SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

----------X

OSCAR ANGUIZACA, MARTHA SUAREZ,

Plaintiff,

- v -

1609-11 BROADWAY LLC, W5 GROUP LLC,SEVERUD ASSOCIATES CONSULTING ENGINEERS P.C.,TIMES SQUARE JV LLC

Defendants.

----------X

INDEX NO. 158340/2018

MOTION DATE 04/03/2025, 04/30/2025, 04/30/2025, 04/30/2025

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 1, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 189, 195, 205, 206, 213, 214, 215, 216, 217, 218

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 1, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 190, 196, 198, 199, 204, 219

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 1, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 192, 193, 194, 197, 202, 203, 220

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 1, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 191, 200, 201, 207, 208, 209, 210, 211, 212

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Oscar Anguizaca ("Plaintiff") and Martha Suarez commenced this action seeking damages for personal injuries and loss of consortium resulting from Plaintiff's August 28, 2018, workplace accident.

FACTS

Times Square JV LLC ("Times Square") was the owner of the building located at 1601 Broadway, New York, New York 10018 ("Building"). In August 2018, Times Square and W5 Group LLC ("W5") entered into an agreement ("Contractor Agreement") for W5 to serve as the general contractor for a demolition ("Demolition") of the 11th and 12th floors of the Building. The Agreement provided that W5 would indemnify and hold harmless Times Square against any claims or liabilities arising out of bodily incurred in connection with the Demolition.

On August 18, 2018, an affiliate of Times Square entered into an agreement ("Severud Agreement") on behalf of Times Square with Severud Associates Consulting Engineers P.C. ("Severud") for Severud to serve as an engineering consultant on matters relating to the structural integrity of the Building during the Demolition (NYSCEF Doc No. 143, at 17–20 [PDF pagination]). While the Severud Agreement provided that Severud would indemnify Times Square for claims resulting from Severud's negligence, nowhere in the agreement did Severud agree to indemnify Times Square for the negligence of another subcontractor (*see id.* at 7).

According to testimony from Joe Marrone, the corporate representative for W5, W5 then hired Calvin Maintenance ("Calvin") to supply workers for the Demolition (NYSCEF Doc No. 158, at 28). Marrone testified that he was a member of the board of W5, a limited liability corporation, and he also co-owned Calvin with his brother (*id.* at 6–7, 28–29). Marrone testified that prior to Plaintiff starting his work on the Demolition, Marrone gave Plaintiff an outline of the parameters of the Demolition and the scope of the work to be completed (*id.* at 13).

On August 28, 2019, Plaintiff was the senior foreman of a crew tasked with demolishing the 11th and 12th floors of the Building under the employment of Calvin. Plaintiff testified that he and other crewmembers installed corrugated metal Q-decking along the beams of the 12th

floor for workers to walk across (NYSCEF Doc No. 155, at 91). Plaintiff testified that at the time of the accident, around 70 percent of the 12th floor had been removed (*id.* at 48). Plaintiff testified that while he was getting ready to leave for the day, he walked toward the corner of a sheet of corrugated metal Q-decking to retrieve a tool that had been left there (*id.* at 84). Plaintiff testified that when he reached the corner of the metal sheet, the corner bent downward, causing him to fall to the 11th floor (*id.* at 84–85, 88).

Plaintiff testified that harnesses were available to him on the worksite and that he was personally responsible for choosing which safety equipment would go to the worksite (NYSCEF Doc No. 156, at 29–30, 58). Plaintiff also testified that he was not wearing a harness at the time of the accident because his coworkers told him that the safety line was not long enough to reach the tool that he was attempting to retrieve (*id.* at 41–42). Plaintiff testified that Marrone told crewmembers to wear a harness when they would cut the Q-decking and walk across the beams (*id.* at 29).

PENDING MOTIONS

On April 30, 2025, Times Square moved for an order granting summary judgment dismissing plaintiff's complaint as against it, and for dismissal of W5's cross-claims against Times Square for contractual and common-law indemnification (NYSCEF Doc No. 165 [mot. seq. 006]).

On April 30, 2025, Plaintiff moved for summary judgment pursuant on his Labor Law § 240(1) claim as against all defendants (NYSCEF Doc No. 147 [mot. seq. 007]).

