038-1039 [2021]; *Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 888 [2d Dept 2019]). In order to find the absence of proper protection, "[t]here must be evidence that the ladder was defective or inadequately secured and

that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Karanikolas*, 120 AD3d at 555 [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]).

Here, plaintiff's deposition testimony that he mishit the nail and fell to the ground after the extension ladder moved shows that the ladder was inadequately secured and is sufficient to establish his prima facie entitlement to summary judgment on his Labor Law § 240 (1) cause of action (see *Lochan v H & H Sons Home Improvement, Inc.*, 216 AD3d 630, 632 [2d Dept 2023]; *Jurski v City of New York*, 204 AD3d 983, 984 [2d Dept 2022]; see also *Paiba v 56-11 94th St. Co., LLC*, 228 AD3d 881, 882 [2d Dept 2024]; *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 677-678 [2d Dept 2021]). Based on plaintiff's deposition testimony regarding the movement of the unsecured ladder, plaintiff was not required to show that the ladder was defective in order to make out his prima facie burden (see *Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 538 [1st Dept 2021]; *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 730 [2d Dept 2020]; *Mingo v Lebedowicz*, 57 AD3d 491, 493 [2d Dept 2008]; *Whalen v ExxonMobile Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008], *lv denied* 53 AD3d 1124 [4th Dept 2008]). Plaintiff also had no obligation to explain why it moved (see *Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 504 [1st Dept 2021]; *Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019] [ladder moved for no apparent reason]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759-760 [2d Dept 2018] [ladder moved for no apparent reason]). Similarly, any failure by plaintiff to properly position the ladder does not establish that his conduct was the sole proximate cause of the accident (see *Orellana*, 173 AD3d at 887; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008]). Under the circumstances here, plaintiff's eye injury caused by the flying nail was tied to the movement of the ladder, and thus, was a foreseeable consequence of defendants' failure to provide plaintiff with an adequately secured ladder (see *Gordon*, 82 NY2d at 561-562).

The Owner Defendants, however, assert that plaintiff does not have a Labor Law § 240 (1) cause of action because plaintiff's act of hanging the sign on the scaffold does not constitute "altering" work and is thus not covered work within the meaning of section 240 (1). While plaintiff's act of hanging a sign, in and of itself, would not constitute covered work (see *Munoz v DJZ Realty, LLC*, 5 NY3d 747, 748 [2005]; *Adika v Beth Gavriel Bukharian Congregation*, 119 AD3d 827, 827-828 [2d Dept 2015]), he was part of the crew erecting the sidewalk bridge that

itself constitutes a structure which was being built as part of the larger construction project involving the erection of a new building (*see Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 955-956 [2d Dept 2014]). Plaintiff's work was thus ancillary to the larger project involving the erection of the sidewalk bridge and building construction and is therefore sufficient to demonstrate that plaintiff was performing covered work within the meaning of section 240 (1) (*see Depass v Mercer Sq., LLC*, 219 AD3d 801, 802 [2d Dept 2023]; *Ramones v 425 County Rd., LLC*, 217 AD3d 977, 979 [2d Dept 2023]; *Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 886 [2d Dept 2021]; *Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 544 [2d Dept 2004]; *see also Phillip v 525 E. 8th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012]; *Gomez-Lopez v RFR/K 81 Prospect Owner LLC*, 2023 WL 5225351[U], *2 [Sup Ct, Kings County 2023]).

This court rejects defendants' additional assertion that plaintiff was the sole proximate cause of his injuries because of his failure to wear safety goggles. Any failure by plaintiff to wear safety goggles cannot be the sole proximate cause of plaintiff's injuries because they are not a Labor Law § 240 (1) safety device (*see Peters v Structure Tone, Inc.*, 204 AD3d 522, 524 [1st Dept 2022]). Moreover, to the extent that plaintiff's failure to wear goggles could be relevant to plaintiff's section 240 (1) cause of action, the failure would only be relevant to plaintiff's eye injury caused by the flying nail and would not be relevant to the injuries suffered when he hit the ground. In any event, if Pollak and Calderon's testimony is in fact sufficient to establish, *prima facie*, that plaintiff was provided with goggles and required to wear them, plaintiff's own testimony denying that he was provided with goggles demonstrates a factual issue in this respect.

