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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21

Justice

Justice

Index Number : 401598/2009
PANTELIS, MIKE
vs.
KOCH SKANSKA
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 401598/09

MOTION DATE 8/23/12

MOTION SEQ. NO. 003

NNEL

(And a third-party action).

The following papers, numbered 1 to 19 were read on this motion and cross motions for summary judgment

Notice of Motion; Affirmation — Exhibits A-O	No(s). 1; 2
Notice of Cross Motion–Affirmation — Exhibits 1-2 [Affidavits]	No(s). 3-6
Notice of Cross Motion–Affirmation — Exhibits A-C	No(s). 7-8
Affirmation (in opposition to plaintiff's cross motion and reply to plaintiff's opposition) — Exhibit A	No(s). 9
Replying Affirmation (in response to partial opposition)	No(s). 10
Replying Affirmation — Exhibits 3-4, 5 [Affidavit]	No(s). 11-12
Supplemental Affirmation	No(s). 13
Supplemental Affirmation; Supplemental Affirmation	No(s). 14; 15
Letter; Further Supplemental Affirmation	No(s). 16; 17
Second Supplemental Affirmation; Second Supplemental Affirmation	No(s). 18; 19

HON. MICHAEL D. STALLMAN

HON. MICHAEL D. STALLMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/21/12
New York, New York

, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

MIKE PANTELIS,

Plaintiff,

-against-

Index No. 401598/09

KOCH SKANSKA and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants.

----------X

KOCH SKANSKA and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590602/09

LIBERTY MAINTENANCE, INC.,

Third-Party Defendant.

Decision and Order

Hon. Michael D. Stallman, J.:

This action concerns a workplace accident of May 28, 2008, when plaintiff, a painter-sandblaster then employed by third-party defendant Liberty Maintenance, Inc. (Liberty), fell from an allegedly unsecured scaffold during his work on the Triborough Bridge-Wards Island Viaduct. In this motion sequence number 003, defendants Koch Skanska (Koch) and the Triborough Bridge and Tunnel Authority (TBTA; together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and for summary judgment on their third-party claim against Liberty for contractual indemnification. Liberty cross-

moves for summary judgment dismissing the complaint against defendants. Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment in his favor on his claim pursuant to Labor Law § 240 (1).

BACKGROUND

Plaintiff alleges that he was working on a platform when he fell approximately 10 feet and was injured. He contends that he fell because there was no overhead safety line from which he could tie off, and because the planking he was standing on was unsecured. Defendants and Liberty assert that plaintiff chose not to tie off on the safety line and that the planks on the platform were properly secured, i.e., that plaintiff was the sole proximate cause of his accident.

The Photographs

The existence and admissibility of photographic evidence have been the subject of several court orders and the deposition of plaintiff on May 21, 2012. Of particular import are three photographs (A, B and C [Demetri 6/25/12 Supp. Affirm., Ex. C]) of the inside of the containment area which may, or may not, show whether there was a safety line present and whether the planks in the platform were properly secured.

"A photograph is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph

accurately represents that which it purports to depict" (*Corsi v Town of Bedford*, 58 AD3d 225, 228-229 [2d Dept 2008]). "The criteria for the use of photographs to show a defect [are] that they be taken reasonably close to the time of the accident and that the condition at the time of the accident be substantially as shown in the photographs ..." (*Melendez v New York City Tr. Auth.*, 196 AD2d 460, 461 [1st Dept 1993]). "[P]hotographs [are] properly authenticated by testimony that they fairly and accurately represent[] the condition of the [accident site] on the date of the accident" (*Diakovasilis v Bright & Sunny Corp.*, 265 AD2d 294, 294 [2d Dept 1999]). "[U]nauthenticated photographs [do] not constitute evidentiary proof in admissible form so as to raise a triable issue of fact ..." (*Charlip v City of New York*, 249 AD2d 432, 433 [2d Dept 1998]). "[P]hotographs are of no value unless they substantially depict the scene at the time of the accident" (*Kaplan v Einy*, 209 AD2d 248, 251 [1st Dept 1994], citing *Melendez*, 196 AD2d at 461).

