Dittmer v Claremont Children's School
2012 NY Slip Op 30938(U)
March 1, 2012
Sup Ct, Queens County
Docket Number: 23349/2008
Judge: Frederick D.R. Sampson
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Sampson
Justice

IA Part 31

STEVEN DITTMER, x

Plaintiff,

-against-

CLAREMONT CHILDREN'S SCHOOL, CLAREMONT CHILDREN'S SCHOOL, LLC., and GOTHIC AMSTERDAM REALTY CO,LLC,

Defendants,
x

CLAREMONT CHILDREN'S SCHOOL, LLC

Third-Party Plaintiff

-against-

STEVEN DITTMER d/b/a ATTENTION TO DETAIL

Third-Party Defendants.
x

Index Number 23349 2008

Motion Date December 15 2011

Motion Cal. Number 7

Motion Seq. No. 2

The following papers numbered 1 to 73 read on these (2) motions by Gothic Amsterdam Realty Co., LLC (Gothic), for summary judgment dismissing plaintiffs' complaints pursuant to CPLR 3212, or alternatively, for summary judgment in its favor on its claims for indemnification and reimbursement of attorneys' fees from Claremont Children's School, LLC (Claremont), and for indemnification from Steven Dittmer d/b/a Attention to Detail (ATD); (3) on this motion by plaintiff Ramos for summary judgment in his favor on his claim pursuant to Labor Law §241(1); (4) on this motion by Claremont to dismiss Ramos' common-law negligence cause of action; (5) cross motion by plaintiff Ramos to amend the bill of particulars to assert additional Industrial Code violations; and (6) on this cross motion by Dittmer for summary judgment on his claim pursuant to Labor Law §240 (1).

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Upon the foregoing papers it is ordered that the motions and cross motions are decided as follows:

Plaintiffs, in this labor law/negligence action, seek damages for personal injuries sustained on August 26, 2008, when Dittmer fell from a ladder that was placed on top of two scaffold sections. Ramos was holding the ladder and he too fell when the scaffold shifted and the ladder and scaffold fell to the ground. Gothic was the owner and Claremont was the lessee of the premises where the accident occurred. Prior to the date of the accident, Claremont hired Dittmer d/b/a ATD to extend certain walls in the school. Specifically, the project entailed extending certain walls in two rooms on the second floor of the school from their original height (11 ½ to 12 feet) up to the dome ceiling, which was at the highest point, 24 feet from the floor. Ramos was an employee of ATD, and Dittmer was self-employed doing business as ATD.

Plaintiffs commenced these consolidated actions against the defendants, the owner of the premises, and the lessee alleging, inter alia, violations of Labor Law §§ 200, 240 (1) and § 241 (6). In two separate motions Gothic moves to dismiss each plaintiff's claims under the Labor Law. Plaintiff Ramos moves for summary judgment on his claim pursuant to Labor Law §240(1). Claremont moves to dismiss Ramos' common-law negligence cause of action. Claremont cross moves to dismiss plaintiff Dittmer's Labor Law §240 (1) action. Ramos cross moves to amend the bill of particulars, and Dittmer cross moves for summary judgment on his claim pursuant to Labor Law §240 (1). Except for the cross motion by Ramos to amend his bill of particulars, the motions and cross motions are respectively opposed.

Facts

Upon his examination before trial, Dittmer testified as follows: On the date of the accident, he was performing interior renovations inside of Claremont Children's School located at 747 Amsterdam Avenue, New York. Dittmer was performing these renovations

as part of an agreement between Claremont and ATD, a company owned by Dittmer. The agreement is represented in the form of a one page "estimate" outlining the work Dittmer was to perform and the cost of the work. Dittmer did not hire any subcontractors to complete any work at Claremont. At the time of the accident, Dittmer had two employees - Anthony Ramos and Leo Colon. Dittmer was the only individual that supervised and instructed Ramos and Colon as to what to do. Further, Dittmer was the sole individual who determined how the work was to be done. At no time did Dittmer take instructions from anyone from Gothic.