On May 7, 2025, W5 moved for: leave to amend its answer pursuant to CPLR § 3025(b) to assert affirmative defenses based on the Workers' Compensation Law's exclusive remedy rules; and for an order granting summary judgment dismissing Plaintiffs' complaint against it;

and dismissing the other defendants' cross-claims for common-law indemnification and contribution (NYSCEF Doc No. 125 [mot. seq. 004]).

On May 30, 2025, Severud moved for summary judgment dismissing Plaintiffs' complaint as against it, and also to dismiss the defendants' cross-claims for indemnification and contribution (NYSCEF Doc No. 136 [mot. seq. 005]). Plaintiffs did not file opposition to Severud's motion for summary judgment.

The motions are consolidated herein and determined as set forth below.

DISCUSSION

Summary judgment is a drastic remedy reserved for cases when it is apparent that "no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). To prevail on summary judgment, the movant must establish *prima facie* entitlement to judgment as a matter of law, tendering evidence in admissible form demonstrating the absence of any triable issues of fact (CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25–26 [2019]). When the movant meets this initial burden, summary judgment will be denied only when the nonmovant provides evidence in admissible form demonstrating the existence of triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, "[m]ere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016] [alteration in original]). Courts view the evidence in a light most favorable to the nonmovant, according the nonmovant "the benefit of every reasonable inference" (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

Severud's Motion for Summary Judgment is Granted

Severud first argues for summary dismissal of Plaintiff's complaint as against it because Severud was not an owner or a general contractor under the Labor Law, nor did it exercise any supervisory authority of Plaintiff's work necessary for Plaintiff's Labor Law § 200 and common-law negligence claim.

Plaintiff's Labor Law §§ 240(1) and 241(6) Claims

Severud argues that it cannot be held liable under Labor Law §§ 240(1) or 241(6) because it did not qualify as an owner, general contractor or statutory agent under the statute. The Court agrees. Additionally as noted Plaintiff did not oppose the motion. The mandates of Labor Law §§ 240(1) and 246(1) apply to the owners of buildings, their general contractors and their statutory agents (*see* Labor Law §§ 240(1) & 241(6)). It is undisputed from the record that Times Square was the owner of the Building and that W5 was the general contractor of the Demolition. Severud has thus made out a *prima facie* case for summary dismissal of Plaintiff's Labor Law claims.

The Court also dismisses Plaintiff's Labor Law § 240(2) and (3) claims against Severud because it is undisputed that Plaintiff's accident did not occur on scaffolding (*see* Labor Law § 240(2) ["Scaffolding . . . more than twenty feet from the ground or floor . . . shall have a safety rail of suitable material . . . ."]; *see also id.* § 240(3) ["All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use."]).

Severud argues that it cannot be liable to Plaintiff for common-law negligence or under Labor Law § 200 because it did not exercise supervisory authority or control over Plaintiff's work. The Court agrees.

Finally, the Court dismisses Martha Suarez's claim for loss of consortium as against Severud in light of the dismissal of the rest of Plaintiff's complaint as against Severud, and because said relief is unopposed.

Severud's Motion to Dismiss Defendants' Cross-Claims

The Court also grants Severud's motion to dismiss Times Square's and W5's cross-claims as against it for common-law indemnification and contribution.

Regarding contractual indemnification, Article 7 of the Severud Agreement provides:

> To the fullest extent permitted by law, Professional [Severud] shall defend (as respects claims for bodily injury, personal injury and/or property damage), indemnify and hold harmless Owner [Times Square] . . . from and against any and all claims, suits, losses or expenses (including reasonable legal fees and other expenses of litigation in connection with this indemnification and the enforcement thereof) arising from the negligent act, error or omission or violation of law of Professional or Professional's employees[.] (NYSCEF Doc No. 143, at 7 [PDF]).

Nothing in the Severud Agreement suggests that Severud would indemnify Times Square for claims arising out of the negligence of another subcontractor (*see id.*). The opposition papers make no argument that Severud was negligent.

Accordingly, the Court dismisses Times Square's cross-claim for contractual indemnification as against it because Plaintiff's accident did not occur from Severud's negligence or violation of law.

W5's Motion to Amend Its Answer and for Summary Judgment

CPLR § 3025(b) provides:

> A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the

pleading (CPLR § 3025(b)).

