[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IAS PART 11

----------X
JULIO RICARDO VEGA VEGA,

Plaintiff,

-against-

RENAISSANCE 632 BROADWAY, LLC.,

Defendant.
----------X

Index No.: 15500/09
Motion Date: June 22, 2011
Cal. Nos.: 38 & 39
Seq. Nos.: 3 & 4

----------X
RENAISSANCE 632 BROADWAY, LLC.,

Plaintiff,

-against-

SHAIRA CONSTRUCTION CORP.,

Defendant.
----------X

Third-Party Index No.: 350018/10

The following papers numbered 1 to 15 read on the plaintiff Julio Ricardo Vega Vega ("Vega")'s motion for summary judgment pursuant to Labor Law §§ 240 and 241 and defendant Renaissance 632 Broadway, LLC., ("Renaissance")'s motion for summary judgment as against third-party defendant Shaira Construction Corp., ("Shaira") granting contractual and common law indemnity and as against the plaintiff, an order dismissing plaintiff's negligence claims and claims under Labor Law §§ 200 and 241(6).

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Opposition Affirmation (Defendant - Renaissance - Exhibits.....	5 - 6
Memorandum of Law in Partial Opposition to Plaintiff's Motion for Partial Summary Judgment (Defendant - Renaissance).....	7
Reply Affirmation (Plaintiff).....	8
Notice of Cross-Motion - Affidavits - Exhibits.....	9 - 12

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

It is undisputed that the plaintiff Vega was employed by third-party defendant Shaira, as a laborer working on the ground floor and basement levels of a building owned by defendant Renaissance. Furthermore, Vega's duties and responsibilities consisted of helping two other workers by cleaning the work area and removing fallen pipe from the basement. The plaintiff had been in the employ of Shaira, without any negative employment history, for approximately one year, and had been assigned to this particular work-site for approximately four days. On the date of the accident, while cutting overhead pipe for purposes of demolition, plaintiff was struck by a piece of pipe that had swung free, causing plaintiff to fall from the ladder he was using.

The plaintiff acknowledges in his moving papers that third-party defendant Shaira's testimony, through Balwinder Singh, completely contradicts the testimony of the plaintiff. The conflicting deposition testimony as to whether or not the plaintiff was working pursuant to the direction and supervision of his employer as opposed to Shaira's testimony, that the plaintiff undertook the task of climbing the ladder and cutting the pipe without authority and/or direction from his employer, fails to establish a prima facie case for judgment as a matter of law. The evidence raises triable issues of fact as to whether the plaintiff was the sole proximate cause of the accident. (*See Franzese v. Consolidated Dairies, Inc.*, 83 A.D.3d 775 [2d Dept. 2011]; *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2d Dept. 2005].)

Summary judgment is a drastic remedy that "should only be employed when there is no doubt as to the absence of triable issues" (*See Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*See Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280 [2003]; *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 960 [1998], *see also, Pollack v. Margolin*, 84 A.D.3d 1341 [2d Dept. 2011]; *Franzese v Consolidated Dairies, Inc.*, supra, citing, *Kolivas v Kirchoff*, supra; *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept. 2002].) To prevail on a Labor Law §240(1) cause of

action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident. However, where a plaintiff's actions are the sole proximate cause of his injuries, liability under this provision does not attach. Plaintiff's argument that the issue of whether his own misuse of the ladder could at best be considered contributorily negligent, and therefore, cannot stand in the way of a § 240(1) claim is defeated by the basic premise that the contradictory testimony by the parties indicates that the underlying question of fact is whether or not plaintiff should have been performing the task he became injured trying to accomplish, in the first place. (See *Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 [2006].) The court cannot determine, as a matter of law, whether or not strict liability can be imposed. (*see, Blake v Neighborhood Hous. Servs.,* supra ; *Vouzainas v Bonasera*, 262 AD2d 553 [2d Dept. 1999].)

Plaintiff's motion for summary judgment pursuant to Labor Law § 240(1) is denied. Defendant Renaissance's cross-motion for summary judgment dismissing plaintiff's cause of action pursuant to Labor Law § 240(1) as against it is also denied accordingly.

The court next turns to the branch of plaintiff's motion for summary judgment pursuant to Labor Law § 241(6). To recover under Labor Law § 241(6), a plaintiff must demonstrate the violation of an Industrial Code provision that is applicable given the circumstances of the accident and set forth specific safety standards. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].) In the bill of particulars, as well as the supplemental bill of particulars, plaintiff herein alleges violations of 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.16 12 NYCRR 23-1.21(a)-(f) [particularly (b)(3) and (b)(4)(ii) and (iv)], 12 NYCRR 23-2.1, 12 NYCRR 23-3.2, 12 NYCRR 23-3.3 (a)-(m) [particularly, (b)(3) and (c)], 12 NYCRR 23-5.1, 12 NYCRR 23-5.18, and 12 NYCRR 23-5.3.

