

Hippolyte v Grey-Ruso Constr. Corp.

2026 NY Slip Op 31351(U)

April 1, 2026

Supreme Court, Kings County

Docket Number: Index No. 519132/17

Judge: Wavny Toussaint

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At an IAS Term, Part 70 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 1st day of April, 2026.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

AUGUSTE HIPPOLYTE,

Index No.: 519132/17

Plaintiff,

DECISION AND ORDER

-against-

GREY-RUSO CONSTRUCTION CORP., 35 WEST 45TH STREET ASSOCIATES, LLC, POLER CONTRACTING, INC., BRAVO BUILDERS, LLC, and CPM BUILDERS, INC.,

Defendants.

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BRAVO BUILDERS, LLC,

Third-Party Plaintiff,

-against-

McCORMACK CONTRACTING, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____ 329-330, 332, 349-350, 384-385

Opposing Affidavits/Answer (Affirmations) _____ 393, 395, 397, 400, 420, 421, 428

Affidavits/ Affirmations in Reply _____ 422, 424, 426, 462, 463

Other Papers: _____

Upon the foregoing papers, defendant 35 West 45th Street Associates, LLC (35 West) moves (Seq. 15) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing Auguste Hippolyte's (plaintiff) complaint as against it, or, in the alternative, granting summary judgment in its favor on its cross-claims against defendant/third-party plaintiff Bravo Builders, LLC (Bravo Builders) for common-law indemnification and contractual indemnification. Third-party defendant McCormack Contracting Inc. (McCormack) moves (Seq. 16) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing both the third-party complaint and plaintiff's complaint. Bravo Builders moves (Seq. 17) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's complaint and any and all cross-claims and/or counterclaims as against it, or, in the alternative, granting summary judgment in its favor on its third-party claim for common-law indemnification against McCormack.¹ The motions are opposed to varying degrees.

BACKGROUND

Plaintiff asserts causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), arising from injuries he purportedly sustained on June 27, 2017, when, while performing taping/spackling work as part of the build-out on the eighth floor of the commercial office building located at 35 West 55th Street, New York, New York (the Building), plaintiff's foot slipped on the scaffold as he was stepping onto an A-frame ladder, causing him to fall to the ground. The Building was owned by

¹ In an order dated December 30, 2021 (NYSCEF Doc No. 170), the court denied Bravo Builders' previous motion for summary judgment on the ground that it was premature.

defendant 35 West, which leased the Building's eighth and ninth floors to Bravo Builders. At the time the lease was executed, the eighth and ninth floors were vacant. Thereafter, Bravo Builders commenced the project at issue to build-out the space. In connection with the project, Bravo Builders served as the construction manager and retained McCormack as the framing/drywall installation contractor. McCormack, in turn, hired non-party Exclusive Drywall & Concrete Finishing, Inc. (Exclusive) to perform drywall finishing work (i.e. taping, spackling and sanding). Plaintiff Auguste was employed by Exclusive as a spackler.

According to plaintiff's deposition testimony, on the date of the accident he was performing drywall spackling work that required him to use a bakers scaffold. He was working alongside a co-worker, Jevon, who served as his on-site supervisor. Plaintiff received all of his instructions regarding the work he was performing from Exclusive as relayed to him by Jevon. While plaintiff understood that the scaffold that he was using belonged to the carpenters, he believed that the ladders used by him and Jevon had been supplied by Cephas Coward, Exclusive's president. Prior to commencing work, plaintiff and Jevon removed the wheels from the scaffold so that it would sit flatter and more securely. The scaffold was equipped with front and rear guardrails that reached approximately to plaintiff's midsection.

At the time of the accident, plaintiff was attempting to step from the scaffold onto an eight-foot A-frame ladder positioned adjacent to it in order to descend to the floor. As he was in the process of stepping down, his foot, which remained on the scaffold platform, allegedly slipped. Plaintiff testified that he grabbed the scaffold's railing to steady himself,

but a sharp metal edge on the railing cut through his glove, causing him to lose his grip. He then fell to the floor, and both the scaffold and ladder toppled over. Plaintiff was unable to identify the cause of his foot slipping. He further testified that there was nothing defective about the ladder and described the scaffold platform as being in good condition, stating that his only concern with the scaffold was the sharp edge on the railing.