Here, plaintiff was not exactly sure who took the photographs ("I think it was Vladimir [another sandblaster]" [Demetri 6/25/12 Supp. Affirm., Ex. B, Plaintiff's 5/21/12 Depo., at 10]), he was not present when the photographs were taken (*id.* at 11), and he was unable to tell exactly when the photographs were taken ("[I]t have to be before my accident" [*id.* at 11, 19, 53]; "It could be a week, could be a few days. I don't remember

exactly" [*id.* at 21]). Plaintiff identified photograph A as depicting "the way the area where [he was] working looked right before [his] accident" (*id.* at 7-8). "[Is] this exactly the way the area looked right before you fell? Yes, ma'am" (*id.* at 10). "[Does] photograph A show[] where you were standing right before you fell? ... Yes. It does" (*id.* at 15). Plaintiff also testified that the boards in the picture were not tied (*id.* at 9, 51).

However, plaintiff testified that photograph B does not "show the area where [plaintiff] was standing right before [his] accident" (*id.* at 23). Photograph B shows a "[d]ifferent place" (*id.* at 25). Photograph C shows "the same area of the bridge where [his] accident took place" (*id.* at 27), but plaintiff could not tell from looking at photograph C where he was right before his accident (*id.* at 27). Of the three photographs, photograph A best shows where plaintiff's accident took place (*id.* at 29).

The Court finds that, even if photograph A were taken one week before the accident, rather than just a few days, it was still taken reasonably close to the time of the accident.

The Court concludes that of the three photographs at issue, only photograph A has been authenticated and is admissible in evidence.

In addition, the Court reiterates the part of its April 17, 2012 order that stated: "However, Liberty is not precluded,

either on a motion for summary judgment or at trial, from offering testimony from witnesses as to their observations of the work site, so long as such testimony is based on each witness's own observations and independent recollection, and not based on a review of any photographs not previously exchanged during discovery."

Plaintiff's Expert

Although plaintiff's expert's affidavit was untimely submitted, the Court will consider it in the absence of any wilfulness or prejudice (*see e.g. Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555 [1st Dept 2011]; *Downes v American Monument Co.*, 283 AD2d 256, 256 [1st Dept 2001]). However, the Court finds that the expert's affidavit is little more than a paraphrase of the various Industrial Code provisions allegedly violated and plaintiff's other allegations. It ignores the testimony of defendants' and Liberty's deponents, and makes assertions based on photographs which are not identified. The sum total is completely conclusory, and thus shall have no bearing on the determination of this matter.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 (1) provides, in relevant part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such

> places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

"Labor Law § 200 codifies the common-law duty to maintain a safe work site" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1046 [2d Dept 2012]). There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: whether the injuries resulted from a dangerous condition (*see e.g. Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940 [2d Dept 2009]), or from the means and methods by which the work was done. This case involves the means and methods by which the work was done (*see e.g. Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Supervision and control are preconditions to liability under Labor Law § 200 when the accident arises from the contractor's means and methods of performing the work. "In other words, the party against whom liability is sought must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition [internal quotation marks and citation omitted]" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 48 [1st Dept 2012]). "'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the

manner in which the work is performed' [citation omitted]" (*Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012]).

TBTA is the owner of the Triborough Bridge, and Koch was the general contractor for the project that included the sandblasting and painting of the bridge and viaduct. No one from either defendant told plaintiff where or how to do his job, neither defendant provided plaintiff with tools or safety equipment, and neither defendant entered the containment area (Ostrover 9/9/11 Affirm., Ex. G, Plaintiff's 2/22/10 Depo., at 113-116). John Pouso, Koch's safety director, was basically in charge of safety for Koch's employees (Ostrover 9/9/11 Affirm., Ex. H, Pouso Depo., at 17-18). His inspections of scaffolds were limited to Koch's scaffolds (*id.* at 58-60), and Koch employees did not enter the containment areas or inspect Liberty's scaffolds once they were set up (*id.* at 60-64). In addition, Pouso never saw a TBTA site inspector enter the containment area (*id.* at 83).