The specific safety standards set forth in 12 NYCRR 23-1.7 and 1.8, which relate to protection from general hazards and specific safety standards, respectively, do not apply since the underlying action does not involve work to be performed above plaintiff's head with planking to provide access to the pipes. The court notes that 12 NYCRR 23-1.7 is not applicable to the facts of this case, as that regulation applies to safety devices for hazardous openings, and not to an elevated hazard. (see 12 NYCRR 23-1.7[b][1]; *Rau v Bagels N Brunch, Inc*., 57 A.D.3d 866[2d Dept. 2008]; *Kwang Ho Kim v. D & W Shin Realty Corp*., 47 A.D.3d 616 [2d Dept. 2008].) Particularly, plaintiff was required to work in the exposed area, therefore, provisions requiring barricades, fencing and or safety railing and therefore planking, life nets, safety belts, etc. are also not applicable. As to the provision in 12 NYCRR 23-1.7 which requires that owners and contractors maintain working areas free from tripping hazards, also does not apply to the facts of this case. The court finds that, after reviewing all the evidence submitted thus far, it would be highly probable that, due to the ceiling height of the basement from floor to ceiling, the implementation of the overhead protections required by subsection 23-1.7(a) would have made the demolition of the overhead pipes impossible to accomplish (*Steinman v. Morton Intern., Inc*.,756 F.Supp.2d 314 [2010].

With respect to the remaining sections of 23-1.7 and the entire provision of 23-1.8, plaintiff's claim does not include air contamination, lack of oxygen or exposure to

corrosive/toxic substances, therefore, those provisions which relate to safety and equipment for such issues are also not applicable. Plaintiff's injuries do not involve eyes, or breathing, therefore, the provisions regarding eye protection equipment and respirators are also not relevant, as are the provisions relating to head protection since plaintiff does not allege head injuries. The provision in 23-1.8 regarding footwear is also inapplicable inasmuch as it refers to work being performed with wet weather and or other water conditions (also obviating the need for waterproof clothing).

Regulation 12 NYCRR 23-1.16 sets standards for safety belts, harnesses, tail lines and lifelines respectively, is inapplicable here because the plaintiff was not provided with any such devices. (*Forschner v Jucca Co.*, 63 A.D.3d 996 [2 Dept. 2009]; *Kwang Ho Kim v D & W Shin Realty Corp.*, supra; *see Dzieran v 1800 Boston Rd., LLC,* 25 A.D.3d 336 [1st Dept. 2006]; *see also Rau v Bagels N Brunch, Inc*., supra). As to the particular provisions that plaintiff references within 23-1.21, subsections (b)(3) and (b)(4)(ii) and (iv), (b) (3) are inapplicable because plaintiff affirmatively states in his testimony that he had inspected the ladder prior to use on the date in question, found it in working condition, and had in fact had had no problems with using it throughout that day. Sub-subsections (b)(4)(ii) and (iv) are also inapplicable in that plaintiff has failed to submit any evidence that the surface under the level was slippery, or that the steps of the ladder were slippery. In point of fact, plaintiff testified that the ladder was placed on a level concrete flooring, free of debris. The court also notes, with regard to the remaining subsections of 23-1.21[(a),(e), particularly], plaintiff has failed to establish the height of the ladder itself inasmuch as there is contradictory testimony as to whether the ladder was a six-foot or an eight-foot ladder, and it is undisputed that the ladder plaintiff used was an A-frame ladder, not a ladder contemplated for use by this provision. Furthermore, there has been no allegation by plaintiff as to maximum load requirements and there is no evidence that the ladder was deficient in this. There has also been no testimony as to any violation of ladder maintenance and or necessary replacement, as referenced in 23-1.21(b)(3).

Industrial Code provisions 12 NYCRR 23-2.1 has been held to lack the specificity required to be a predicate for liability under Labor Law §241(6) (*see Venezia v State of New York*, 57 AD3d 522 [2008].) With regard to 12 NYCRR 3.2, general requirements for demolition operations refers: 1) to the removal of exterior glass before demolition; 2) the shutting, capping and/or sealing of all supply lines with the involvement and 24-hour advance written notification to any service/utility company so involved; 3) the protection and/or relocation of any supply lines that must be maintained during demolition with written notification 48-hours in advance of such relocation to the appropriate utility company; and the protection of adjacent structures, assemblage of barricades and dust control in relation to the above stated activities. The court notes that none of these requirements have any bearing on plaintiff's cause of action.

Industrial Code provision 23-3.3(b)(3) and (c), refers to demolition by hand and in particular (b)(3) is without merit to this action inasmuch as it refers to the demolition of walls and/or partitions with the application of wind or vibration causing or assisting to cause the collapse. (*See Maternik v Edgemere-by-the-Sea Corp.*, 19 Misc.3d 1118(a) [2008] [23-3.3(b)(3) not applicable to demolition of a roof - held not to involve a wall and/or partition].) Provision