A court should not grant leave to amend when the proposed amendment is "palpably insufficient or patently devoid of merit" (*Tribeca Space Mgrs., Inc. v Tribeca Mews Ltd.*, 200 AD3d 626, 628 [1st Dept 2021]). If the proposed amendment meets this standard, a court should grant leave to amend so long as there is no surprise or prejudice to the opposing party resulting directly from the delay (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). A party opposing amendment is prejudiced when there is some indication that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position (*Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981]). Finally, the party opposing amendment "must overcome a heavy presumption of validity" favoring leave (*O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]).

W5 wishes to amend its answer to assert the affirmative defense that it was Plaintiff's special employer, limiting Plaintiffs' recovery against W5 to that which Plaintiff was entitled under the Workers' Compensation Law. The Court declines to grant leave to amend because the proposed amendment is patently devoid of merit.

A general employee of one employer may also be under the employment of another in a situation known as a special employment relationship. As explained by the Court of Appeals:

> A special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon [1] clear demonstration of surrender of control by the general employer and [2] assumption of control by the special employer (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

To allege it was a special employer, W5 must allege a clear demonstration of surrender of control by Plaintiff's employer *and* assumption of control by W5 (*Bellamy v Columbia Univ.*, 50 AD3d 160, 167 [1st Dept 2008] [emphasis in original], citing *Thompson*, 78 NY2d at 577).

Surrender of control by the general employer and assumption of control by the special employer occurs when there is evidence of an "actual working relationship sufficient in kind and degree to show that the putative employer had come to exercise complete control over all essential, locational and commonly recognizable components of the work relationship" (*id.* at 168 [internal citations and quotations removed]).

W5 bases its motion to amend on Plaintiff's deposition testimony in which Plaintiff stated that he personally believed that his employer was W5 (NYSCEF Doc No. 126, at 8–9). Plaintiff's own subjective belief, however, does not show that Calvin surrendered control over Plaintiff or that W5 then assumed control. Further, W5 argues that it was Plaintiff's special employer because Joe Marrone directed Plaintiff's work, and Marrone was a member on the board of W5, a limited liability corporation, and also the co-owner of Calvin, Plaintiff's employer (*id.* at 4–5). This argument is without merit because of the well-established principle that "a corporation exists independently of its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]).

The only possible inference drawn from the evidence is that there could have been *overlapping* authority between W5 and Calvin at the time of Plaintiff's accident (*see* NYSCEF Doc No. 126, at 5). W5 notes that the two general foremen for the Demolition—Sal Tantillo and John Cusiak—were employed by Calvin and W5, respectively (*id.*). However, this evidence of shared control negates any inference that Calvin *surrendered* control of "all essential, locational and commonly recognizable components of [Calvin and Plaintiff's] work relationship" (*see Bellamy*, 50 AD3d at 167).

Accordingly, the Court denies W5's motion for leave to amend its answer based on the evidence in the record establishes that the proposed amendment would be "patently devoid of merit" (*Tribeca Space Mgrs., Inc. v Tribeca Mews Ltd.*, 200 AD3d 626, 628 [1st Dept 2021]).

The Court also denies W5's motion for summary judgment as it is wholly based on the affirmative defenses raised in its proposed amendment.

The Parties' Motions Relating to Summary Judgment on Labor Law § 240(1) Are Denied As there are Material Questions of Fact

The parties each move for summary judgment on Plaintiff's Labor Law § 240(1) claim. Plaintiff argues that he is entitled to summary judgment because the failure to provide him with an adequate safety device proximately caused his elevation-related injury. Times Square argues that it cannot be liable for Plaintiff's injury because Plaintiff was either a recalcitrant worker or the sole proximate cause of his accident.

Plaintiff failed to make a prima facie showing entitling him to summary judgment

Labor Law § 240(1) provides:

> All contractors and owners and their agents . . . in the . . . demolition . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed (Labor Law § 240(1)).