DISCUSSION

Timeliness of Bravo Builders' Motion

Initially, the Court notes Bravo Builders' motion is untimely as it was made more than 60 days after the filing of the note of issue (*See* Kings County Supreme Court Uniform Civil Term Rules, Part B, Rule 6; CPLR § 3212 [a]; *Souffrant v M&K Real Estate Assoc., LLC*, 225 AD3d 914, 915 [2d Dept 2024]; *see also Stevens v RX Med. Dynamics, LLC*, 191 AD3d 487, 487-488 [1st Dept 2021] [good cause requirement applied to motion made one day late], *lv denied* 37 NY3d 909 [2021]).² The Court cannot consider Bravo Builders' good cause arguments for its delay in moving because these arguments were raised for the first time in its reply papers (*Rivera v Zouzias*, 190 AD3d 994, 995 [2d Dept 2021]; *O'Neil v Environmental Prods. Corp.*, 187 AD3d 771, 772 [2d Dept 2020]). Nevertheless, this Court will consider Bravo Builders' untimely motion, despite its failure to demonstrate good cause, because the grounds raised in its motion are nearly identical to the grounds raised in 35 West and McCormick's timely summary judgment motions (*Gomez v Tilden*

² The timeliness of Bravo Builder's motion was raised by McCormack in its opposition papers. In any event, even in the absence of an objection by a party, this court has the authority to address the timeliness of a summary judgment motion *sua sponte* (*Baram v Person*, 205 AD3d 470, 470-471 [1st Dept 2022]).

Estates, LLC, 241 AD3d 791, 792-793 [2d Dept 2025]; *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]).

Labor Law § 240 (1)

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 (*Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]). Under section 240 (1), scaffolding and ladders must be “constructed, placed and operated as to give proper protection” to employees using them. However, a fall from a scaffold or ladder does not establish, in and of itself, that proper protection was not provided (*Torres v New York City Hous. Auth.*, 199 AD3d 852, 854 [2d Dept 2021]; *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1667 [2d Dept 2020]). For ladders, 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 v Elias Taverna, LLC*, 120 AD3d 552, 555 [2d Dept 2014] [internal quotation marks omitted]; *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; see also *Mora v 1-10 Bush Term. Owner, L.P.*, 214 AD3d 785, 786 [2d Dept 2023]). Similar proof is necessary to demonstrate that a scaffold failed to provide proper protection (*Torres*, 199 AD3d at 854; *Medina-Arana*, 187 AD3d at 1667-1668).

Contrary to the arguments of 35 West, Bravo Builders and McCormack, plaintiff's accident involved an elevation related risk for purposes of Labor Law § 240 (1) since he was working at a significant elevation and he fell from a height (*Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]). Instead, defendants' liability under section 240 (1) turns on whether the available scaffold and ladder provided proper protection and whether any failure in that regard was a proximate cause of plaintiff's injuries.

Here, plaintiff's testimony that he began to fall because his foot slipped on the scaffold supports a finding that the accident was unrelated to any inadequacy in the scaffold as a safety device -- particularly given his inability to identify what caused his foot to slip (*Weinberg v Alpine Improvements, LLC*, 48 AD3d 915, 916-917 [3d Dept 2008]; *Kozlowski v Grammercy House Owner Corp.*, 46 AD3d 756, 758 [2d Dept 2007]; *Costello v Hapco Realty*, 305 AD2d 445, 446 [2d Dept 2003]; *Singh v 180 Varick, LLC*, 203 AD3d 1194, 1196 [2d Dept 2022]). However, plaintiff also testified that after he cut his hand on the railing while attempting to steady himself, the scaffold fell on top of him. This testimony does not clearly identify what precipitated the movement of the scaffold. If the scaffold shifted when the plaintiff grabbed the railing to regain his balance, that movement may have contributed to plaintiff's fall and may thus constitute a proximate cause of his injury (*Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574-575 [1st Dept 2019]; *see also Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]; *Goodwin v Dix Hills Jewish Ctr.*, 144 AD3d 744, 747 [2d Dept 2016]; *Ruiz v WDF, Inc.*, 45 AD3d 758, 758 [2d Dept 2007]). On the other hand, if the scaffold fell only after plaintiff had already fallen,