In terms of equipment, Dittmer d/b/a ATD owned basic interior renovations tools and two ladders, a six-foot "A" frame ladder and a ten-foot straight ladder. Dittmer also owned a van which he used for his business which displayed the letters "ATD" for "Attention to Detail" and the company's telephone number. At no time did this plaintiff borrow any equipment from Gothic. Prior to beginning renovation work at Claremont, Dittmer took measurements of the interior. While taking measurements of the interior, Dittmer determined that the renovation work would require the use of scaffolds, which he rented. Dittmer explained to the rental company the nature of the work to be done and based upon this description, the company representative recommended that Dittmer rent four sections of scaffold to obtain the height needed. Based on the recommendation, Dittmer rented four sections of scaffold. Each section consisted of a steel outer frame, with locked in braces and a wood platform with railing around it. It was two and a half feet wide, seven feet long and six and a half feet high. Each section could be extended by putting another section on top of it. The scaffold had wheels with locks. Dittmer rented all four scaffolds as recommended and brought all four sections to the job site, but on the date in question, was inexplicably only using two scaffolds along with a ladder to reach the extended height needed. Dittmer would have either of his two workers come up on the scaffold and hold the ladder while working from it. If Dittmer was up on the scaffold alone, he would screw a piece of metal down to the platform of the scaffold to hold the ladder in place while working from it. Prior to the subject accident, while working from the ladder on top of the two scaffold sections inside of the first of the two rooms, Dittmer noticed that the scaffold would move side to side a little bit.

After completing the first room in about a week, Dittmer began working on the second room and again only set up two scaffolds although all four were available to use. The second room was approximately twenty feet by twenty-five feet and Dittmer was to build the wall up to the ceiling along the twenty foot length of the wall. The ceiling varied in height. The wall was eleven feet high before plaintiffs began working on it and plaintiffs were to extend the wall to sixteen feet at the lowest point of the ceiling and twenty-six feet at the highest point of the ceiling. After setting up the two scaffold sections to a height of thirteen feet, Dittmer began to do the metal framing of the wall. When Dittmer first began working in the

second room, he secured the scaffold by screwing a piece of metal to the wall. However, Dittmer only secured the scaffold to the wall when he was working up there by himself.

Dittmer was working in the second room for approximately four days prior to his accident. During those four days, he moved the scaffold section approximately six to eight times on each side of the wall. On the date in question, Dittmer was to complete spackling on the wall and he worked from a ladder placed on top of two scaffold sections. Dittmer testified that he could not recall whether he secured the scaffold to the wall and had not instructed his employees to secure the scaffold to the wall. When his accident occurred, Dittmer was working from the ten-foot straight ladder placed on top of the two scaffold sections at the highest portion of the wall. Dittmer personally decided to work on the ladder placed on top of the two scaffold sections. Dittmer was working from the ladder for approximately thirty minutes prior to his accident. As Dittmer was working from the ten-foot ladder placed on top of the two scaffold sections, his employee, plaintiff Ramos, was on the scaffold with him holding the ladder while Dittmer was on it. The upper portion of the ladder was not secured to the wall as Dittmer was working on it. Prior to the accident, Dittmer felt the scaffold move, and then felt the ladder drop straight down and he fell with it to the ground. Dittmer testified that at no time did he request that the other two scaffold sections be brought to where he was working and that there was nothing to prevent him from adding a third scaffold to extend the height of the platform at which he could work. Likewise, there was nothing preventing him from securing the scaffold to the wall.

Ramos' testimony regarding the events of the date of the accident were very similar. He received instructions only from Dittmer and Colon. Dittmer worked from a scaffold to extend the walls to the elevated heights of the ceiling. He would work on the platform of the scaffold to hand Dittmer tools. To reach the uppermost height of where the wall would extend to the ceiling, Dittmer used a ladder placed on the scaffold. The scaffold on which Dittmer worked was set up against the wall. Ramos testified that both he and Colon shared responsibility for checking that the locking mechanism of the wheels of the scaffold were engaged and in place. Prior to working on the scaffold, Ramos testified that he would make sure that the locking mechanism of the wheels were engaged. About an hour prior to the accident, Ramos observed Dittmer set up the ladder on top of the platform. Dittmer requested that Ramos hand Dittmer the ladder and that the ladder was in a closed position with the top leaning against the wall and the bottom resting on the wooden platform. Ramos then complied with Dittmer's direction that he go up on the scaffold and hold onto the ladder while Dittmer worked from it. Ramos held the ladder continuously for about an hour before the accident occurred. Ramos held that ladder by facing the wall and the rungs and holding onto both rails. While Ramos was holding the ladder, Dittmer was performing spackling, holding the spatula in one hand and the ladder in the other. Suddenly, Ramos testified, the

ladder and scaffold both moved away from the wall to the ground and both Ramos and Dittmer fell.