Betterbuilt, Silvercup and the Owner Defendants, each submit that they are also entitled to summary judgment in their favor or at least denial of plaintiff's motion based on Calderon's testimony that he only instructed plaintiff to pass out material from the truck and did not instruct him to hang any signs. In order to receive the protections of Labor Law § 240 (1), an employee must show that he or she was both permitted or suffered to work on a structure and hired by someone as part of the project (*see Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Because of these requirements, workers who perform work that is not required by work instructions or that is contrary to such instructions, are working outside the scope of their employment and are not entitled to the protections of section 240 (1) (*see Yaguachi v Park City 3 & 4 Apts., Inc.*, 185 AD3d 635, 636 [2d Dept 2020]; *Goya v Longwood Hous. Dev. Fund Co., Inc.*, 167 AD3d 402, 403 [1st Dept 2018]; *McCue v Cablevision Sys. Corp.*, 160 AD3d 595, 595

[1st Dept 2018]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]; *Lazri v Kingston City Consol. School Dist.*, 95 AD3d 1642, 1644 [3d Dept 2012]; *see also Fuczynski v 144 Div., LLC*, 208 AD3d 1153, 1156 [2d Dept 2022]). In view of this caselaw, Calderon's testimony that plaintiff had not been instructed to install the no parking signs is sufficient to demonstrate an issue of fact relating to whether plaintiff was working outside the scope of his employment at the time he hung the signs and requires denial of plaintiff's motion. Contrary to the contentions of the defendants, plaintiff's testimony that he had been instructed to perform such work raises factual issues regarding his work assignments and requires the denial of defendants' respective motions and cross-motions relating to the section 240 (1) cause of action.

Under Labor Law § 241 (6), an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Lopez v Kamco Servs, LLC*, 231 AD3d 1142, 1144 [2d Dept 2024]). "In order to establish prima facie entitlement to summary judgment, a defendant must show that the plaintiff failed to identify a section of the Industrial Code that was allegedly violated, that any such section is insufficiently specific to support liability or is inapplicable to the facts of the case, or that the defendant complied with the requirements of the identified provision" (*Lopez*, 231 AD3d at 1144 [internal quotation marks omitted]; *see Gonzalez v City of New York*, 227 AD3d 958, 960 [2d Dept 2024]).

Here, the defendants have failed to demonstrate their prima facie entitlement to summary judgment dismissing the Labor Law § 241 (6) cause of action with respect to Industrial Code (12 NYCRR) § 23-1.8 (a), which requires the provision and use of suitable eye protection for certain designated activities and "any other operation which may endanger the eyes." Defendants make no assertion that section 23-1.8 (a) is inapplicable to plaintiff's work in hanging the no parking sign with a hammer and nail (*see Roque v 475 Bldg. Co., LLC*, 171 AD3d 543, 544 [1st Dept 2019]; *Montenegro v P12, LLC*, 130 AD3d 695, 696 [2d Dept 2015]; *but see Herman v Lancaster Homes*, 145 AD2d 926, 926 [4th Dept 1988], *lv denied* 74 NY2d 601 [1989]). Defendants assert, however, through the testimony of Pollak and Calderon, that they have established that they complied with the requirements of the section, and plaintiff's failure to wear

the safety goggles was the sole proximate cause of plaintiff's eye injury (*see McCormack v Universal Carpet & Upholstery Cleaners*, 29 AD3d 542, 544 [2d Dept 2006]). Assuming that Pollak and Calderon's testimony would be sufficient to demonstrate, prima facie, that plaintiff was provided with and required to use safety goggles when hammering nails (*but see Sheley v Kingsfort Bldrs., Inc.*, 207 AD3d 1155, 1155-1156 [4th Dept 2022]), plaintiff's own testimony that he was not provided with or required to wear safety goggles, testimony which each of the defendants submit in support of their own motions and cross-motions, demonstrates the existence of a factual issue with respect to compliance with section 23-1.8 (a) (*see Lopez*, 231 AD3d at 1144).