Courts construe the meaning of Section 240(1) "as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 101 [2015]). A violation of Section 240(1) occurs when a defendant fails "to provide plaintiff with a proper elevation-related safety device" and "this violation proximately cause[s] plaintiff's injuries" (*Rivas v Nestle Realty Holding Corp.*, 188 AD3d 430, 430–31 [1st Dept 2020]). When the plaintiff makes out such a case, the statute imposes absolute liability against the owner of the

property and the general contractor of the project (*Melber v 6333 Main St., Inc.*, 91 NY2d 759, 762 [1998]).

Plaintiff acknowledges that there were harnesses available on site and that he was not wearing a harness at the time of the accident. Plaintiff testified he was not wearing a harness because he did not know the area where he was going to walk had been cut, and that workers told him that the tie offs for the harnesses provided would have been too short to allow him to reach the tool he was seeking to retrieve.

The cases relied upon by Plaintiff are distinguishable because in those cases no safety device was provided. In this case a safety device was available but there is a question as to whether it would have been adequate for the task at hand ie whether he could have attached the harness to an anchor point, as required, and still completed his task.

The only evidence Plaintiff cites concerning the harness's inadequacy is his belief that the safety line was not long enough for him to retrieve the tool "[b]ecause the boys were using it and they said it doesn't go any further" (*id.* at 7). This is not "evidentiary proof in admissible form" suffiecnt to make out a prima facie case because it is based on the hearsay statements of his coworkers (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Orr v Vornado Realty L.P.*, 232 AD3d 495, 495 [1st Dept 2024] [*reversing summary judgment for the movant when the evidence offered in support was an expert report based on the inadmissible hearsay of another person and not the expert's personal knowledge*]).

The Court thus denies Plaintiff's motion for summary judgment because issues of fact exist as to whether Plaintiff was provided with an adequate safety device that would have prevented his fall.

However, Defendants also fail to make a *prima facie* showing entitling them to dismissal of the 240(1) claim.

Times Square argues that it is not liable under Section 240(1) because Plaintiff was a recalcitrant worker and the sole proximate cause of his accident.

> A defendant has no liability under Labor Law § 240(1) when plaintiffs: (1) "had adequate safety devices available," (2) "knew both that" the safety devices "were available and that [they were] expected to use them," (3) "chose for no good reason not to do so," and (4) would not have been injured had they "not made that choice" (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40, 790 N.Y.S.2d 74, 823 N.E.2d 439 [2004]).

Biaca-Neto v. Bos. Rd. II Hous. Dev. Fund Corp., 34 N.Y.3d 1166, 1167–68 (2020).

Here there are questions of fact as to whether the safety device available was adequate.

Additionally, the general safety instructions Times Square relies upon in seeking summary judgment are insufficient to warrant judgment as a matter of law.

"The mere failure by plaintiff to follow safety instructions" does not render plaintiff the sole proximate cause of his injuries (*cf. Fazekas*, 132 A.D.3d at 1403-1404, 18 N.Y.S.3d 251; *see generally Whiting v. Dave Hennig, Inc.*, 28 A.D.3d 1105, 1106, 815 N.Y.S.2d 382 [4th Dept. 2006]; *Young v. Syroco, Inc.*, 217 A.D.2d 1011, 1012, 629 N.Y.S.2d 931 [4th Dept. 1995]). The evidence presented by defendants established only that plaintiff possibly failed to follow safety instructions, not that he outright refused to "use available, safe and appropriate equipment" (*Miles v. Great Lakes Cheese of N.Y., Inc.*, 103 A.D.3d 1165, 1167, 958 N.Y.S.2d 847 [4th Dept. 2013] [internal quotation marks omitted]; *see Powers v. Del Zotto & Son Bldrs.*, 266 A.D.2d 668, 669, 698 N.Y.S.2d 74 [3d Dept. 1999]). Defendants failed to demonstrate that plaintiff " 'chose for no good reason not to' " wear a safety harness (*Fazekas*, 132 A.D.3d at 1404, 18 N.Y.S.3d 251). At most, plaintiff's "alleged conduct would amount only to comparative fault and thus cannot bar recovery under the statute" (*Lagares*, 177 A.D.3d at 1395, 113 N.Y.S.3d 790).

Schutt v. Bookhagen, 186 A.D.3d 1027, 1029, 130 N.Y.S.3d 153, 156 (4th Dept., 2020)

Times Square's Motion for Summary Dismissal of Plaintiff's Other Claims

The Court denies Times Square's motion for summary dismissal of Plaintiff's Labor Law § 241(6) claim.