Mitchell Rutter testified on behalf of Gothic that Gothic had no involvement whatsoever in the hiring, management, supervision, direction, control or inspection of the work performed by ATD and plaintiffs. In fact, Rutter testified that Gothic was unaware of any construction work being performed by ATD and plaintiffs at the Claremont School at any time during the summer. Gothic only learned of the work performed by plaintiffs in the school about one week after the alleged accident.

Discussion

Motions by Gothic and Cross Motion by Claremont

In two separate motions, Gothic moves to dismiss each of the plaintiffs' claims pursuant to Labor Law §§ 200, 240(1) and 241(6), and for summary judgment on its claims for indemnification and attorney's fees from Claremont or, alternatively, for indemnification from Steven Dittmer d/b/a ATD. Claremont also cross moves to dismiss Dittmer's 240(1) action. To the extent that both parties move and cross move to dismiss Dittmer's labor cause of action on the ground that Dittmer was the sole proximate cause of the accident, the court will address the issue in the same section of the decision as provided below.

Labor Law §240(1)

The branch of the motion which is to dismiss Ramos' claim pursuant to Labor Law §240(1), is denied. While Gothic preliminarily notes that it is moving to dismiss Ramos' claim pursuant to this section, there is no discussion of the same in the motion.

Gothic and Claremont move and cross move, respectively, to dismiss the cause of action under Labor Law § 240(1), with regard to Dittmer, on the ground that this plaintiff's own actions were the sole proximate cause of his accident. Specifically, despite the availability of four scaffolds which would allow the injured plaintiff to safely reach higher in order to perform his work, the injured plaintiff chose to unsafely use two scaffolds and place a ladder on top of the two scaffolds. The branch of the motion by Gothic and the cross motion by Claremont to dismiss Dittmer's claim, pursuant to Labor Law §240 (1), are granted.

To prevail on a claim under Labor Law § 240(1), a plaintiff must establish an elevation related-injury and that a violation of the statute was a proximate cause of his or her injuries (*see Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [1997]; see also,

Rocovich, 78 NY2d at 514; *Bland*, 66 NY2d at 460; *Bahrman v Holtsville Fire Dist.*, 270 AD2d 438 [2000]; *Skalko v Marshall's, Inc.*, 229 AD2d 569 [1996]). Proximate cause is established where a "defendant's act or failure to act as the statute requires" was a substantial cause of the events which produced the plaintiff's injuries (*Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 561-562 [1993]; *Rodriguez v Forest City Jay Street Associates*, 234 AD2d 68, 69 [1996]; *Ekere v Airmont Industrial Park*, 249 AD2d 104, 105 [1998]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute (*see Zimmer*, 65 NY2d at 521), a Labor Law § 240(1) cause of action will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries *(see Tweedy v Roman Catholic Church of Our Lady of Victory*, 232 AD2d 630 [1996]; see also *Blake*, 1 NY3d at 289). The owner or contractor must breach the statutory duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them. The sole proximate cause defense generally applies where a plaintiff misused a safety device, removed a safety device, failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device (*see e.g. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006] [plaintiff's choice to use inadequate ladder, despite proper ladders readily available at site, was sole proximate cause of accident]; *Blake*, 1 NY3d at 291 [plaintiff's misuse of ladder was sole proximate cause of accident]; *Letterese v State of New York*, 33 AD3d 593, 593-594 [2006] [plaintiff's decision to use inadequate ladder despite availability of adequate ladders on site was sole proximate cause of accident]; *Negron v City of New York*, 22 AD3d 546, 547 [2005] [plaintiff's failure to have himself re-tied off was sole proximate cause of accident]; *Plass v Solotoff*, 5 AD3d 365, 367 [2004] [plaintiff's unilateral determination to use only one plank instead of the three available was sole proximate cause of accident], lv denied 2 NY3d 705 [2004]).

The evidence in this case indicates that Dittmer, the owner of the subcontracting business, unilaterally made the determination to use only two scaffolds, despite having all four scaffolds available to him for use. Dittmer's decision to use an improper device, i.e. the ladder leaning on top of the scaffold, was the sole proximate cause of the accident. The record reveals that Dittmer knew what height he had to work from and he had available sections of the scaffold to use to extend the scaffold but, instead, he used an improper set up, namely the ladder on top of an unsecured scaffold, leaning against the wall. The placement of the ladder on top of the scaffold and leaning against the wall was improper and unsafe as the angle of the ladder coupled with Dittmer's weight on the ladder, created a force which pushed the scaffold and the ladder off the wall. Worse yet, Dittmer did not secure the scaffold and the ladder to the wall. Under these circumstances, his actions were the sole cause of his injuries as a matter of law and he cannot recover for his injuries under Labor

