

**Scandariato v Tri Borough Scaffolding & Hoisting;
Inc.**

2026 NY Slip Op 31628(U)

April 6, 2026

Supreme Court, Kings County

Docket Number: Index No. 518881/2022

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 518881/2022
Seqs. 006, 007, 008

Part LL1M

PETER SCANDARIATO,

Plaintiff,

against

TRI BOROUGH SCAFFOLDING AND HOISTING, INC.,
ATRIA HEALTH LLC, AND JGR SERVICES INC.

Defendants.

TRI BOROUGH SCAFFOLDING AND HOISTING, INC.,

Third-Party Plaintiff,

against

JGR SERVICES INC.,

Third-Party Defendant.

JGR SERVICES INC.,

Second Third-Party Plaintiff,

against

VANGUARD CONSTRUCTION AND DEVELOPMENT
COMPANY INC.,

Second Third-Party Defendant.

ATRIA HEALTH LLC,

Third Third-Party Plaintiff,

against

TRI BOROUGH SCAFFOLDING AND HOISTING, INC.,

Third Third-Party Defendant.

DECISION/ORDER

ATRIA HEALTH LLC,

Fourth Third-Party Plaintiff,

against

VANGUARD CONSTRUCTION AND DEVELOPMENT
COMPANY INC.,

Fourth Third-Party Defendant.

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: NYSCEF 256-335.

Upon the foregoing papers, defendants Tri Borough Scaffolding and Hoisting Inc. (Tri Borough), Atria Health, LLC (Atria), and JGR Services, Inc. (JGR)'s motion for summary judgment (Seq. 006), second and fourth third-party defendant Vanguard Construction and Development Company Inc. (Vanguard)'s motion for summary judgment (Seq. 007), and plaintiff's motion for summary judgment (Seq. 008) are decided as follows:

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on May 23, 2022, while working on the roof at 36 East 57th Street, New York, NY a/k/a 40 East 57th Street, New York, NY (the premises). The third-party action was discontinued on August 11, 2025. The third third-party action was discontinued on August 11, 2025. The following is undisputed: Atria owned the premises. Atria hired Vanguard to serve as the general contractor. Vanguard employed the plaintiff. Tri Borough was sub-contracted to erect a scaffold on the roof. Tri Borough sub-subcontracted with JGR to actually erect the scaffold. Manuel Jorge

testified on behalf of Tri Borough that Tri Borough retained responsibility for its sub-contractor and that he (Mr. Jorge) was present on the roof on May 23, 2022, prior to the incident (Jorge EBT at 87). It is undisputed that Vanguard was responsible for permitting other workers access to the roof. The plaintiff had the pass to access the roof and was instructed to provide workers access to the work (Scandariato EBT at 78–79).

Several of the facts in this case are undisputed: The plaintiff was working on the roof of the premises. A scaffold had been erected on the roof to facilitate the installation of duct and exhaust systems. JGR workers were on the scaffold performing modifications at the time of the incident. While the plaintiff was standing near the scaffolding to check on JGR's progress, a hammer fell and struck the plaintiff (Scandariato EBT at 81). Alejandro Villanueva, of JGR identified the worker involved as JGR employee Dixon Marquez and testified that the hammer fell from Mr. Marquez's tool pouch after it became stuck on the scaffold (Villanueva EBT at 106; 108). JGR workers were required to provide their own tool belts; they were not given "anything" to keep hammers from falling out of pouches, despite Mr. Villanueva's testimony that he had seen hammers fall out of pouches before (*id.* at 108–109; 111). Mr. Villanueva denied that there were tethers for tools available on site, and testified that the nylon lines visible in the photographs of JGR workers were to secure their helmets (*id.* at 140). However, Mr. Villanueva also testified, "If I would have know [sic] that this accident was going to occur, I probably would have tied up the tools as well" (*id.* at 142).