On the other hand, defendants have demonstrated, prima facie, that Industrial Code (12 NYCRR) § 23-1.21, setting requirements for ladders, was not violated. Defendants have done so through plaintiff's deposition testimony that the ladder had rubber feet, that it appeared to be in good condition, and that the area where he placed the ladder was dry and did not have any dirt or debris (*see Thomas v North Country Family Health Ctr., Inc.*, 208 AD3d 962, 966 [4th Dept 2022]; *Cordova v 653 Eleventh Ave. LLC*, 190 AD3d 637, 637 [1st Dept 2021]). In addition, nothing in plaintiff's testimony about the ladder moving suggests that this movement was caused by a defect with the ladder or the ladder's footing (*see Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 625 [2d Dept 2007]). Plaintiff, who has pointed to no evidentiary proof suggesting that a defect with the ladder or its footing played a role in the accident, has failed to demonstrate a factual issue warranting denial of this aspect of defendants' respective motions and cross-motions.

Defendants have also shown, prima facie, that Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.8 (c) (1), 23-1.11 (c), and 23-1.17, are insufficiently specific, inapplicable to the facts here, or were not violated. Plaintiff, who has not addressed these sections in his opposition papers, has failed to demonstrate a factual issue warranting denial of this portion of the respective motions and cross-motions (*see Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]).

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action to the extent that it is premised on Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.8 (c) (1), 23-1.11 (c), 23-1.17 and 23-1.21.

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, the Owner Defendants and Betterbuilt have demonstrated their prima facie entitlement to

dismissal of those causes of action by showing that plaintiff's fall arose from the means and methods of the work (*see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 672-673 [2d Dept 2018]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 652-653 [2d Dept 2014]; *see also Breslin v Macy's, Inc.*, 211 AD3d 569, 569-570 [1st Dept 2022]) and that they did not supervise or control the injury-producing work (*see Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]). Plaintiff, who has failed to point to any evidence suggesting that the Owner Defendants or Betterbuilt exercised anything more than general supervision and control over the worksite, has failed to demonstrate the existence of a factual issue warranting denial of this aspect of the Owner Defendants and Betterbuilt's respective motions (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 496 [2d Dept 2022]; *Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]).

Silvercup, however, has failed to demonstrate its prima facie entitlement to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action. While Pollack's testimony that all of Silvercup's employees transitioned to working for GWT Enterprises at some point before the project at issue would support a finding that Silvercup did not supervise or control plaintiff's work, Calderon, plaintiff's direct supervisor on the date of the accident, testified that he did not know whether he was working for Silvercup or GWT Enterprises when the accident occurred. In view of Calderon's testimony, Silvercup has failed to demonstrate the absence of factual issues as to whether it supervised plaintiff's work (*see Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1092-1094 [2d Dept 2019]). Since Silvercup has failed to demonstrate its prima facie showing in this respect, the portion of its motion seeking dismissal of plaintiff's common-law negligence and section 200 causes of action must be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Turning to the Owner Defendants' contractual indemnification claim against Betterbuilt, the broadly worded indemnification provision contained in the Hold Harmless agreement entered into by the Owner Defendants and Betterbuilt, provides, as is relevant here, that, "To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the above referenced 'Owner' from and against any and all claims, alleged or actual, arising out of the

work or activities of the Contractor.”⁴ Since the Owner Defendants have demonstrated that they were not negligent and since plaintiff’s injury was suffered while he was performing work relating to the erection of the sidewalk bridge, work subsumed in Betterbuilt’s obligations under its contract with the Owner Defendants, the Owner Defendants have demonstrated their prima facie entitlement to summary judgment on their contractual indemnification claim against Betterbuilt (*see Cedillo v Nautilus Realty Ltd. Partnership*, 219 AD3d 1300, 1301-1302 [2d Dept 2023]; *Mogrovejo v HG Hous. Dev. Fund Co., Inc.*, 207 AD3d 461, 463 [2d Dept 2022]; *De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 605-606 [2d Dept 2017]; *Scott v 122 East 42 St., LLC*, 34 Misc 3d 1233 [A], 2012 NY Slip Op 50358[U], *10-11 [Sup Ct, Queens County 2012]; *see also Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). Betterbuilt, which only argued in opposition that the Owner Defendants failed to demonstrate, prima facie, that they were not negligent, has failed to demonstrate a factual issue in its opposition papers. The Owner Defendants are thus entitled to summary judgment in their favor on their third-party claim for contractual indemnification against Betterbuilt.