and did not contribute to the fall itself, then its collapse would not be a proximate cause of plaintiff's injuries (*Durkin v Long Is. Power Auth.*, 37 AD3d 400, 401 [2d Dept 2007]; *Costello*, 305 AD2d at 446).

Apart from the issues concerning the scaffold's movement, this Court finds that plaintiff's testimony that the railing was sharp, and that this prevented him from gripping it to stop his fall, raises triable issues of fact regarding the adequacy of the scaffold. Regardless of whether Labor Law § 240 (1) would have required railings on the scaffold under the circumstances (*compare Holly v County of Chautauqua*, 13 NY3d 931, 932 [2010]; *Medina-Arana*, 186 AD3d at 1667; *Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 855 [3d Dept 1995]; *with Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 885 [2d Dept 2021]), once the defendants chose to provide railings, they were obligated to ensure that those railings were adequate to protect workers using the scaffold (*Covey v Iroquis Gas Trans. Syst., L.P.*, 89 NY2d 952, 954 [1997]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 979 [2d Dept 2021]; *Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011]; *De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948, 949-950 [2d Dept 2003]). Although the above cited caselaw addressing railings or guardrails generally involves their collapse, the fundamental purpose of such devices is to prevent workers from falling from scaffolds. It is reasonable to foresee that workers will use railings as handholds to steady themselves under circumstances similar to those described here (*Leon-Rodriguez*, 192 AD3d at 885). As a result, there are at least factual issues as to whether the sharp edge of the railing here

rendered it inadequate for its intended purpose and a jury may find this defect a proximate cause of plaintiff's fall.

Accordingly, in view of these factual issues raised by plaintiff's own deposition testimony - submitted by 35 West, Bravo Builders and McCormack in support of their respective motions - defendants have failed to establish their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Because they did not meet their initial burden, their motions must be denied regardless of the sufficiency of plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Labor Law § 241 (6)

Turning to plaintiff's Labor Law § 241 (6) cause of action, under that section 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]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). "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 v Kamco Servs., LLC*, 231 AD3d 1142, 1144 [2d Dept 2024];

[internal quotation marks omitted]; *Kelly v RBSL Realty, LLC*, 244 AD3d 1086, 1088 [2d Dept 2025]).

Plaintiff, in his bill of particulars, alleged violations of Industrial Code 12 NYCRR, §§ 23-1.7 (d); 23-1.15 (a)-(e); 23-1.16 (a)-(f); 23-1.30; 23-5.1; 23-5.2; 23-5.3; 23-5.4; 23-5.13; and 23-5.14.³ With respect to Industrial Code § 23-1.7 (d), which addresses slippery conditions, defendants have demonstrated that it is inapplicable because plaintiff did not know what caused his foot to slip and did not identify any wetness or foreign substance on the scaffold that caused a slippery condition (*Villa v East 85th Realty, LLC*, 189 AD3d 1661, 1662 [2d Dept 2020]; *Steinsvaag v City of New York*, 96 AD3d 932, 933 [2d Dept 2012]). Industrial Code § 23-1.16, which addresses requirements for safety belts and harnesses, is inapplicable since no such devices were provided (*Venegas v Shymer*, 201 AD3d 1001, 1003 [2d Dept 2022], *lv denied* 41 NY3d 1016 [2024]; *Forschner v Jucca Co.*, 63 AD3d 996, 998-999 [2d Dept 2009]). Because the bakers scaffold used by plaintiff is specifically described in Industrial Code § 23-5.18, which addresses manually propelled mobile scaffolds, Industrial Code § 23-5.2 – prohibiting the use of scaffolds “not named, specified or described in this Part (rule)” – does not apply (*Marine v Haroldon Court Condominium, Inc.*, 2008 WL 11362263[U], *7 [Sup Ct, NY County 2008]; *cf. Devoy v City of New York*, 192 AD3d 665, 669 [2d Dept 2021]). Plaintiff’s own deposition testimony that there was nothing wrong with the lighting demonstrates that Industrial Code