Daniel Papa was the TBTA's construction project manager. Papa himself never went inside a containment area for the purpose of making an inspection (Ostrover 9/9/11 Affirm., Ex. I, Papa Depo., at 68), but it was not Koch's employees' responsibility to make sure that Liberty's workers had proper anchorage points (*id.* at 70). Papa did nothing to ensure that

Liberty's workers had safety cables overhead, or that the scaffolding was secure, or that Liberty's workers were using their personal protective equipment within the containment area (*id.* at 72).

Joshua Bowley was Liberty's health and safety officer, with the responsibility of overall job site safety compliance (Ostrover 9/9/11 Affirm., Ex. J, Bowley Depo., at 10). His supervisor for the project was Dimo Kalikatzaros (Kalikatzaros) (*id.* at 25). It was Kalikatzaros who would tell the Liberty workers where to work each day (*id.* at 30). Liberty provided its workers with their safety equipment (*id.* at 43-44). As Liberty's health and safety officer, it was Bowley's responsibility to ensure that scaffolding was secure and that Liberty's workers had a proper place to tie off (*id.* at 155). In May 2008, no one from defendants told plaintiff where or how to do his job, provided him with any tools or equipment for his job, or supervised his work (*id.* at 84-85). Liberty was responsible for the way in which plaintiff did his work (*id.* at 86).

Kalikatzaros was Liberty's foreman and supervisor for, among other things, plaintiff's blasting crew (Ostrover 9/9/11 Affirm., Ex. K, Kalikatzaros Depo., at 15, 17, 94). According to Kalikatzaros, no one from defendants entered into the containment area, provided plaintiff with tools or safety equipment, told plaintiff where or how to do his job (*id.* at 45-47), or

supervised him (*id.* at 86-87). Kalikatzaros, however, noticed that, at the time of his accident, plaintiff was wearing his safety harness (*id.* at 41, 58) and was tied off to the safety cable (*id.* at 58; 54-55 [there was a safety cable inside the containment area, and while Kalikatzaros was inside the containment area, he saw plaintiff tied off]). Liberty's blasters, including plaintiff, set up the planking inside the containment area at the beginning of the day of the accident (*id.* at 49-50; 53-54, 90-91, 96 [plaintiff attached his planking to two cables with ropes]; 97-98 [plaintiff himself set up the plank he was working on on two cables]). Kalikatzaros inspected the planking (*id.* at 51); no one from defendants had anything to do with setting up or inspecting the planking (*id.* at 59-60). After the accident, Kalikatzaros again inspected the plank, and everything was the way it was supposed to be: there were two cables under the plank, and they were secured to the plank with two ropes, the planking was tight and secure, and the safety cable was present above (*id.* at 167-169; 79-80 [everything was in place, but Kalikatzaros did not see plaintiff's lanyard]).

George Manolakos was a Liberty journeyman painter and supervisor (Ostrover 9/9/11 Affirm., Ex. L, Manolakos Depo., at 7-10; Kalikatzaros Depo., at 44). According to Manolakos, Kalikatzaros told plaintiff what to do each day, and Liberty provided plaintiff with tools and safety equipment (Manolakos

Depo., at 16-20). Plaintiff himself set up the planking he was standing on at the time of the accident (*id.* at 78-79). Neither defendant was responsible for inspecting the planks in the containment area, and no one from either defendant entered the containment area prior to or on the day of the accident (*id.* at 79-80, 40).