On the other hand, in view of the evidence in the record demonstrating that Betterbuilt was not negligent and that it did not supervise or control the injury producing work, the portion of the Owner Defendants’ motion seeking summary judgment on the common-law indemnification claim against Betterbuilt must be denied (*see Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Debennedetto*, 190 AD3d at 938; *Gonsalves v 35 W. 54 Realty Corp.*, 147 AD3d 815, 817 [2d Dept 2017]; *see also McCarthy*, 17 NY3d at 377-378; *Chapa v Bayles Props., Inc.*, 221 AD3d 855, 857 [2d Dept 2023]).

The Owner Defendants have also failed to demonstrate their prima facie entitlement to summary judgment on their breach of contract to obtain insurance claim against Betterbuilt. With respect to the general liability coverage requirements, the copy of Betterbuilt’s general liability insurance policy submitted by the Owner Defendants in support of the motion contains a blanket additional insured endorsement and such an endorsement will generally satisfy the additional insured requirements of a construction contract (*see Cooper v BLDG 7th St. LLC*, 231 AD3d 533, 534 [1st Dept 2024]; *Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dept

⁴ The Hold Harmless agreement identified Betterbuilt as the contractor and 1690-1692 Holdings and Rockford as the owner.

2020]; *Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *see also Kassir v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]; *Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 620 [2d Dept 2024]). The fact that Betterbuilt's general liability insurer has denied coverage at this juncture does not demonstrate that Betterbuilt failed to obtain the requisite coverage (*see Titov*, 230 AD3d at 620; *Perez*, 10 AD3d at 498). Any issue relating to the tender denial would need to be resolved by the Owner Defendants bringing a declaratory judgment action directly against the insurer (*see Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]; *see also Holler v Dominion Energy Transmission, Inc.*, 221 AD3d 1491, 1493 [4th Dept 2023]).

With respect to the agreement's excess insurance requirements, the Owner Defendants have submitted Betterbuilt's April 11, 2022, response to plaintiff's demand for insurance disclosure in which Betterbuilt stated that a search was being conducted for excess and/or umbrella policies and that, if any such policies existed, Betterbuilt reserved the right to supplement the disclosure. Although Betterbuilt's failure to locate a copy of its policy may constitute some evidence that it did not obtain the excess coverage required by the agreement, the response can also be read as only stating that a copy of the policy could not be located, not that such coverage had not been obtained. Under these circumstances, the Owner defendants have failed to demonstrate, as a matter of law, that no such coverage had been obtained (*see Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]). The portion of the Owner Defendants' motion relating to its breach of contract claims against Betterbuilt must thus be denied regardless of the sufficiency of Betterbuilt's opposition papers (*see Winegrad*, 64 NY2d at 853).

Turning to the Owner Defendants' contractual indemnification claims against Silvercup, the Betterbuilt/Silvercup contract, as relevant here, required Silvercup to indemnify the Owner Defendants for claims "arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . cause[d] in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable." Since the Owner Defendants have failed to eliminate factual issues regarding whether plaintiff's injuries were caused by negligent acts or omissions and there has been no finding of negligence against Silvercup or its subcontractors, the Owner Defendants

are not entitled to summary judgment in their favor on their contractual indemnification claim against Silvercup (*see Alvarenga v Castagna Realty Co., Inc.*, 224 AD3d 648, 649-650 [2d Dept 2024]; *Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 887 [2d Dept 2021]; *Sinsheimer v Amgras*, 71 AD3d 982, 983 [2d Dept 2010]; *see also Agurto v One Boerum Dev. Partners LLC*, 221 AD3d 442, 444 [1st Dept 2023]). Since Silvercup has failed to demonstrate, *prima facie*, that it or its subcontractors were not negligent, it has failed to demonstrate its *prima facie* entitlement to summary judgment dismissing the contractual indemnification cause of action (*see Sellitti v TJX Cos., Inc.*, 127 AD3d 724, 726 [2d Dept 2015]).