³ “12 NYCRR” is omitted from further references to the cited Industrial Code sections.

§ 23-1.30 - which addresses sufficient illumination at the worksite - was not violated (*Cruz v Metropolitan Tr. Auth.*, 193 AD3d 639, 640 [1st Dept 2021]).

Since plaintiff did not specify the violation of any particular subsection(s) or subdivision(s) of Industrial Code §§ 23-5.1, 23-5.3, 23-5.4, 23-5.13 and 23-5.14, 35 West, Bravo Builders and McCormick cannot be faulted for failing to address the specifics of those sections in moving for summary judgment to dismiss plaintiff's Labor Law § 241 (6) cause of action (*cf. Marte v. Tishman Constr. Corp.*, 223 AD3d 527, 528 [1st Dept 2024]; *McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016] [court deemed portion of section 241(6) cause of action abandoned where plaintiff had failed to identify the specific Industrial Code subdivisions or subsections violated]). This Court will consider the Industrial Code sections, subsections and subdivisions plaintiff identified for the first time in opposition to the instant motions as their assertion involves no new factual allegations, raises no new theories of liability and causes no prejudice (*Sheng Hai Tong*, 144 AD3d at 889; *Doto*, 129 AD3d at 664). As discussed below, except for Industrial Code § 23-5.1 (j) (1), the newly identified sections or subsections are either inapplicable or were not violated.

Plaintiff's own deposition testimony that the ladder was in good condition, that he had no difficulty using it before the accident, that his foot slipped on the scaffold, and that the ladder fell only after he was already in the process of falling, precludes any finding that Industrial Code §§ 23-1.21 (b) (1), addressing ladder strength, 23-1.21 (b) (3) (i), (b) (3) (iv), addressing ladder maintenance, 23-1.21 (b) (4) (ii), addressing ladder footings, and 23-1.21 (e) (2), requiring that step ladders be firmly braced, were violated or were a

proximate cause of his injuries (*Singh*, 203 AD3d at 1197; *Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; *Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 625 [2d Dept 2007]; *cf. Costello*, 305 AD2d at 447-448). Industrial Code § 23-5.1 (f), which requires that scaffolds be kept in good repair, cannot be relied upon as a predicate for a Labor Law § 241 (6) cause of action because it sets a general, rather than specific, safety standard (*Debenedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865, 867 [2d Dept 2016]). Industrial Code (12 NYCRR) § 23-5.3, addressing metal scaffolds, is inapplicable because that section expressly provides that it does not apply to mobile scaffolds, which are governed by Industrial Code §§ 23-5.18 and 23-5.3 [a]. Likewise, Industrial Code §§ 23-5.4, 23-5.13 and 23-5.14 are inapplicable because plaintiff's testimony regarding the subject scaffold demonstrates that it was not a "tubular welded frame scaffold," a "carpenters' portable bracket scaffold" or a "bricklayers' square scaffold" within the meaning of those sections (*cf. Juseinoski v Board of Educ. of the City of N.Y.*, 2005 NY Slip Op 30078[U], *7 [Sup Ct, Queens County 2005]).