Mr. Villanueva also testified that he requested that the plaintiff check on the scaffold work (Villanueva EBT at 103). The plaintiff also testified that the "scaffold foreman" told him to "come out to the roof" and take a picture to send to plaintiff's supervisor (Scandariato EBT at 79–80). The netting around the scaffold was loosened during JGR's installation, and tightening

the netting was the last step in the scaffold construction (Villanueva at 115–116). Mr. Villanueva claimed that the netting could not be installed until the end because workers needed to reach outside of the netting to hammer the corners of the toe boards (*id.* at 120).

It is undisputed that the plaintiff was not wearing a hard hat on the date of the incident. Plaintiff testified that he was told not to wear a hard hat in the lobby of the building and “not to look like a construction worker” on the day of the incident because there were tenants in the area (Scandariato EBT at 64–65). There were no hard hat signs on the roof because “that level is an area where people from the restaurant go and they use it” (*id.* at 70).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Amendment

Although leave to amend pleadings is generally given pursuant to CPLR 3025 (b), that general rule is limited by certain circumstances. Permission to amend is “committed to the broad discretion of the trial court,” and should be denied where a proposed amendment is “patently devoid of merit” (*Vorobichik v Greenpoint Goldman SM, LLC*, 164 AD3d 866, 866 [2d Dept 2018]).

Vanguard seeks leave to amend its answer to assert cross-claims sounding in indemnification against Tri Borough and JGR. However, cross-claims are not the appropriate procedural vehicle for Vanguard’s putative claims (CPLR 3019 [b]). Vanguard is not a direct

defendant in the main action and is not a co-defendant with JGR or Tri Borough in any of the third-party actions. Additionally, Tri Borough and JGR cannot be brought into the second third-party or fourth third-party actions as “other persons alleged to be liable” since they are already named defendants that have joined issue in the primary action and JGR even commenced a third-party action against Vanguard (CPLR 3019 [b]; *contra Lane v Lizza*, 91 AD2d 989 [2d Dept. 1983]). Vanguard has also failed to sufficiently account for its delay in seeking to assert these claims. Vanguard alludes, although it does not explicitly state, that it believed its sub-contracts would provide indemnity and defense, rendering formal claims unnecessary. Even if this excuse were accepted, *arguendo*, as a reasonable basis for delay, the record does not contain any information about Vanguard issuing a tender request or the sub-contractors denying tender which would establish a timeline for Vanguard’s delay. In the absence of a reasonable explanation, considering that the action is on the trial calendar, and in light of the procedural deficiencies already discussed, Vanguard’s motion to amend is denied (*see Migdal v MNT Props., LLC*, 206 AD3d 903 [2022]).

Statutory Defendant Status

JGR and Tri Borough contend that they are not statutory defendants under the Labor Law. A sub-contractor is an agent of the general contractor, and may be held vicariously liable to the plaintiff, “if it had the ability to control the activity which brought about the injury” (*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520 [2d Dept 2008]). “The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right” (*Van Blerkom v Am. Painting, LLC*, 120 AD3d 660, 661 [2d Dept 2014]).

Here, it is undisputed that Tri Borough and JGR were responsible for the construction of the scaffold, and by extension, the work being performed during the modification of the scaffold.

It is also clear that the incident resulted from that work. Therefore, since record shows that JGR and Tri Borough were agents of Vanguard with authority to direct and control the harm-producing work, they are proper statutory defendants under the Labor Law (*see Van Blerkom*, 120 AD3d at 662).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is “absolute” where the failure or absence of a safety device enumerated by the statute is a proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haines v. New York Tel. Co.*, 46 NY2d 132, 136 (1978) and *Ross v Curtis-Palmer HydroElec. Co.*, 81 NY2d 494, 500 (1993)]). To recover for an injury caused by a falling object, a plaintiff must show that the object was being hoisted, secured, or required securing for the purpose of the undertaking (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]).