Factual issues also require denial of the portion of the Owner Defendants' motion for breach of contract based on a violation of the insurance procurement requirements of Betterbuilt's contract with Silvercup. Most importantly, the Owner Defendants have failed to provide a copy of Silvercup's policy and its endorsements, and without that, this court cannot tell, as a matter of law, whether the policy obtained by Silvercup, and particularly, the policy's blanket additional insured endorsement, complied with the contract's additional insured requirement that Silvercup name the Owner Defendants as additional insured on a primary basis. Contrary to the assertions of Silvercup's insurer contained in its disclaimer letter, the language from the purported endorsement appears to only depend on the existence of a written contract requiring that an entity be added as an additional insured, and does not appear to require contractual privity with that entity (*see 115 Kingston Ave. LLC v Mt. Hawley Ins. Co.*, 2019 NY Slip Op 30052[U], *3-4 [Sup Ct, New York County 2019]; *Valley Forge Ins. Co. v Arch Specialty Ins. Co.*, 2016 NY Slip Op 32320[U], *6-8 [Sup Ct, New York County 2016]; *Eilerson Dev. Corp. v Selective Ins. Group, Inc.*, 542 F Supp 3d 177, 186 [NDNY 2021], *aff sub nom. Amerisure Ins. Co. v Selective Ins. Group, Inc.*, 2023 WL 3311879 [2d Cir 2023]; *cf. Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 135 [2018]; *Arch Specialty Ins. Co. v Nautilus Ins. Co.*, 213 AD3d 404, 405 [1st Dept 2023]).⁵ On the other hand, the insurer's reliance on the purported endorsement's requirement that additional insured status depends on the existence of a certificate of insurance identifying the entity as an additional

⁵ According to the disclaimer letter, which contrary to the insurer's assertions, is dated, the purported endorsement provides, as relevant here, for "Additional Insured Coverage where required by written contract and evidenced by certificate of insurance" and provides coverage for Silvercup's "acts or omissions" or "[t]he acts or omissions of those acting on [Silvercup's] behalf." Unlike *Gilbane*, the endorsement here contains no language suggesting that the contract at issue must be directly with the named insured (*cf. Gilbane*, 31 NY3d at 135).

insured may be deemed inconsistent with the contract's additional insured requirements. Thus, it provides a basis for finding that Silvercup failed to obtain a policy in compliance with the contract (*see Roldan v New York Univ.*, 81 AD3d 625, 629 [2d Dept 2011]; *Bachrow v Turner Constr. Corp.*, 46 AD3d 388, 388 [1st Dept 2007]; *Clapper v County of Albany*, 188 AD2d 774, 775-776 [3d Dept 1992]). On this record, however, the insurer's disclaimer letter, in and of itself, fails to demonstrate that the policy obtained violates the contract as a matter of law, and at least some of the grounds alleged in the letter are issues better addressed in the context of a declaratory judgment action against the insurer (*see Garcia*, 231 AD2d at 402; *see also Holler*, 221 AD3d at 1493).

Because of the factual issues with respect to whether Calderon was employed by Silvercup, and thus, whether Silvercup supervised and controlled plaintiff's work, the portions of the Owner Defendants' motion and Silvercup's cross-motion addressed to the Owner Defendants' common-law indemnification claims against Silvercup must be denied (*see Sandoval-Morales v 164-20 N. Blvd., LLC*, 231 AD3d 501, 504 [1st Dept 2024]; *Zong Wang Yang v City of New York*, 207 AD3d 791, 796-797 [2d Dept 2022]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1097 [2d Dept 2018]; *see also McCarthy*, 17 NY3d at 377-378; *Chapa*, 221 AD3d at 856-857).

As is relevant to the portion of the Owner Defendants' motion seeking summary judgment on its contractual indemnification claim against GWT Enterprises, Silvercup's annual contract with GWT Enterprises provides that, "Subcontractor shall indemnify and hold Contractor and Contractor's customer harmless from any and all claims arising out of or relating to Subcontractor's Work or arising out of or relating to any act or omission of Subcontractor." Although the Owner Defendants assert that they should be considered Silvercup's customer within the meaning of this section, they have failed to demonstrate that fact as a matter of law because the language of Betterbuilt's contract with Silvercup suggests that it was Betterbuilt, not the Owner Defendants,⁶ who hired GWT Enterprises, and who would be considered Silvercup's customer within the meaning of the indemnification provision (*see Leon-Rodriguez*, 192 AD3d at 887; *cf. Garcia v Black Sea Properties, LLC*, 227 AD3d 1486, 1489 [4th Dept 2024]).