Law § 240(1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City, supra; Marques v Suffolk County Sewer Agency,*272 AD2d 452 [2000]*; Tsangalidis v O.K.G. Professional Consultants,* 243 AD2d 627 [1997]; *Cannata v One Estate,* 127 AD2d 811 [1987]; *see also, Ossorio v Forest Hills S. Owners,* 251 AD2d 475 [1998]). Accordingly, the motion by Gothic and the cross motion by Claremont to dismiss Dittmer's claim pursuant to Labor Law §240(1), are granted.

Labor Law §241(6)

Labor Law § 241(6), by its very terms, imposes a *nondelegable* duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (*see also, Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501-502 [1993]; *Long v Forest-Fehlhaber,* 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]; *Allen v Cloutier Constr. Corp.,* 44 NY2d 290, 299-300 [1978], *rearg denied* 45 NY2d 776 [1978]). "An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*Rizzuto v L.A. Wenger Contr. Co.,* 91 N.Y.2d at 350, 670 N.Y.S.2d 816, 693 N.E.2d 1068).

In order to establish their Labor Law § 241(6) claims, plaintiffs must demonstrate that their individual injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common law standards of care (*Ross v Curtis–Palmer Hydro–Elec. Co.,* supra at 503–505; *Ares v State,* 80 NY2d 959 [1992]; *Fair v 431 Fifth Avenue Assocs.,* 249 AD2d 262 [1998]; *Vernieri v Empire Realty Co.,* 219 AD2d 593 [1995]; *Adams v Glass Fab, Inc.,* 212 AD2d 972 [1995]).

Here, except for 12 NYCRR 23–5.1(b) , all of the other Industrial Codes which plaintiffs allege were violated are either insufficient to form a basis for a Labor Law § 241 (6) violation, or inapplicable to the facts at hand. First, plaintiffs' labor law § 241(6) claim predicated upon a violation of the Administrative Code and Charter of New York City §26-228 and the Code of Federal Regulations §1910.1 and 1910.28 is dismissed because as a predicate to proving a violation of Labor Law § 241 (6), plaintiffs must prove a violation of a New York Industrial Code. Neither of the regulations here are part of the New York Industrial Code and are, in any event, too general to support a Labor Law § 241(6) claim. Further, 12 NYCRR §§23-1.4 and 23-1.5 are general safety directives, insufficient as a predicate for Labor Law §241(6) liability (*see Maldonado v Townsend Ave. Enters.*, 294 AD2d 207 [2002]; *Sihly v New York City Tr. Auth.*, 282 AD2d 337 [2001], *lv dismissed* 96

NY2d 897 [2001]; *Hawkins v City of New York*, 275 AD2d 634 [2000]). 12 NYCRR § 23–1.7 is inapplicable to the facts of this case and thus do not support the Labor Law § 241 (6) cause of action. §§ 23–1.7 (a) concerns overhead hazards; § 23–1.7 (b) relates to falling hazards caused by hazardous openings or related to bridge or highway overpass construction; §§ 23–1.7 (c) concerns drowning hazards; § 23–1.7 (d) concerns slipping hazards; § 23–1.7 (e) concerns tripping and other hazards; § 23–1.7 (f) concerns vertical passageways; § 23–1.7 (g) concern air-contaminated or oxygen deficient work areas; and § 23–1.7 (h) concern corrosive substances. Plaintiffs have not submitted any evidence indicating that these regulations were violated and that such violation was the proximate cause of plaintiffs' accident. 23-1.21 provides general specifications for ladders and ladder ways. This section is inapplicable to the facts at hand. Here, there is no factual basis for imposing liability under 12 NYCRR 23–1.21, since the condition of the subject ladder is not at issue.

The branch of the motion by Gothic which is to dismiss plaintiffs' Labor Law § 241(6) claims based upon a violation of 23-5.1(b), is denied. 12 NYCRR 23–5.1(b) states as follows:

> Scaffold footing or anchorage. The footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction. Unstable supports, such as barrels, boxes, loose brick or loose stone, shall not be used.