Times Square asks this Court for summary dismissal of Plaintiff's Labor Law § 241(6) claims, stating that Plaintiff "cannot establish that a violation of any of the alleged Industrial

Codes was a proximate cause of the alleged accident as [Plaintiff] caused his own accident" (NYSCEF Doc No. 188, at 2). The Court disagrees.

Times Square inappropriately blends its sole proximate cause analysis under Labor Law § 240(1) with its argument for dismissal under Labor Law § 241(6) (*see id.* at 12). A sole proximate cause defense is inapplicable to a 241(6) claim. *Rivera v Suydam 379 (*216 AD3d 495, 496 [1st Dept 2023]).

The appropriate analysis under Labor Law § 241(6) is whether there was a violation of a regulation in the Industrial Code that places a "specific, positive command" on the owner or general contractor to ensure safe working conditions (*Rizzuto v LA Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]). If there was such a violation, Plaintiff must then prove that the violation of the Industrial Code proximately caused his injury (*Romano v New York City Tr. Auth.*, 213 AD3d 506, 507–08 [1st Dept 2023]; *see also Ares v State*, 80 NY2d 959, 959 [1992]).

As noted above, while Times Square argues that Plaintiff was careless in failing to wear a harness when he went to retrieve the tool, that speaks only to comparative negligence, which is an issue of damages and not liability under (*see Fresco v 157 E. 72nd St. Condo.*, 2 AD3d 326, 328 [1st Dept 2003] ["The general contractor is liable to plaintiff for the full amount of plaintiff's damages, less plaintiff's comparative fault, by reason of the violation of Labor Law § 241(6)."]).

The Court grants Times Square's motion for summary dismissal of Plaintiff's Labor § 240(2) and (3) claims.

Times Square offers undisputed evidence that Plaintiff's accident did not occur on scaffolding (*see* Labor Law § 240(2) ["Scaffolding . . . more than twenty feet from the ground or floor . . . shall have a safety rail of suitable material . . . ."]; *see also id.* § 240(3) ["All scaffolding shall be so constructed as to bear four times the maximum weight required to be

dependent therefrom or placed thereon when in use."]). Plaintiff did not oppose this portion of Times Square's motion (NYSCEF Doc No. 193, at 1).

Accordingly, the Court grants Times Square's motion for summary dismissal of Plaintiff's Labor Law § 240(2) and (3) claims as against Times Square. The Court also dismisses these claims as against W5 for the same reasons.

The Court grants Times Square's motion for summary dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims.

An owner or general contractor is not liable under Labor Law § 200 or for common-law negligence "for injuries that arise out of the manner or method of work unless it had the authority to supervise or control that work" (*Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]; *see also Leveron v Prana Growth Fund I, L.P.*, 181 AD3d 449, 451 [1st Dept 2020] [*reasoning that the plaintiff's Section 200 and negligence claims as against the owner and general contractor were without merit because the means and methods of the plaintiff's work were controlled solely by the plaintiff's employer*]). To demonstrate supervisory authority, the contractor must have "controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [emphasis in original]). General supervisory authority "is insufficient to constitute supervisory control" (*id.*).

Times Square cites evidence that it did not supervise the manner or method of Plaintiff's work but that representatives of W5 and Calvin did so. Plaintiff did not oppose this portion of Times Square's motion (*see* NYSCEF Doc No. 193, at 1). Accordingly, the Court grants Times Square's motion for summary dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims as against it.

Times Square's and W5's Motions Regarding Indemnification

Times Square moves for summary judgment on its claim of contractual indemnification against W5. In opposition, W5 argues that Times Square's motion is premature because the Plaintiffs' claims have not yet been adjudicated, and also that Times Square's own negligence in causing Plaintiff's accident is in issue. For the reasons set forth below, the Court grants Times Square's conditional summary judgment for contractual indemnification.