On the other hand, Industrial Code § 23-5.1 (j) (1) states a specific standard requiring scaffolds to have safety railings on their open sides (*Claesen v VRD Contr., Inc.*, 241 AD3d 494, 498 [2d Dept 2025]). While section 23-5.1 (j) (1) expressly exempts scaffolds with platform elevations of "not more than seven feet" from this railing requirement (*Monfredo v Arnell Constr. Corp.*, 171 AD3d 600, 600 [1st Dept 2019]), plaintiff's testimony that the platform was "around" seven feet above the ground does not unequivocally demonstrate that the exception applies to the facts herein (*De Araujo v*

Titanium Constr. Servs., Inc., 2025 NY Slip Op 32817[U], *5-6 [Sup Ct, NY County 2025]; *Hernandez v Pacific 670-674, LLC, Inc.*, , 2021 NY Slip Op 32545[U], *7-8 [Sup Ct, Kings County 2021]). There are thus factual issues as to whether this railing requirement applies, and, assuming it does, there are also factual issues as to whether Industrial Code § 23-1.15, which sets requirements for railings, was violated (*Claesen*, 241 AD3d at 498).

Common-Law Negligence and Labor Law § 200

35 West and Bravo Builders are entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action. The deposition testimony of 35 West and Bravo Builders' witnesses, along with that of plaintiff, demonstrates that these defendants did not provide plaintiff with any of the equipment at issue, including the ladder and scaffold. Further, plaintiff's own testimony indicating that the accident occurred as he was stepping off of the scaffold demonstrates that the incident did not occur as the result of a dangerous or defective property condition, but rather, was the result of Exclusive's methods and manner of performing the work (*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]; *Karanikolas*, 120 AD3d at 555; *cf. Chowdhury v Rodriguez*, 57 AD3d 121, 129-130 [2d Dept 2008]). Where a plaintiff's injuries arise from the manner in which the work is performed, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]). Moreover, under a methods and manner of work theory of liability, "no liability will attach to the owner [or general

contractor] solely because it may have had notice of the allegedly unsafe manner in which work was performed” (*Martinez v Nader Enters., LLC*, 235 AD3d 630, 632 [2d Dept 2025]; *Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993];).

Here, the deposition testimony of plaintiff, Exclusive’s president, and the witnesses from 35 West, Bravo Builders and McCormack, demonstrates that 35 West and Bravo Builders did not provide Exclusive or its employees with instructions relating to the performance of the work. Indeed, plaintiff previously testified that he received all his instructions from Exclusive as relayed to him by his on-site supervisor and co-worker, Jevon. As a result, 35 West and Bravo Builders have established their prima facie case that they did not supervise or control the work at issue (*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]; *Przyborowski*, 120 AD3d at 652-653; *cf. Chowdhury*, 57 AD3d at 129-130). Contrary to plaintiff’s contentions, the fact that 35 West and Bravo Builders may have had general authority to supervise the work or to stop the work in the face of a safety violation is insufficient to demonstrate supervision and control for purposes of liability under the common-law and Labor Law § 200 claims (*Kelly*, 244 AD3d at 1089; *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]). Accordingly, 35 West and Bravo Builders are entitled to summary judgment dismissing plaintiff’s common-law negligence and Labor Law § 200 causes of action.

Indemnification Issues

Because 35 West has demonstrated that it was free from negligence and, given the fact that plaintiff's accident arose from "work . . . done . . . in or about the Demised Premises," (NYSCEF Doc No. 336, Lease Rider at § 44 [A]) within the meaning of the indemnification provision of 35 West and Bravo Builders' lease, 35 West has demonstrated its entitlement to summary judgment in its favor on its contractual indemnification claim against Bravo Builders (*Mejia v Cohn*, 188 AD3d 1035, 1038-1039 [2d Dept 2020]; *see also Alfieri v ABB, Inc.*, 227 AD3d 941, 942 [2d Dept 2024]). Further, contrary to Bravo Builders' contention, General Obligations Law § 5-322.1 does not bar recovery despite the language in the indemnification provision that would allow 35 West to potentially obtain recovery for its own negligence since 35 West has demonstrated that it was not negligent (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179-181 [1990]; *Marulanda v Vance Assoc., LLC*, 160 AD3d 711, 712-713 [2d Dept 2018]; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 798 [2d Dept 2014]).