The allegation by Ramos is that the scaffold which fell was inadequately secured at the time Dittmer was performing his spackling work on the wall extension. The record indicates that the scaffold was not "secure against movement" as evidenced by the movement of the scaffold while Dittmer was on top of the ladder which was leaning on the scaffold. Furthermore, the record indicates that Dittmer failed to secure the scaffold to the wall as he had previously done while working on the project and that Dittmer failed to use the adequate number of scaffold sections to reach the appropriate height for the undertaking.

Accordingly, the branches of the motion which are to dismiss the claims of Ramos and Dittmer pursuant to Labor Law §241 (6) based upon a violation of 23–5.1(b), are denied. The violation of an explicit and concrete provision of the State Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable. In turn, the owner or general contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241 (6), including contributory and comparative negligence (*see, Rizzuto v Wenger Contr. Co.,* 91 NY2d 343 [1998]; Long v Forest-Fehlhaber, 55 NY2d 154 [1982]). As for

plaintiff Dittmer, issues of fact exist as to this plaintiff's comparative negligence (*see Rizzuto v Wenger Contr. Co., supra; Long v Forest–Fehlhaber,* 55 NY2d 154 [1982]; *Amirr v Calcagno Constr. Co.,* 257 AD2d 585 [1999]).

Labor Law 200/ Common Law Negligence

Gothic also moves to dismiss plaintiffs' claims under Labor Law § 200, and common-law negligence. 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, 127–128 [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, 868 [2005]; *Aranda v Park East Constr.,* 4 AD3d 315 [2004]; *Akins v Baker,* 247 AD2d 562, 563 [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, 61 [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 exercise 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 [2011]).

Here, the accident arose out of the means and methods Dittmer employed in performing his work. It is undisputed that Gothic did not exercise any authority or control over plaintiffs' work, let alone the specific means and methods Dittmer employed in performing his work. Thus, Gothic cannot be held liable under plaintiffs' Labor Law § 200 and common-law negligence claims.

The branch of Gothic's motion and the separate motion by Gothic for contractual indemnification from Claremont is withdrawn by counsel in her affidavit dated November 14, 2011. The branch of the motion by Gothic which is for summary judgment on its claims for common-law indemnification against Dittmer d/b/a ATD, is granted. The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party

(*see* Curreri v Heritage Prop. Inv. Trust, Inc., 48 AD3d 505, 507 [2008]). "If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner" (*id.* at 507). To establish their claim for common-law indemnification, Gothic "[is] required to prove not only that they were not negligent, but also that the proposed indemnitor [ATD] was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v Carrera Realty Corp*., 32 AD3d 874, 875 [2006]). Here, Gothic made a showing of the same. There is no evidence in the record that Gothic was involved in any way with the renovation work at issue and the record contains evidence of Dittmer's (d/b/a ATD) negligence.

Cross Motion by Ramos to amend the bill of particulars

Ramos' cross moves to amend the bill of particulars to assert additional violations of the Industrial Code as they relate to this plaintiff's Labor Law §241 (6) claim. Specifically, Ramos seeks to add the following sections of the Industrial Code: 23-1.21, 1.7 (b), 1.15, 1.16, 1.17, 1.19, 1.32, 2.3, 2.4, 3.2, 3.3, 3.4, 5.1, 5.2, 5.3 and 5.4. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*see, Trataros Constr., Inc. v New York City Hous. Auth.,* 34 AD3d 451 [2006]; *Surgical Design Corp. v Correa,* 31 AD3d 744 [2006]; *Melendez v Bernstein,* 29 AD3d 872 [2006]). While the cross motion is unopposed, the proposed amendment is palpably insufficient or patently devoid of merit and should not be permitted (*see, Morris v Queens Long Is. Med. Group, P.C.,* 49 AD3d 827 [2008]). Regarding the above proposed amendments, section, 23-1.7(b) is inapplicable as it relates to falling hazards caused by hazardous openings and falling hazards relating to bridge or highway overpass construction. 12 NYCRR 23–1.15 sets standards for safety railings. The section is inapplicable here because plaintiffs were not provided with safety railings (*see,* Fusca v A & S Const., LLC, 84 AD3d 1155 [2011]; Forschner v Jucca Co., 63 AD3d 996 [2009]; *Kwang Ho Kim v D & W Shin Realty Corp.,* 47 AD3d 616 [2008]). 12 NYCRR 23–1.16, which sets standards for safety belts, is not applicable because it is undisputed that plaintiff was not provided with any safety belts (*see, Forschner v Jucca Co.,* supra; *Rau v Bagels N Brunch, Inc.,* 57 AD3d 866 [2008]; *Smith v Cari, LLC,* 50 AD3d 879 [2008]; *see, also Clavijo v Universal Baptist Church,* 76 AD3d 990 [2010]). 12 NYCRR 23–1.17, which set forth standards for safety railings, safety belts, and life nets, respectively, are inapplicable here because plaintiff was not provided with any of these devices (*see, Dzieran v. 1800 Boston Rd., LLC.,* 25 AD3d 336, 337 [2006]; *Luckern v Lyonsdale Energy Ltd. Partnership,* 281 A.D.2d 884 [2001]). The plain language of 12 NYCRR 23-1.19 requires the use catch platforms, "during the construction of exterior masonry walls of any building or other structure, except chimneys." This section is inapplicable herein. Similarly,