3.3(c) refers to the requirement of inspections and plaintiff in this instance has failed to establish how any inspections of the pipe would have prevented the pipe from becoming unsecured once he cut the pipe and supporting brackets. It is prima facie, that 12 NYCRR 23–3.3(c), governing inspections, does not apply to the facts of this case, as that regulation requires "continuing inspections against hazards which are created by the progress of the demolition work itself," rather than inspections of how demolition would be performed (*Smith v. New York City Housing Authority*, 71 A.D.3d 985 [2d Dept. 2010].) "The hazard which allegedly caused the injured plaintiff's accident arose from the actual performance of the demolition work, not structural instability caused by the progress of the demolition, the hazard sought to be avoided by that provision of the Industrial Code." (*See Clavijo v Universal Baptist Church*, 76 A.D.3d 990 [2d Dept. 2010].) The court finds that Industrial Code provisions 12 NYCRR 23-5.1 (general provisions for all scaffolds), 23-5.18 (provision for manually-propelled mobile scaffolds) and 23-5.3 (general provisions for metal scaffolds) do not apply because the plaintiff himself alleges that the accident occurred from the use of a ladder, having nothing to do with any scaffolding or the requirement for scaffolding.

Defendant Renaissance has made a prima facie showing that the regulations set forth by plaintiff as violations are either too general to support a Labor Law § 241(6) claim, or inapplicable given the circumstances of the accident. Therefore, plaintiff's motion for summary judgment pursuant to Labor Law § 241(6) is denied. Defendant Renaissance's cross-motion for summary judgment dismissing plaintiff's complaint as against it, pursuant to Labor Law §241(6) is therefore granted.

Defendant's motion for summary judgment pursuant to Labor Law § 200 is granted on the grounds that defendants had no supervisory control over this injury-producing work. *(see Ross v Curtis–Palmer Hydro–Elec. Co.*, supra.) There is no evidence that the defendant Renaissance gave any instructions on what needed to be done, how to do it, and/or monitoring and oversight of the timing and quality of the work . (*See Dalanna v City of New York*, 308 A.D.2d 400 [1ST Dept. 2003].) Neither plaintiff nor third-party defendant Shaira alleges that defendant Renaissance had any substantive contact with the particular project. A general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons has been held insufficient to impose such liability. (*Paz v City of New York*, 925 N.Y.S.2d 453 [1st Dept. 2011]; *Samaroo v Patmos Fifth Real Estate, Inc*., 32 Misc.3d 1209(A), Slip Copy, 2011 WL 2636257 N.Y.Sup. June 2011].) Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept. 2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those defendants who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc*., 21 AD3d 866 [2d Dept. 2005]; *Aranda v Park East Constr*., 4 AD3d 315 [2d Dept. 2004]; *Akins v Baker*, 247 A.D.2d 562 [2d Dept. 1998].) Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v. Puccia*, 57 AD3d 54 [2d Dept. 2008]). On the other hand, "[w]here a

plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercisers no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law." (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2d Dept. 2011].)

It is undisputed that plaintiff was the sole employee of the third-party defendant Shaira. Defendant Renaissance moves for summary judgment dismissing all common-law indemnification claims asserted against it. In so moving, defendant Renaissance maintains that since third-party defendant Shaira was the sole employer of the plaintiff no common-law indemnification claims with regard to the plaintiff may lie against it unless the plaintiff sustained a "grave injury" as that term is defined in Workers' Compensation Law § 11. (*See Maxwell v Rockland County Community Coll.*, 78 AD3d 793 [2d Dept. 2010]) Here, a review of plaintiff's bill of particulars, supplemental bill of particulars and deposition testimony demonstrates that the plaintiff did not sustain a grave injury in the accident. No opposition has been submitted by either plaintiff or the third-party defendant Shaira to this branch of defendant Renaissance's cross-motion. Accordingly, all common-law indemnification claims against the defendant Renaissance must be dismissed.

The court will now address that branch of Renaissance's cross-motion for summary judgment on their third-party cause of action for contractual indemnification against third-party defendant Shaira and summary judgment dismissing said cause of action pursuant to Labor Law § 240(1) asserted against them. The right to contractual indemnification depends upon the specific language of the contract. (*See George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept. 2009].) A party seeking contractual indemnification must also prove itself free from negligence because it cannot be indemnified to the extent its negligence contributed to the accident. (General Obligations Law §5-322.1; *see Cava Constr. Co., Inc. v Gelatec Remodeling Corp.*, 58 AD3d 660 [2d Dept. 2009].) The contract between Renaissance and Shaira provides for indemnification as between them for actions arising out of the work in progress. It is not void under General Obligations Law § 5-322.1 because it authorizes indemnification in accordance with such provision. (*See Giangarra v Pav-Lak Contr., Inc.,* 55 AD3d 869 [2d Dept. 2008].) In any event, as previously discussed, there is no evidence in the record demonstrating that the defendant Renaissance was actively negligent in connection with plaintiff's accident. Therefore, defendant Renaissance is entitled to contractual indemnification against third-party defendant Shaira if it is held vicariously responsible in the event plaintiff ultimately is successful at trial in establishing a cause of action pursuant to a Labor Law § 240(1). As determined above, as to defendant Renaissance's motion to dismiss plaintiff's cause of action pursuant to Labor Law § 240(1), that branch of the motion is denied.

Dated: July 25, 2011

_____

SIDNEY F. STRAUSS, J.S.C.