⁶ Although the contract identifies the Owner Defendants at the owners of the project, the agreement states that it is an agreement between Betterbuilt and Silvercup.

Regarding the Owner Defendants' insurance procurement claim against GWT Enterprises, the insurance procurement requirements of Silvercup and GWT Enterprises' annual contract only requires that the "contractor" be named as an additional insured on GWT Enterprises' general liability policy. Since this annual contract specifically identifies the "contractor" as Silvercup, the Owner Defendants' have failed to demonstrate, prima facie, the absence of factual issues as to whether they are intended beneficiaries of the insurance procurement provision. The Owner Defendants' motion in this respect must therefore be denied.

In view of the factual issues as to whether GWT Enterprises employed plaintiff, and thus, whether the Workers' Compensation bar to common-law indemnification claims applies (*see Callaghan v Point at Saranac Lake, Inc.*, 83 AD3d 1177, 1179-1180 [3d Dept 2011]; *Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 680 [2d Dept 2009]; *cf. Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 72-73 [2d Dept 2023]; Workers Compensation Law § 11 [1]) and the factual issues as to whether GWT Enterprises was negligent (*see Sandoval-Morales*, 231 AD3d at 504; *Zong Wang Yang*, 207 AD3d at 796-797; *McDonnell*, 165 AD3d at 1097), the portion of the Owner Defendants' motion seeking summary judgment on their common-law indemnification claim against GWT Enterprises must be denied.

The portion of the Owner Defendants' motion seeking summary judgment in their favor on their contribution claims against Betterbuilt, Silvercup and GWT Enterprises is denied as a party is only entitled to recover on a contribution claim upon a jury determination of apportionment of damages and the payment of damages in excess of that party's proportionate share of the judgment (*see Klinger v Dudley*, 41 NY2d 362, 369 [1977]; *Mogil v Gorgone*, 225 AD2d 674, 675 [2d Dept 1996]; CPLR 1401, 1402). The portion of Silvercup's motion seeking dismissal of the Owner Defendants' contribution claim against it is denied in view of the factual issues with respect to Silvercup's supervision and control of plaintiff's work discussed above (*see Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]; *Randazzo v Consolidated Edison Co. of NY, Inc.*, 177 AD3d 796, 798 [2d Dept 2019]; *State of New York v Defoe Corp.*, 149 AD3d 889, 890 [2d Dept 2017]).

Since Betterbuilt's contract with Silvercup only requires Silvercup to indemnify Betterbuilt based on a showing of a negligent act or omission by Silvercup or its subcontractors, and since Betterbuilt – in view of the factual issues discussed above – has failed to demonstrate such negligence as a matter of law, the portion of Betterbuilt's motion seeking summary

judgment on its contractual indemnification claim against Silvercup is denied (*see Alvarenga*, 224 AD3d at 649-650; *Leon-Rodriguez*, 192 AD3d at 887). These same factual issues require the denial of the portion of Betterbuilt's motion seeking summary judgment on its common-law indemnification claims against Silvercup (*see Sandoval-Morales*, 231 AD3d at 504; *McDonnell*, 165 AD3d at 1097; *see also McCarthy*, 17 NY3d at 377-378). Based on the reasons stated above with respect to the Owner Defendants, the portion of Betterbuilt's motion seeking contribution from Silvercup is denied (*see Klinger*, 41 NY2d at 369; CPLR 1401, 1402). With respect to its breach of the insurance procurement claims against Silvercup, Betterbuilt has not submitted any evidentiary proof showing that Silvercup failed to obtain an insurance policy naming Betterbuilt as an additional insured as required by its contract with Silvercup (*see Breland-Marrow*, 208 AD3d at 629; *Ginter*, 121 AD3d at 844). The factual issues identified here with respect to the Owner Defendants' claims against Silvercup also require denial of the portion of Silvercup's motion seeking dismissal of Betterbuilt's claims against it.