12 NYCRR 23-1.32 [warning signs], 23-2.3 [structural steel assembly], 23- 2.4 [flooring requirements in tiered building construction being erected by tower crane or derrick], 23-3.2 [general demolition requirements], 23-3.3 [demolition by hand], 23-3.4 [mechanical methods of demolition], 23-5.2 [specific scaffold approval], 23-5.3 [general provisions for metal scaffolding] and 23-5.4[tubular welded frame scaffolds], all do not apply to the facts at hand.

Motion by Ramos for summary judgment on his claim pursuant to Labor Law §240(1)

Labor Law § 240(1) imposes a non-delegable duty upon the owner and contractor to supply necessary security devices for workers at an elevation, to protect them from falling (*see, Bland v Manocherian,* 66 NY2d 452 [1985]; *Rodriguez v. Forest City Jay St. Assoc.,* 234 A.D.2d 68 [1996]). A violation of this duty results in absolute liability where the violation was the proximate cause of the accident (*see Crespo v Triad, Inc.,* 294 A.D.2d 145 [2002]). Ramos made a prima facie showing that he was not provided with the adequate protection required, and nothing in defendant's submissions create material issues of fact in this regard. There is no dispute that Ramos was working at a height of approximately 13 feet above the ground when the scaffold tilted and went straight down and there were no protective devices in place to protect him from falling (*see, Vanriel v A. Weissman Real Estate,* 262 A.D.2d 56 [1999]).

There is no issue of fact as to whether the defect or insufficiency in the provided protective devices constituted a proximate cause of plaintiff's accident. A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause. It does not matter whether plaintiff's fall was the result of the scaffold falling over, or its tipping, or was due to his employer's weight shifting the scaffold. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident (*see, Anderson v International House,* 222 A.D.2d 237 [1995]). Accordingly, the motion by Ramos for summary judgment in his favor on his claim pursuant to Labor Law §241 (1), is granted.

Motion by Claremont and Cross Motion by Dittmer

The motion by Claremont to dismiss Ramos' common-law negligence cause of action is denied, as moot as this plaintiff has withdrawn his common law and Labor Law §200 claims. The cross motion by Dittmer for summary judgment on his claim pursuant to Labor Law §240 (1), is denied for reasons stated above in the paragraphs pertaining to Gothic's motion to dismiss the same.

Conclusion

The branch of the motion by Gothic which is to dismiss Ramos' claim, pursuant to Labor Law § 240(1), is denied. The branch of the motion by Gothic and the cross motion by Claremont to dismiss Dittmer's claim, pursuant to Labor Law § 240(1), are granted.
The branches of the motion by Gothic which are to dismiss the claims of Ramos and Dittmer pursuant to Labor Law § 241(6), based upon a violation of 23–5.1(b), are denied. The branches of the motion which are to dismiss plaintiffs' Labor Law §241(6) claims, based on other sections of the Industrial Code are granted. The branches of the motions by Gothic which are to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims, are granted. The branch of Gothic's motion and the separate motion by Gothic for contractual indemnification from Claremont is withdrawn by counsel in her affidavit, dated November 14, 2011. The branch of the motion by Gothic which is for summary judgment on its claims for common-law indemnification against Dittmer d/b/a ATD, is granted. The motion by Ramos for summary judgment in his favor on his claim, pursuant to Labor Law §241 (1), is granted. The motion by Claremont to dismiss Ramos' common-law negligence cause of action is denied as moot as this plaintiff has withdrawn his common law and Labor Law §200 claims. The cross motion by Ramos to amend the bill of particulars to assert additional Industrial Code violations is denied.

The cross motion by Dittmer for summary judgment on his claim, pursuant to Labor Law §240 (1), is denied.

Dated: March 1, 2012

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J.S.C.