Plaintiff’s testimony is sufficient to make out his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim. The plaintiff was performing covered work at the time of his accident and was struck by a falling object that should have been secured for the purpose of the undertaking. The plaintiff observed the object that struck him and was not rendered unconscious (*contra Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664 [2d Dept 2020]; *Henriquez v Grant*, 186 AD3d 577 [2d Dept 2020]; *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733 [2d Dept 2015]). The presence of netting around the scaffold is evidence that it was foreseeable that an object could fall from the scaffold and strike those standing below (*see e.g. Bornschein v Shuman*, 7 AD3d 476 [2d Dept 2004]). During a modification which purportedly required loose netting throughout, alternative safety devices were necessary to protect workers below from falling objects. As Mr. Villaneuva testified, he

would have provided tethers or cords for tying tools if he had known the accident was going to happen; these safety devices should have been provided.

In opposition, the defendants have failed to raise a triable issue of material fact. As already stated, the hammer was an object that required securing for the purpose of the undertaking. Defendants' contention that the safety netting is not a safety device contemplated by Labor Law § 240 (1) is plainly incorrect (*see Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 1092 [2d Dept 2015] ["the vertical netting constituted a safety device within the meaning of Labor Law § 240 (1)]). There is no testimony that Mr. Villaneuva or anyone else ever told plaintiff to leave the roof because he did not have a hard hat, and in any event, "[a]n instruction not to be in a particular area is not a safety device in the sense that plaintiff's failure to comply with the instruction [would be] equivalent to refusing to use available, safe and appropriate equipment" (*Rivera v 26 W. 56, LLC*, 241 AD3d 844 [2 Dept 2025]). Moreover, it is un rebutted that the plaintiff was instructed to be on the roof to inspect the scaffolding. Finally, unlike *Galvan v Triborough Bridge and Tunnel Authority*, 29 AD3d 517 (2d Dept 2006), there is no question here about whether the tool that fell was "deliberately thrown" or "accidentally dropped." The testimony is clear that the hammer fell out of Mr. Marquez's tool pouch because the pouch was inadequate to secure the hammer during the work Mr. Marquez was performing.

Therefore, plaintiff's motion is granted, and defendants' motion is denied, with respect to his Labor Law § 240 (1) claim.

Labor Law § 241 (1)

Defendants seek summary judgment on plaintiff's Labor Law § 241 (6) claim; the plaintiff does not move as to this claim. To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3)

suffered harm, (4) a proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff only advances substantive opposition with respect to Rules 23-1.7 (a) (overhead protection) and 1.8 (c) (1) (hardhats); the plaintiff withdraws the other alleged Industrial Code violations.

With respect to overhead protection, the presence of netting indicates that the area around the scaffold was one which was ordinarily exposed to falling hazards. Additionally, it is undisputed that the netting was loose. Therefore, defendants have failed to demonstrate that no alternative overhead protection or barriers establishing a controlled access zone were necessary, and their motion is denied with respect to this alleged Industrial Code violation.

Defendants have demonstrated that the plaintiff was provided with a hard hat by Vanguard. However, plaintiff has raised a triable issue of fact by testifying that he was instructed not to wear his helmet on the date of his incident. Therefore, defendants' motion is also denied with respect to this alleged Industrial Code violation (*see e.g. Carlton v City of New York*, 161 AD3d 930 [2d Dept 2018]).

Labor Law § 200

Plaintiff seeks summary judgment against Tri Borough and JGR on his Labor Law § 200 claim; all defendants also move for summary judgment on this claim. Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Claims under this statute are evaluated under dangerous premises condition analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 131 [2d Dept 2008]), a dangerous means and methods analysis (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]), or a combination of the

two (*id.*). The plaintiff pleaded and seeks summary judgment on a “means and methods” theory of liability under Labor Law § 200.