On the other hand, based on its own showing that it was not negligent and did not actually supervise or control the injury producing work, Bravo Builders has demonstrated its entitlement to summary judgment dismissing 35 West's common-law indemnification claim against it (*Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dept 2022]; *Debenedetto*, 190 AD3d at 938; *Gonsalves v 35 W. 54 Realty Corp.*, 147 AD3d 815, 817 [2d Dept 2017]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Contrary to 35 West's assertion, Bravo Builders' contractual authority to supervise the work is, in and of itself, insufficient to establish a common-law

indemnification claim (*McCarthy*, 17 NY3d at 377-378). Accordingly, the portion of Bravo Builders' motion seeking dismissal of 35 West's common-law indemnification claim is granted. For the same reasons, the portion of 35 West's motion seeking summary judgment in its favor on its common-law indemnification claim against Bravo Builders is denied.

Turning to the portion of McCormack's motion seeking summary judgment dismissing Bravo Builders' contribution and common-law indemnification claims, as discussed above with respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, the deposition testimony of plaintiff and the other witnesses in the record demonstrates, *prima facie*, that McCormack did not supervise and control plaintiff's work. Further, in his deposition testimony, Paul Campbell, a McCormack supervisor, stated that McCormack was no longer on the site by early June 2017. Although Campbell stated that McCormack had a scaffold at the site, he asserted that it had been removed by the first week of June, a date well before plaintiff's June 27, 2017, accident. While this testimony would absolve McCormack for any responsibility for the scaffold used by plaintiff, plaintiff's own testimony, in conjunction with other evidence in the record, is sufficient to demonstrate an issue of fact as to whether the scaffold plaintiff was using was borrowed from McCormack.⁴

In this respect, it is essentially undisputed that McCormack, in its role as the framing and drywall contractor, was the carpentry company at the jobsite. Plaintiff, in his own testimony, stated the scaffold he was using was not provided by Exclusive, but was one his

⁴ Although Bravo Builders does not make this argument in its opposition papers, it was presented by plaintiff in his opposition papers to McCormack's motion and was addressed by McCormack in its reply.

coworker said he could use. Plaintiff added that one of the carpenters on the jobsite had told him that it belonged to them and plaintiff asserted that the carpenters saw plaintiff performing work from this scaffold prior to the accident. In view of this testimony, there is an issue of fact as to whether plaintiff had implied or tacit permission to use the scaffold with the allegedly defective handrail, which is treated as a defective property condition, that requires denial of McCormack's motion (*Chowdhury*, 57 AD3d at 129-132; *see also Abreu v Rodriguez*, 195 AD3d 1277, 1279 [3rd Dept 2021]; *cf. Scekcic v SL Green Realty Corp.*, 132 AD3d 563, 565-566 [1st Dept 2015]).⁵

These factual issues likewise require denial of the portion of Bravo Builder's motion for summary judgment on its common-law indemnification claim against McCormack.

CONCLUSION

Accordingly, it is hereby

ORDERED, that 35 West's motion (Seq. 15) is granted to the extent that: (1) plaintiff's common-law negligence and Labor Law § 200 causes of action are dismissed; (2) plaintiff's Labor Law § 241 (6) cause of action is dismissed with respect to Industrial Code (12 NYCRR) §§ 23-1.7 (d), 23-1.16 (a)-(f), 23-1.30, 23-5.2, 23-5.3, 23-5.4, 23-5.13 and 23-5.14; and (3) 35 West is granted conditional summary judgment in its favor with respect to its contractual indemnification cross-claim as against Bravo Builders. 35 West's motion is otherwise denied; and it is further

⁵ By way of a stipulation dated July 14, 2025, Bravo Builders discontinued its third-party claims against McCormack for contractual indemnification and breach of contract for failing to obtain insurance (NYSCEF Doc No. 410). In view of this discontinuance, the portion of McCormack's motion addressing those claims has been rendered academic.


McCORMACK CONTRACTING, INC.,

Third-Party Defendants.

-----X.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

Hon. Wavny Toussaint
J.S.C.