A court will enforce an indemnification provision in an agreement "as long as the intent to assume such a role is 'sufficiently clear and unambiguous'" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007], quoting *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). When a party is under no legal duty to indemnify, courts strictly construe language in an indemnification agreement "to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Article 11 of the Subcontractor Agreement between Times Square and W5 provides:

> To the fullest extent permitted by law Contractor [W5] agrees for itself, and to cause its subcontractors, to indemnify, defend and hold harmless Owner [Times Square] . . . from and against any and all subrogation efforts, claims of third parties resulting in liabilities, losses, obligations, fines, liens, penalties, actions, judgments, damages, costs (including, without limitation, reasonable attorneys' fees and expenses incurred in connection therewith and in the enforcement of this indemnification), charges, expenses and demands of whatever kind . . . in connection with and/or arising from or out of the following[:]
>
> (i) any actual or alleged negligent, willful or wrongful act resulting in bodily injury (including death), personal injury or property damage by Contractor, Contractor's sub-contractors, their respective officers, employees, servants, agents, suppliers, invitees, successors and assigns[;]
>
> (ii) the Work or any breach of this Contract[;] or
>
> (iii) any statutorily imposed liability for injury to employees or failure to comply with any site safety laws, laws or regulations affecting the Work.
>
> (NYSCEF Doc No. 184, at 9–10 [PDF pagination]).

The Court holds that the provision is sufficiently clear and unambiguous to mandate that W5 indemnify Times Square for liability arising out of Plaintiff's injury. The Court gives no credence to W5's argument in opposition that the lack of the conjunction "or" between paragraphs (i) and (ii) requires that the conditions in paragraphs (i) and (ii) both be satisfied before the indemnification obligation is triggered. Courts interpret contracts "according to the plain meaning of [their] terms" (*Bank of NY Mellon v WMC Mtge., LLC*, 136 AD3d 1, 6 [1st Dept 2015]). No plain reading of the Subcontractor Agreement would insert an unwritten "and" between subsections (i) and (ii) when a written "or" exists within subsection (ii) and precedes subsection (iii).

Equally unavailing is W5's argument that contractual indemnification is premature because Times Square "must prove itself free from negligence" (NYSCEF Doc No. 202, at 9). As held by the First Department, in a case cited by W5, "it is inappropriate to grant conditional summary judgment on an owner or general contractor's contractual indemnification claim . . . where an issue of fact exists as to whether the owner or general contractor's negligence was the *sole proximate cause* of the underlying claim" (*Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2022]). W5 raises no evidence from the record that Times Square was negligent in causing Plaintiff's accident—let alone that Times Square was the sole proximate cause of Plaintiff's accident. If Times Square were partially negligent in causing Plaintiff's accident, that would not prevent the Court from granting Times Square conditional summary judgment because a party "may be entitled to indemnification even if it is found partially negligent" (*Ramirez v Almah LLC*, 169 AD3d 508, 509 [1st Dept 2019]).

Accordingly, the Court grants Times Square conditional summary judgment for contractual indemnification against W5.

Based on the foregoing, the Court also denies W5's motion for summary dismissal of Times Square's claims of common-law indemnification and contribution.

The Court need not address Times Square's motion for common-law indemnification as it is academic.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion of W5 Group LLC (mot. seq. 004) is granted to the extent that Plaintiffs' claims under Labor Law § 240(2) and (3) are dismissed as against it, and it is otherwise denied; and it is further

ORDERED that the motion of Severud Associates Consulting Engineers P.C. (mot. seq. 005) is granted in its entirety; and

ORDERED that the motion of Times Square JV LLC (mot. seq. 006) is granted to the extent that Plaintiffs' claims under Labor Law § 200; Labor Law § 240(2) and (3); and for common-law negligence are dismissed as against it, and also that Times Square's cross-claim for conditional contractual indemnification against W5 is granted; and it is further

ORDERED that the motion of Plaintiffs (mot. seq. 007) is denied; and it is further

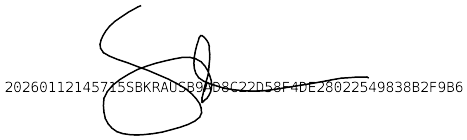
ORDERED that all other requests for relief are denied; and it is further

ORDERED that, within twenty (20) days from entry of this order, the parties shall upload a stipulation amending the caption to remove Severud Associates Consulting Engineers P.C. from the action, and all future papers filed with the Court shall reflect this amended caption; and it is further

ORDERED that, within twenty (20) days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119, New York, NY 10007); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this Court.



1/7/2026

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☐	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☐	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**