As an initial matter, Plaintiff does not oppose Atria’s motion for summary judgment on this claim. It is undisputed that Tri Borough and JGR had authority over the means and methods of the scaffold modification. Mr. Jorge testified that he “instruct[ed] [JGR] on the work they have to do” (Jorge EBT at 88). As already noted, Mr. Villanueva testified that he would have tied the tools to the workers if he had known that the accident would happen, which is essentially an admission of negligence. Since Tri Borough and JGR had the authority to control the means and methods of the work, and the work was performed negligently, plaintiff’s motion for summary judgment on his Labor Law § 200 claim is granted (*cf. Ricottone v PSEG Long Is., LLC*, 221 AD3d 1032 [2d Dept 2023]; *see e.g. Hewitt v NY 70th Street LLC*, 187 AD3d 574 [1st Dept. 2020]). Comparative fault, if any, does not preclude summary judgment but is instead preserved for the time of trial (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]). Here, since plaintiff prevailed on summary judgment on his Labor Law § 240 (1) claims, there will not be a trial on liability and the preservation of comparative fault is moot.

Contractual Indemnification

The right to contractual indemnification is established by the “specific language of the contract” (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “In addition, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Vanguard's contractual indemnification obligation to Atria extends to any claim "arising out of or resulting from the performance of the Work . . . but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor [sic], anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (contract at § 3.18). Since JGR and Tri Borough have been found negligent, and they were Vanguard's sub-contractors, the indemnification obligation has been triggered, and Atria has shown itself free from negligence. Therefore, Atria's motion for contractual indemnification is granted.

Since Vanguard's motion to amend was denied, its motion for summary judgment on the proposed cross-claims must also be denied. Vanguard did not assert any cross-claims or counter-claims in its original answers. In any event, such a motion would be fatally premature since the co-defendants would not yet have had the opportunity to join issue (*see* CPLR 3212).

Common Law Indemnification and Contribution

"Absent an express indemnification agreement, or a 'grave injury' as enumerated in Workers' Compensation Law § 11, an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits" (*Fleming v Graham*, 10 NY3d 296, 299 [2008]; *see* WCL § 11 [1]). Vanguard contends that the common-law indemnification and contribution claims against it must be denied pursuant to WCL § 11. In opposition, JGR, Tri Borough, and Atria argue that the plaintiff has alleged a traumatic brain injury, which constituted a grave injury under the WCL and permits non-contractual claims against Vanguard. As defined by the WCL, the relevant grave injury is defined as "[an] acquired injury to the brain caused by an external physical force resulting in permanent total disability. A permanent total disability requires a showing that the injured employee is no longer employable in any capacity" (*Grech v HRC Corp.*, 150 AD3d 829, 830 [2d Dept 2017] [internal citations omitted]). Here, plaintiff has

alleged that he suffered a “traumatic brain injury,” which he alleged to be “permanent and progressive” and “may limit his activities in his employment” (see plaintiff’s bill of particulars at 2; 4–5). However, the plaintiff has not alleged that he is unemployable in any capacity. Notably, the plaintiff has not individually sought to bring a direct action against his employer, indicating that he does not believe his injuries constitute a grave injury as defined by the WCL. Therefore, Vanguard’s motion is granted with respect to the common-law indemnification and contribution claims against it (see *NGM Insurance Company v MGC Design & Construction Corp.*, 237 AD3d 958 [2d Dept 2025]).

As already noted, Vanguard does not have any active claims for common-law indemnification, contribution, or breach of contract; therefore, its motion for summary judgment is denied.

Conclusion


Atria, Tri Borough, and JGR’s motion for summary judgment (Seq. 006) is granted to the extent of dismissing all alleged Industrial Code provisions except Rules 23-1.7 (a) and 1.8 (c) (1) and plaintiff’s Labor Law § 200 claim against Atria only, and with respect to Atria’s contractual indemnification claim against Vanguard; the motion is otherwise denied.

Vanguard’s motion to amend and for summary judgment (Seq. 007) is denied.

Plaintiff’s motion for summary judgment (Seq. 008) is granted.

This constitutes the decision and order of the court.

April 6, 2026
DATE



DEVIN P. COHEN
Justice of the Supreme Court