As this evidence makes clear, neither defendant had the authority to supervise or control plaintiff's work, nor had either defendant responsibility for the manner in which plaintiff performed his work. Accordingly, the parts of defendants' motion and Liberty's cross motion which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims are granted.

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in pertinent part:

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

"Labor Law § 240 (1) provides exceptional protection for workers against the 'special hazards' that arise when either the work site itself is elevated or is positioned below the level

where materials or load are being hoisted or secured [internal quotation marks and citation omitted]" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 615 [2d Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). In order "[t]o establish liability on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 564-565 [2d Dept 2011]). However, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability [under section 240 (1)]" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *see also Paz v City of New York*, 85 AD3d 519, 519 [1st Dept 2011] ["Specifically, if adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, then liability under section 240 (1) does not attach"]).

The evidence discloses the following:

About a week before the accident, Liberty's rigging crew installed the steel safety cable inside the containment

area, and the safety cable was available to plaintiff to tie off on, about five feet above the plank on which plaintiff was standing (Kalikatzaros Depo., at 126-127; Manolakos Depo., at 37-38, 76, 109-110; *but see* Plaintiff's Depo., at 71 [plaintiff was not tied off at the time of the accident because "There was no cable to tie off"; however, on the same page, plaintiff also attested that he was not wearing a harness, and a little later, he testified that he left his harness and lanyard in the trailer (*id.* at 89-90)]).

The wooden planks used by Liberty's blasters were set up by the blasters, including plaintiff, who were also responsible for inspecting and securing them before working. Bowley, Liberty's health and safety officer, also inspected the pick scaffold system every day (Plaintiff's Depo., at 58-59, 70, 255; Kalikatzaros Depo., at 49; Bowley Depo., at 10, 90, 132, 155). Kalikatzaros was also responsible for inspecting the wooden planking, ropes around the planks, ties, supporting cables and safety cables before plaintiff started working (Kalikatzaros Depo., at 51, 114-119). Before the accident, Kalikatzaros and Manolakos checked each plank inside the containment area for safety (Manolakos Depo., at 121-123).

Mariusz Zapisek was a Liberty journeyman painter. He testified that the planks inside the containment area were tied off to the cable with rope at each end, and Zapisek could reach

the safety cable to tie off to when he was standing on the plank. When the work was progressing, the planks were always tied down (Zapisek Depo., at 37-38, 42, 100-101).

Plaintiff set up his own planking on the day of the accident (Kalikatzaros Depo., at 50; Manolakos Depo., at 78-79). He attached the plank to two cables, then secured the plank to cables with two ropes (Kalikatzaros Depo., at 53-54, 90-91, 95-99).

Before the accident, Kalikatzaros saw plaintiff tied off (Kalikatzaros Depo., at 54, 125). After the accident, Manolakos saw that plaintiff's plank was tied onto support cables, and that plaintiff was wearing his harness (Manolakos Depo., at 136).

After the accident, Kalikatzaros and Manolakos went into the containment area to inspect the area where plaintiff had been working. They found that the plank was fine, safe, secure and tightly tied with rope on each side to the support cables, and that the safety cable above was still in place (Kalikatzaros Depo., at 79-80, 167-169; Manolakos Depo., at 68-69, 141-144). In addition, after the accident, Kalikatzaros told Zapisek to finish plaintiff's job. Zapisek checked plaintiff's plank to make sure it was safe by shaking it. He saw that the ropes on both ends of the plank and the plank itself were secure. When Zapisek worked on plaintiff's plank, he tied off. The safety

line was above him (Zapisek Depo., at 46-47, 145-146, 151).

Within minutes after the accident, Kalikatzaros saw plaintiff outside the containment area and plaintiff was not wearing a safety harness. However, Manolakos had already removed plaintiff's coverall, harness and "everything" after the accident (Kalikatzaros Depo., at 84-85, 157).

The May 29, 2008 accident form (Ostrover 9/9/11 Affirm., Ex. N) contains the following entries: "Describe the incident: Employee alleges that he stepped onto the work scaffold and the scaffold went down causing him to fall. The employee allegedly fell on to the support cables for the platform and then landed on the metal deck platform." "Describe any contributing factors which may have caused the incident: lack of awareness to surrounding work area; Not wearing fall protection." "Additional notes: Employee was not wearing his fall protection equipment at the time of the incident." "The employee has reviewed this report and agrees with its contents. /signed/ Mike Pantelis" (*see also* Bowley Depo., at 82-83 [Bowley wrote down in the accident report what Pantelis dictated to him]).

In light of the conflicting evidence presented above, the parts of defendants', Liberty's and plaintiff's motion and cross motions which seek summary judgment on plaintiff's Labor Law § 240 (1) claim must be denied. Issues of fact exist as to whether plaintiff himself was the sole proximate cause of his

accident.

Labor Law § 241 (6) provides, in relevant part:

> All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

The Commissioner's rules are set forth in the Industrial Code, 12 NYCRR Part 23. "Labor Law § 241 (6) imposes a *nondelegable duty* ... upon owners and contractors to provide reasonable and adequate protection and safety to [construction workers] [internal quotation marks and citations omitted]" (*Forschner v Jucca Co.*, 63 AD3d 996, 998 [2d Dept 2009]). "To recover under Labor Law § 241 (6), a plaintiff must establish that, in connection with construction, demolition, or excavation, an owner or general contractor violated an Industrial Code provision which sets forth specific applicable safety standards" (*Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d at 1047).

In his bills of particulars, plaintiff alleges that defendants violated no less than 19 provisions of the Industrial

Code, every one of which has multiple subsections which are left unaddressed until his cross motion. The Court deems all the provisions and subdivisions that plaintiff has not expressly specified in his motion papers to be abandoned.

Section 23-1.16 (b) provides:

> Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

Although this section has been found sufficiently specific as to serve as a predicate for a section 241 (6) claim (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560 [1st Dept 2010]), the evidence before the Court makes it impossible to rule on the issue of whether this provision was violated. While there is no doubt that Liberty provided plaintiff with the proper harness and lanyard, and other safety devices for his protection, it is possible that the safety line was not present; it is possible that plaintiff chose not to wear the harness and lanyard; and it is possible that plaintiff chose not to tie off on the safety line, both of which latter circumstances would demonstrate that

this provision was not violated. Because issues of fact remain, the parts of defendants' and Liberty's motion and cross motion seeking dismissal of plaintiff's section 241 (6) claim based on 12 NYCRR 23-1.16 (b) are denied.

Section 23-1.16 (e) pertains to lifelines, and is inapplicable in this matter. Plaintiff alleges that defendants failed to provide a safety line, not that the safety line provided failed to comply with this section. Thus, the parts of defendants' and Liberty's motion and cross motion which seek summary judgment dismissing the 241 (6) claim based on 12 NYCRR 23-1.16 (e) are granted.

Section 23-5.1 (b) governs scaffold footing or anchorage. It requires that scaffolds' footing 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." This section is inapplicable. There is no evidence that an improper footing or anchorage of the scaffold was a causative factor in plaintiff's accident.

The same may be said for section 23-5.1 (c) (2). The provision requires that "[e]very scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement." Whether there was adequate bracing or not, there is no evidence that a lateral movement of the scaffold caused or

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contributed to plaintiff's injuries.

Plaintiff rests his contention that section 23-5.1 (e) (1) was violated on its last sentence: "Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place." There is no evidence that the scaffold planks were not laid tight, and plaintiff asserts only that they were not securely fastened. Since the regulation only requires that "inclined planking" be securely fastened, and there is no evidence that the subject planking was inclined, this provision is inapplicable.

Industrial Code § 23-5.1 (h) governs scaffold erection and removal, and requires that "[e]very scaffold shall be erected and removed under the supervision of a designated person." This provision does not apply here. What plaintiff is alleging is that the scaffolding was improperly erected because it had no safety line and that the planks were not secured. That is not the same as asserting that the scaffold was not erected under the supervision of a designated person.

Section 23-5.1 (j) (1) requires that "[t]he open sides of all scaffold platforms [except certain inapplicable kinds of platforms], shall be provided with safety railings constructed and installed in compliance with this Part (rule)." Plaintiff alleges that the wooden plank he was standing on was about 10 feet above the metal decking (Plaintiff's Depo., at 60).

However, Manolakos, a Liberty journeyman painter and supervisor who was in the same containment area as plaintiff, attests that plaintiff was about six feet above the deck at the time of his accident (Manolakos Depo., at 31-32, 35). The discrepancy in testimony precludes a finding as to whether 12 NYCRR 23-5.1 (j) (1) was violated or not.

Section 23-5.8 (a) pertains to all suspended scaffolds, requiring: "Inspection before installation. All load-carrying parts or components and means of suspension including adequacy of anchorage or support of every suspended scaffold shall be inspected before such scaffold is installed."[1] There is no evidence that this regulation was violated, no evidence that any of the materials that constituted the scaffold were defective in any way, or that the materials were not inspected prior to their being installed in the scaffold. Dismissal of plaintiff's section 241 (6) claim, as based on this provision, must be granted.

Industrial Code § 23-5.8 (c) (1) requires that "[t]he installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision

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[1] The parties did not address a threshold question of whether the "pick scaffold" in this case was, in fact, a suspended scaffold governed by Industrial Code § 23-5.8.

of a designated person."[2] The evidence indicates that Liberty's riggers set up the cables within the containment area a few days before the accident, and that the blasters, including plaintiff, set up the planks on which they stood. The only evidence before the Court with regard to whether the set up of the containment area was supervised by a designated person is the affidavit of Sergio DeOliveira, Liberty's foreman for the rigging crew, who says that "[a]s the foreman of the rigging crew, it was my responsibility to prepare and set up the containment area underneath the bridge in order to have the other Liberty Maintenance employees perform their work on the bridge, which consisted of abrasive blasting followed by painting of the bridge" (DeOliveira 12/6/11 Aff., ¶ 2). There is no evidence that contradicts this testimony. Therefore, as set up of the containment area, and the scaffold within, was supervised by a designated person, dismissal of plaintiff's section 241 (6) claim, as based on 12 NYCRR 23-5.8 (c) (1), must be granted.

Section 23-5.8 (g), in relevant part, requires that "[e]very suspended scaffold shall be tied in to the building or other structure at every working level." There is no evidence that the pick scaffold that plaintiff was using was defective in this way. While plaintiff asserts that the planks were not

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[2]While plaintiff alleges only a violation of section 23-5.8 (c), his papers make clear that he is asserting a violation of only subsection (1) of section (c).

properly secured, he does not allege that they were not tied to the bridge. Thus, the allegation does not reflect a violation of this section, and the parts of defendants' and Liberty's motion and cross motion which seek dismissal of plaintiff's section 241 (6) claim, based on this provision, are granted.

As for section 23-5.8 (h), no one has testified that the planks on which the blasters stood were supposed to overlap or be nailed in place. Rather, the testimony reflects that the planks were supposed to rest on cables, so that they could be moved from one location to another when the blasters finished in one area and moved on to another. There is no evidence that this section was violated.

Lastly, plaintiff alleges that defendants violated section 23-1.30, which governs illumination in the workplace. "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work ... ." Liberty's Bowley, Kalikatzaros, Manolakos and Zapisek testified that the containment area was surrounded by non-see-through tarpaulins that nevertheless let sunlight and daylight through, and that each blaster was also provided with a light (Bowley Depo., at 56; Kalikatzaros Depo., at 61-62; Manolakos Depo., at 41; Zapisek

Depo., at 39-41). Although Liberty's Jose Claudio Rocha attests that little light came through the tarps (Rocha 11/15/11 Aff., ¶ 9), at no time does plaintiff demonstrate, by any kind of evidence indicating what amount of foot candles of lighting was present that day, that this provision was violated. Dismissal of plaintiff's section 241 (6) claim on the basis of 12 NYCRR 23-1.30 shall be granted.

Contractual Indemnification

The Koch/Liberty subcontract, in its INSURANCE AND INDEMNIFICATION RIDER, required Liberty to procure COMMERCIAL GENERAL LIABILITY insurance coverage (Section III, at 2-3 of 7). Section VI - ADDITIONAL INSURED ENDORSEMENTS, provides that "[i]nsurance policies ... shall be endorsed to name Owner [TBTA] ... Koch Skanska, Inc. ... as additional insureds" (Section VI, at 4 or 7). Section VIII, the HOLD HARMLESS AGREEMENTS/INDEMNIFICATION AGREEMENT provides:

> To the fullest extent permitted by law, the Subcontractor [Liberty] shall indemnify, hold harmless and defend the Contractor [Koch], Owner [TBTA] ... from and against all claims, damages, demands, losses, expenses, causes of action, suits or other liabilities, (including all costs and reasonable attorney's fees), including employment related liability claims arising out of or resulting from the performance of Subcontractor's work under the Subcontract, provided any such claim, damage, demand, loss or expense is attributable to bodily injury ... to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or

> indirectly employed by him or anyone for whose acts he may be liable, regardless whether it is caused in part by a party indemnified hereunder.

(Section VIII, at 6 of 7).

Contrary to Liberty's contention, this provision is valid and enforceable. It contains the savings clause, "to the fullest extent permitted by law," and therefore envisions partial indemnification. Thus, there is no violation of General Obligations Law § 5-322.1 (*see e.g. Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]; *Smith v Broadway 110 Devs., LLC*, 80 AD3d 490, 491 [1st Dept 2011]).

Although the accident arose out of Liberty's work, there is a question as to whether plaintiff was the sole proximate cause of his injuries. Thus, no determination of Liberty's negligence, or lack thereof, has been made, and Liberty's obligations under the provision have yet to be triggered. In addition, the possibility of a finding of defendants' negligence and liability under Labor Law § 241 (6) remains. Thus, any determination of Liberty's possible obligation to indemnify defendants pursuant to their contract is premature.

CONCLUSION

Accordingly, it is

ORDERED that the parts of defendants' motion and Liberty Maintenance, Inc.'s cross motion that seek summary

judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims are granted; and it is further

ORDERED that the parts of defendants' motion and Liberty Maintenance, Inc.'s cross motion that seek summary judgment dismissing plaintiff's Labor Law § 240 (1) claim are denied; and it is further

ORDERED that the parts of defendants' and Liberty Maintenance, Inc.'s motion and cross motion that seek summary judgment dismissing plaintiff's section 241 (6) claim based on 12 NYCRR 23-1.16 (b), 23-5.1 (j) (1)are denied; and it is further

ORDERED that the parts of defendants' and Liberty Maintenance, Inc.'s motion and cross motion which seek summary judgment dismissing the 241 (6) claim based on Industrial Code §§ 23-1.16 (e), 23-5.1 (b), 23-5.1 (c) (2), 23-5.1 (e) (1), 23-5.1 (h), 23-5.8 (a), 23-5.8 (c) (1), 23-5.8 (g), 23-5.8 (h), and 23-1.30, as well as the other sections of the Industrial Code which were alleged, but not addressed by plaintiff, are granted; and it is further

ORDERED that the part of defendants' motion which seeks summary judgment on their contractual indemnification claim is denied; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: November 21, 2012
New York, NY

ENTER:

J.S.C.

HON. MICHAEL L. STALLMAN