With respect to Betterbuilt's contractual indemnification claim against GWT Enterprises, Betterbuilt has demonstrated that it was not negligent, and, as the entity that hired Silvercup to erect the sidewalk bridge, it was Silvercup's customer within the meaning of Silvercup's contract with GWT Enterprises, and thus, the intended beneficiary of its contractual indemnification provision (*see Garcia*, 227 AD3d at 1489; *see also Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015]; *cf. Leon-Rodriguez*, 192 AD3d at 887). Nevertheless, although this provision broadly requires GWT Enterprises to indemnify Betterbuilt for claims "arising out" of the GWT Enterprises work and its acts or omissions, this court finds that there are issues of fact as to whether the accident arose out of GWT Enterprise's work given the factual issues as to whether GWT Enterprises employed plaintiff, whether plaintiff was directed to install the sign by GWT Enterprises or Silvercup, and whether the sign installation was part of Silvercup or GWT Enterprises' responsibilities on the project (*see Piccone v Metropolitan Tr. Auth.*, 205 AD3d 628, 629 [1st Dept 2022]; *Navedo v VNO 225 W. 58th St. LLC*, 203 AD3d 406, 408 [1st Dept 2022], *lv denied* 39 NY3d 904 [2022]; *cf. O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Castro v Wythe Gardens, LLC*, 217 AD3d 822, 826 [2d Dept 2023]).

Betterbuilt has also failed to demonstrate its prima facie entitlement to summary judgment on its breach of insurance procurement claim against GWT Enterprises since it has failed to demonstrate that it is an intended beneficiary of the insurance procurement provision of

Silvercup's contract with GWT Enterprises. The insurance provision only requires that GWT Enterprises obtain insurance naming the "contractor," which in this instance is Silvercup, as an additional insured.

The factual issues as to whether GWT Enterprises employed plaintiff and is entitled to the protections of Workers' Compensation Law § 11 and whether it was negligent, as discussed above with respect to the Owner Defendants' motion, require the denial of the portion of Betterbuilt's motion seeking summary judgment on its common-law indemnification claims against GWT Enterprises.

Based on the reasons stated above with respect to the Owner Defendants, the portion of Betterbuilt's motion seeking contribution from GWT Enterprises is denied (*see Klinger*, 41 NY2d at 369; CPLR 1401, 1402).

The portion of Silvercup's motion seeking summary judgment on its contractual indemnification claim against GWT Enterprises must be denied in view of the issues of fact with respect to its own negligence (*see Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 491 [2d Dept 2022]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 982 [2d Dept 2021]; General Obligations Law § 5-322.1), and as discussed above with respect to Betterbuilt's motion, issues of fact as to whether the accident arose out of GWT Enterprises' work (*see Piccone*, 205 AD3d at 629; *Navedo*, 203 AD3d at 408; *cf. O'Connor*, 58 NY2d at 657-658; *Castro*, 217 AD3d at 826).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (motion sequence number 6) is denied; and it is further

ORDERED, that Betterbuilt's motion (motion sequence number 7) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed against it; and (2) that the Labor Law § 241 (6) cause of action is dismissed to the extent premised on Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.8 (c) (1), 23-1.11 (c), 23-1.17 and 23-1.21. Betterbuilt's motion is otherwise denied; and it is further

ORDERED, that the Owner Defendants' motion (motion sequence numbers 8 and 10) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed against them; (2) the Labor Law § 241 (6) cause of action is dismissed to the extent premised on Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.8 (c) (1), 23-1.11 (c), 23-

1.17 and 23-1.21; and (3) the Owner Defendants are entitled to summary judgment in their favor with respect to their contractual indemnification cause of action against Betterbuilt. The Owner Defendants' motion is otherwise denied; and it is further

ORDERED, that Silvercup's cross-motion (motion sequence number 9) is granted to the extent that the Labor Law § 241 (6) cause of action is dismissed to the extent it is premised on Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.8 (c) (1), 23-1.11 (c), 23-1.17 and 23-1.21. Silvercup's motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice