Baez-Rendon v 250 Bowery Project LLC
2012 NY Slip Op 33550(U)
October 2, 2012
Supreme Court, New York County
Docket Number: 113354/08
Judge: Paul G. Feinman

FILED: NEW YORK COUNTY CLERK 10/03/2012 INDEX NO. 113354/2008
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 113354/2008 E
BAEZ-RENDON, VICTOR
vs
250 BOWERY PROJECT LLC
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 113354/08
MOTION DATE
MOTION SEQ. NO. 006
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: 10/2/2012

Paul G. Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

VICTOR BAEZ-RENDON,
Plaintiff,

against

250 BOWERY PROJECT LLC and FOUNDATIONS GROUP INC., KBC CONCRETE CORP., and DIVERSIFIED INDUSTRIES, INC.,
Defendants.

Index Number 113354/2008E
Mot. Seq. Nos. 006, 007, 008, 009

DECISION AND ORDER

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FOUNDATIONS GROUP INC.,
Third-Party Plaintiff,

against

GCM METAL INDUSTRIES, INC.,
Third-Party Defendant.

T.P. Index Number 590041/2009

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no appearance (default)

E-filed papers considered in review of these motions and cross motion for summary judgment and partial summary judgment:

	PAPERS	NYSCEFS DOCUMENT NOS.:
SEQ. NO. 006	Amended Notice of Motion, Affirmation, exhibits	33 - 35
	Notice of Cross Motion, Affirmation, Affidavit, exhibits	40
	Affirmation in Partial Opp., exhibits	37-38
	Affirmation in Partial Opp., exhibits	101 - 102
	Affirmation in Partial Opp.	105
	Affirmation in Partial Opp., exhibits	115
	Reply Affirmation, exhibits	116, 117, 128-129
	Interim Decision/Order	133
	Reply Affirmation in Cross Motion	121
SEQ. NO. 007	Notice of Motion, Memo of Law, Affirmation	39
	Affirmation in Opp., exhibits	104
	Affirmation in Partial Opp.	105
	Affirmation in Opp.	99
	Affirmation in Partial Opp.	112

	Affirmation in Partial Opp., exhibits	114
	Affirmation in Reply,	123
	Interim Decision/Order	134
SEQ. NO. 008	Notice of Motion, affirmation, exhibits	44
	Affirmation in Opposition	86
	Memorandum of Law in Opp., exhibits	91 - 93
	Affirmation in Partial Opp.	97
	Affirmation in Partial Opp., exhibits	106 - 111
	Affirmations in Reply, exhibit	118 - 110, 125, 130
	Interim Decision/Order	135
SEQ. NO. 009	Notice of Motion, Memo of Law, Affirmation, exhibits	45 - 89
	Notice of Cross Motion, Affirmation, Affidavit, exhibits	40
	Affirmation in Opp	86
	Affirmation in Partial Opp., Memo of Law	94, 96
	Affirmation in Opposition, Affidavit	100, 103
	Affirmation in Reply	120
	Affirmation in Reply	131
	Affirmation, Memorandum of Law in Reply of Cross Mot.	121
	Interim Decision/Order	136
	Transcript of proceedings	139-1

PAUL G. FEINMAN, J.:

Motion sequence numbers 006, 007, 008, and 009 are consolidated for purposes of decision, as is the cross motion pertaining to motion sequence numbers 006 and 009.

Plaintiff, a welder by trade, was injured on June 19, 2007 when a piece of concrete debris fell on his back from above as he was welding in the excavation pit of the construction project owned by 250 Bowery Project LLC.[1] He has sued the project owner, the construction manager, and the two other subcontractors on the job site that day, claiming negligence and breach of various sections of the Labor Law; one of the subcontractors has brought a third-party action against plaintiff's employer, GCM Metal Industries, Inc.

Project owner 250 Bowery Project moves pursuant to CPLR 3212 for partial summary judgment dismissing plaintiff's common-law and Labor Law § 200 claims as against it, for summary dismissal of the cross claims against it brought by Foundations Group, GCM Metal

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[1]The project entailed demolishing three buildings and then constructing an eight-story hotel condominium (see Doc. 33-6, Mot. ex. E, Morse EBT 14).

Industries, and KBC Concrete, and granting summary judgment on its claim of indemnification by one or all of them (motion sequence number 006). Plaintiff cross-moves for an order pursuant to CPLR 3212 granting him partial summary judgment on his claim of liability under Labor Law § 240 (1) as against 250 Bowery Project (cross motion sequence number 006x).[2]

Plaintiff's employer, third-party defendant GCM Metal, moves for summary judgment and dismissal of the third party complaint, as well as summary dismissal of all other claims for contractual indemnification, contribution and common-law indemnification (motion sequence number 007).

Defendant KBC Concrete Corp., the excavation foundation contractor, moves for summary judgment and dismissal of the complaint and all cross-claims as against it, and summary judgment on its cross claim for contractual indemnification as against codefendant Diversified Industries, Inc., as well as common-law indemnification as to the other defendants (motion sequence 008).

Defendant/third party plaintiff Foundations Group, Inc., the construction manager of the project, moves for summary judgment and dismissal of plaintiff's Labor Law claims and common-law negligence claims, and all cross claims; for summary judgment on its cross claims against defendant KBC Concrete seeking contractual indemnity; for summary judgment as to its cross claims against KBC Concrete for breach of contract for failing to procure insurance in favor of Foundations Group; and summary judgment on its third-party action as against third-party defendant GCM Metal Industries, for indemnification, and its claim for of breach of

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[2]Plaintiff's cross motion papers were uploaded into the NYSCEF system without linkage to a specific motion sequence number. It is obvious that the cross motion is intended to be made as part of motion sequence number 006 as well as number 009. Plaintiff is cautioned that any motion papers efiled must be efiled under a specific motion sequence number, and if the same papers are used to cross-move or oppose in two or more motions, the papers must be separately uploaded into each motion sequence number.

contract for GCM Metal Industries' failure to procure insurance in favor of Foundations Group (motion sequence number 009). Plaintiff cross-moves seeking partial summary judgment against Foundations Group on the issue of liability based on Labor Law § 240 (1)(cross motion sequence number 009x).[3]

For the reasons which follow, motion sequence number 006 granted, and the cross-motion is denied. Motion sequence number 007 is granted in part and otherwise denied. Motion sequence number 008 is granted in part and otherwise denied. Motion sequence number 009 is granted in part and otherwise denied.

DOCUMENTARY EVIDENCE AND TESTIMONY

On September 12, 2006, 250 Bowery Project, as owner, and Foundations Group entered into a signed contract agreement providing that Foundations Group would function as the construction manager for the Bowery project (Doc. 33-9 at 4, 7, Mot. ex. I, Contract §§ 2.1.3 and 2.3). Part of the agreement included a multi-page "General Conditions of the Contract for Construction" (Doc. 33-9 at 20 *et seq.*).[4] Among the conditions was that Foundations Group was to "supervise and direct the Work," and would be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract" unless the contract gave "specific instructions" otherwise (Doc. 33-9 at 31, Contract § 3.3). Foundations Group was to "employ a competent

[3] See FN 1.

[4] 250 Bowery includes as part of the contract, AIA Document A201 - 1997, "General Conditions of the Contract for Construction" (Doc. 33-9 at 20, Mot. ex. 1). Plaintiff includes among his exhibits a copy of the same contract, but includes, puzzlingly, the 1987 version of AIA Document A201, which contains somewhat different and additional provisions, in particular section 2.5.2, omitted in the 1997 version, providing that the owner had no control over or responsibility for construction means and methods or safety (Doc. 40 at 169, 188 *et seq.* Cross Mot. ex. F, AIA Document A201, 1987 edition).

superintendent . . . who shall be in attendance at the Project site during performance of the Work" and act as Foundations' representative (Doc. 33-9 at 33, Contract § 3.9.1). Foundations Group would be "responsible to [250 Bowery Project] for acts or omissions of [Foundation's] employees, Subcontractors and their agents and employees" (Doc. 33-9 at 32, Contract § 3.3.2). As discussed more fully below, Foundations Group was to "indemnify and hold harmless [250 Bowery Project] . . . from and against claims" arising out of bodily injury (Doc. 33-9 at 36, Contract § 3.18.1).

250 BOWERY PROJECT LLC

Testifying on behalf of 250 Bowery Project was Jonathan Morse, the project coordinator hired by the managing member of 250 Bowery Project, Peter Moore (Doc. 33-6, Mot. E, Morse EBT 8-9, 12). Morse was principally involved in the financial structuring of the real estate development project and performed general oversight and coordination services during the project dealing largely with investors; he was not the owner's representative (Doc. 33-6, Morse EBT 39). He had no construction-related duties other than his involvement in negotiating the terms of the construction management agreement with the construction manager Foundations Group (Doc. 33-6, Morse EBT 14-15). He visited the work site about once a month to receive progress reports and construction updates from a Foundations Group representative (Doc. 33-6, Morse EBT 19-20). 250 Bowery Project was "not involved in any subcontractor contracts" (Doc. 33-6, Morse EBT 16:23-24).[5] It was the responsibility of Foundations Group to address the means and methods of the project, as well as safety issues (Doc. 33-6, Morse EBT 18, 43).

[5] Although the formal procedure was that Foundations Group would present subcontractors to the owner who would then choose, "more often than not" Foundations Group simply made recommendations to which the owner would agree, and Foundations would then hire and contract with those entities (Doc. 33-6, Morse EBT 17).

FOUNDATIONS GROUP, INC.

Testifying for Foundations Group was Craig Gary, the assistant project manager at the time of plaintiff's accident (Doc. 33-7, Mot. ex. F, Gary EBT pp. 9-10). Gary testified that the owner 250 Bowery Project was not responsible on a day-to-day basis for the specific work at the job site (Doc. 33-7, ex. F Gary EBT 81:6-10). He said that the project manager coordinates and plans the on-site work with the owner, architect, engineers, and consultants, coordinates the subcontractors' work and scheduling, and keeps documentation (Doc. 33-7, Mot. ex. F, Gary EBT 9). He or she acts as the liaison between the various entities (Doc. 33-7, Mot. ex. F, Gary EBT 74). The project manager coordinates but does not supervise the contractors' work (Doc. 33-7, Mot. ex. F, Gary EBT 58).[6]

For this project, Foundations Group hired KBC Concrete as the excavation foundation contractor to provide underpinning in the adjacent properties and all the concrete work on the foundation and the building's superstructure (Doc. 33-7, Mot. ex. F, Gary EBT 20; 21:4-9, 22). Foundations Group and KBC signed an agreement on February 26, 2007 (Doc. 33-10, Mot. ex. J). The contract contains a contractual liability clause, at section 4.6, which provides that the "Subcontractor" will indemnify and hold harmless the "Owner, Contractor . . . and agents and employees " from all claims arising out of KBC Concrete's work at the site, but only to the extent that KBC's actions or inactions negligently caused the injury at issue (Doc. 33-10 at 6, Mot. ex. J, Contract § 4.6.1). Foundations also hired GCM Metal to provide and install steel bracing and shoring (Doc. 33-11 at 7, Mot. ex. K, Contract § 4.6). Their contract is dated April

[6]This is in contrast to its work as a general contractor, when Foundations would use its own labor and insurance, direct the work, and be "directly involved with the workers and performing work"; here, Foundations did not "self-perform" any of the work at the Bowery project (Doc. 33-7, Mot. ex. F, Gary EBT 92:3-14).

9, 2007; it contains an indemnification provision similar to the one between 250 Bowery Project and Foundations Group, to the extent that indemnity would be provided by GCM Metal if its actions or inactions negligently caused the injury at issue (Doc. 33-11 at 7, Mot. ex. K, Contract § 4.6). Gary did not believe there were any subcontractors hired, and he did not remember any contract involving the non-appearing defendant, Diversified Industries in the Bowery project (Doc. 33-7, Mot. ex. F, Gary EBT 23-24; 65).

Gary was at the excavation site "[u]sually several hours" a day (Doc. 33-7, Mot. ex. F, Gary EBT 59). He met daily with the contractors' foremen to discuss the work for the day (Doc. 33-7, Mot. ex. F, Gary EBT 64). The idea was "to plan the work on-site so that there weren't interferences and that one contractor could do the work necessary independently of the other" (Doc. 33-7, Mot. ex. F, Gary EBT 48:3-6). Foundations Group did not require that contractors work in different same area because "[s]ometimes contractors need the help of another contractor for something, sometimes they are easily able to work in the same area. It depends on the circumstances" (Doc. 33-7, Mot. ex. F, Gary EBT 5:10). Foundations left to each contractor to decide the manner in which it undertook and performed the work, but any contractor could raise any work related issues with Foundations (Doc. 33-7, Mot. ex. F, Gary EBT 79). Each contractor had sole responsibility to provide the equipment used on the project as well as the safety equipment for its workers (Doc. 33-7, Mot. ex. F, Gary EBT 75-76, 77,78). Foundations Group provided a site safety coordinator who visited the Bowery Street location on about a weekly basis to assess safety conditions and report anything not in compliance with the safety codes (Doc. 33-7, Mot. ex. F, Gary EBT 55-56). Foundations "enforced the fact if they didn't wear a hard hat on the site," for instance (Doc. 33-7, Mot. ex. F, Gary EBT 77:18-20).

According to Gary, once the initial demolition was complete, KBC Concrete began the

excavation work, digging dirt out to a particular depth, and then doing underpinning to help support the adjacent buildings (Doc. 33-7, Mot. ex. F, Gary EBT 25, 29). KBC mostly used its own excavators, machines comprised of a cab with an articulating arm ending in a "bucket" or scoop that could pick up dirt and debris and load it into a dump truck to be hauled off (Doc. 33-7, Mot. ex. F, Gary EBT 25-26, 29). GCM Metal's work, commencing after KBC Concrete's, was to weld metal plates to steel piles in the construction pit to help stabilize the site's soil (Doc. 33-7, Mot. ex. F, Gary EBT 44, 45-45). KBC Concrete would then install lagging in those areas, and return to excavating (Doc. 33-7, Mot. ex. F, Gary EBT 46). Gary testified that KBC Concrete and GMC Metal workers would not work in the same area at the same time (Doc. 33-7, Mot. ex. F, Gary EBT 46).

On June 19, 2007, Gary was in the site office when one of "the guys in the field" reported plaintiff's accident to him (Doc. 33-7, Mot. ex. F, Gary EBT 34:19-25). Gary went to the excavation site where he saw plaintiff being helped up the side of the embankment (Doc. 33-7, Mot. ex. F, Gary EBT 37). Plaintiff told him that he had been working on a ladder and was hit by a rock (Doc. 33-7, Mot. ex. F, Gary EBT 38). No one witnessed the accident. Gary was told by workers that the excavator caused the rock to fall (Doc. 33-7, Mot. ex. F, Gary EBT 40). A particular large piece of concrete debris in the pit was thought to be the piece that struck plaintiff (Doc. 33-7, Mot. ex. F, Gary EBT 38-39).

Gary recalled there being one excavator about 30 to 50 feet away from the accident site (Doc. 33-7, Mot. ex. F, Gary EBT 41, 49-50). He explained that the excavator would have been working from the top of one of the several "ramps," large mountains of dirt removed from the site's perimeter and placed toward the center of the construction pit; the excavator's arm could turn and operate in any direction to scoop or deposit (Doc. 33-7, Mot. ex. F, Gary EBT 41, 49).

The excavator operator told Gary that he had been moving dirt and debris and did not realize anything had happened (Doc. 33-7, Mot. ex. F, Gary EBT 42, 54). Gary was unable to determine if the concrete debris fell from the excavator bucket or was dislodged from the ramp by the movement of the excavator (Doc. 33-7, Mot. ex. F, Gary EBT 39-40).

Referring to the Foundations Group Daily Job Report he prepared on June 19, 2007, Gary stated that there were two "trades" onsite that day: KBC Concrete with one foreman and four workers was doing a variety of work including hauling out a truck of soil and a container of concrete and brick, and installing wood lagging between piles # 16 and # 17 in the construction site pit (Doc. 33-7, Mot. ex. F, Gary EBT 33-35; Doc. 40 at 166-168, Cross Mot. ex. E, Daily Job Report, 1st page). GCM Metal had one foreman and two workers who welded two plates to piles # 16 and #17 (Doc. 40 at166-168, Cross Mot. ex. E, Daily Job Report 1st page). KBC Cement worked in the southwestern corner and GCM Metal worked in the northeastern corner of the site (Doc. 33-7, Mot. ex. F, Gary EBT 47 (Doc. 40 at 166-168, Cross Mot. ex. E, Daily Job Report 1st page). There were four pieces of heavy equipment onsite, three excavators and one skid-steer, all owned by KBC Concrete (*id.*, 2d page).

KBC CONCRETE CORP.

Testifying for KBC Concrete was Christopher Spirito, its president (Doc. 44-22 Mot. ex. T, Spirito EBT 12). His company was hired for excavation, underpinning, and foundations (Doc. 44-22, Mot. ex. T, Spirito EBT 16). Spirito testified that KBC Concrete did not do excavation work and usually contracted out that job (Doc. 44-22 Mot. ex. T, Spirito EBT Doc. 44-22; 61-62). Here, he obtained Foundations Group's approval to subcontract the excavation work to Diversified Industries, prior to signing the KBC contract with Foundations, and while he could not remember if the approval was in writing, he remembered he spoke with the then

Foundations Group's project manager, Joe Arubia (Doc. 44-22 Mot. ex. T, Spirito EBT 26-27). Diversified Industries was thus hired to do excavation and trucking work by contract signed with KBC on March 16, 2007 (Doc. 44-22, Mot. ex. T, Spirito EBT 28; Doc. 39-16, GMC Mot. ex. Q, Contract § 4.6.1). The contract contains a provision that Diversified as subcontractor would indemnify "the Owner, Contractor, . . . and agents and employees of any of them" for claims of injury arising out of its own negligence (Doc. 39-16, GMC Mot. ex. Q, Contract § 4.6.1).

According to Spirito, KBC Concrete dealt only with Foundations Group, never with the owner 250 Bowery Project (Doc. 44-22 Mot. ex. T, Spirito EBT 49-50). Every time Spirito was on the site, he met with someone from Foundations as well as with his KBC foreman (Doc. 44-22 Mot. ex. T, Spirito EBT 52). Spirito attended weekly or biweekly project "look-ahead" meetings with Foundations Group (Doc. 44-22 Mot. ex. T, Spirito EBT 35, 72, 73, 75:20-25). Spirito did not remember if his foreman on the project coordinated KBC's work with the other trades, as required under the contract signed with Foundations Group, nor if he or his foreman had been advised by Foundations that the KBC foreman was to coordinate the KBC work with the other trades (Doc. 44-22 Mot. ex. T, Spirito EBT 68, 69).

Spirito testified that Foundations Group supervised KBC Concrete's work "step by step," as well as Diversified's work (Doc. 44-22 Mot. ex. T, Spirito EBT 30:19-25, 31:2-10; 25, 80). Foundations Group directly told KBC how to perform its work and what tools were to be used (Doc. 44-22 Mot. ex. T, Spirito EBT 80). No one at KBC instructed or supervised Diversified (Doc. 44-22 Mot. ex. T, Spirito EBT 25, 30). KBC employees brought their tools to the site, consisting of hammers, saws, and other hand tools to be used in underpinning (Doc. 44-22 Mot. ex. T, Spirito EBT 35-36; 67). The excavating machines on site were Diversified's (Doc. 44-22 Mot. ex. T, Spirito EBT 19, 20; 63). Spirito explained that in the past, KBC Concrete had done

excavation work and owned some heavy equipment, in particular two skid steers and a mini-excavator (Doc. 44-22 Mot. ex. T, Spirito EBT 61-62). Initially not remembering if any of those machines were brought to the Bowery site, he did recall that its skid steer was used on site by Diversified for a short period of time (Doc. 44-22 Mot. ex. T, Spirito EBT 62, 83-84).

GCM METAL INDUSTRIES, INC.

Testifying for GCM Metal was Frank Mattarella, a foreman for the company (Doc. 39-15, Mot. ex. M, Mattarella EBT 9). GCM Metal, a steel manufacturer and installer, was hired to weld and install columns to help support the adjacent buildings (Doc. 39-15, Mot. ex. M, Mattarella EBT 8; 23:10-14). GCM manufactured, brought onsite, and installed the columns and beams (Doc. 39-15, Mot. ex. M, Mattarella EBT 24). Plaintiff was one of its welders on this project, working underneath a supervisor (Doc. 39-15, Mot. ex. M, Mattarella EBT 33-34, 39).

GCM Metals attended meetings with Foundations Group and occasionally the other trades; at the first such meeting, Foundations Group directed where it was to commence its work and where and when it was to complete its work (Doc. 39-15, Mot. ex. M, Mattarella EBT 25, 28). Foundations did not give instructions on how the work was to be performed or the tools to be used, and there were no discussions at that meeting about coordinating with other trades (Doc. 39-15, Mot. ex. M, Mattarella EBT 27). No one from GCM Metal had any direct dealing with the owner (Doc. 39-15, Mot. ex. M, Mattarella EBT 65). GCM Metal was responsible for enforcing its safety procedures with its employees (Doc. 39-15, Mot. ex. M, Mattarella EBT 62-63). It had formal weekly safety meetings with its workers, and any time Mattarelli was on the premises he informally made sure its workers were in compliance (Doc. 39-15, Mot. ex. M, Mattarella EBT 22). Mattarella stated that Foundations Group had a safety person, Gary Craig, who would walk through the site, "looking for hard hats, helmets, welding material, [m]aking

sure that the men have goggles and stuff (Doc. 39-15, Mot. ex. M, Mattarella EBT 70: 15-19). Mattarella believed that Foundations could stop the work of a subcontractor if it observed a dangerous condition (Doc. 39-15, Mot. ex. M, Mattarella EBT 70). For instance, once GCM Metal was using an extension cord that was "cut," and Craig "stopped us from using it, and we had to get a new extension cord" (Doc. 39-15, Mot. ex. M, Mattarella EBT 70 -71:2-4).

Mattarella stated there was a "standard" industry policy that when an excavator was in use, other work in the area should stop (Doc. 39-15, Mot. ex. M, Mattarella EBT 63). This policy was not attributable to GCM Metal (Doc. 39-15, Mot. ex. M, Mattarella EBT 69:16-25). At this job site, Mattarella remembered times when the excavator was in use and the GCM men were at work inside the excavation pit (Doc. 39-15, Mot. ex. M, Mattarella EBT 51). His company "had nothing against that" (Doc. 39-15, Mot. ex. M, Mattarella EBT 51:25 - 52:2).

Mattarella testified that he had seen Diversified Industries trucks parked at the construction site, as well as men wearing shirts with the Diversified name (Doc. 39-15, Mot. ex. M, Mattarella EBT 41-42).

PLAINTIFF BAEZ-RENDON

Plaintiff testified[7] that as a welder, his employer provided him with soldering machines and hard hats and security belts (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 19-21). He only took instructions from his supervisor/foreman (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 31-32). His supervisor was told where GCM was to work by "the person in charge of the work that was being done" (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 28:2-12). This individual was "a foreman of all the other workers" (Doc. 39-21, GCM Mot. ex.

[7]Plaintiff testified on two separate occasions, January 5, 2010 (Doc. 39-21, GCM Mot. ex. S) and October 20, 2010 (Doc. 40 at 64 *et seq.* Cross Mot. ex. C).

S, Baez-Rendon EBT 29:17-18). This individual "was supposed to tell my supervisor when I myself should be working, when the backhoe would start up we are supposed to stop, when the backhoe would stop then we could continue our job" (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 45:23-25 - 46:2-4).[8] He knew that GCM and the "cement company" were in communication: the excavator supervisor would tell the GCM foreman/supervisor when not to work based on the machine's usage (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 27:13-19; 88). For instance, when a trailer was being loaded with dirt, the excavator operator would tell the GCM foreman not to work until it was filled, after which the excavator operator would let the GCM foreman know that the workers could resume work (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 86).

On June 19, 2007, he was welding at the lower level of the site, and an excavator was working above him (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 27-28). He was wearing regular work clothes, boots and gloves (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 30-32). He had a hard hat, but he could not wear it when welding because it interfered with the welder's mask (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 31; 102). "When we weld, we take off the hard hats. And when we stop, we put it on." (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 84:7-8).

Throughout the morning on June 19, 2007, the excavator started and stopped (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 85). Three times plaintiff's supervisor directed plaintiff to stop working because the excavator was working nearby (Doc. 40 at 64 *et seq.*, Cross Mot. ex. C Baez-Rendon EBT 48-49). The last time after plaintiff resumed working, when the machine

[8]Plaintiff testified that his coworkers were speaking with the "one who was in charge of the job" in order that an ambulance be called (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 59). Gary Craig testified that his office called an ambulance at plaintiff's request (Doc. 33-7, Mot. ex. F, Gary EBT 37).

again started up, he continued to work because he was not told to stop (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 44-46, 51). He asked his supervisor/foreman, but was told to keep working (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 82-83).[9] He could hear the excavator moving from right to left and back (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 48-49). It was working "directly" above him (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 101:15-18; Doc. 40 at 64 *et seq*. Cross Mot. ex. C, Baez-Rendon EBT 47-48, 49).

Shortly before noon, while kneeling and working, plaintiff was hit on the right side of his middle and lower back by a falling piece of concrete debris (Doc. 39-21, GCM Mot. ex. S, Baez-Rendon EBT 41:25; 42:4-7; Doc. 40 at 64 *et seq.*, Cross Mot. ex. C, Baez-Rendon EBT 55). Plaintiff did not know where the rock fell from (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 52). He assumed the excavator caused its fall.

ACCIDENT REPORT

The accident report completed by Craig Gary of Foundations Group after an investigation on June 19, 2007, states that while plaintiff was welding "in the north-east corner of the job-site," he was hit by "falling concrete debris" that fell from the site ramp south of where plaintiff was working, and that an "excavator by another contractor, KBC, was operating on the ramp at the time" (Doc. 115-3, Gordon Affirm. in Opp. ex. C).

Plaintiff commenced his action claiming negligence and violation of Labor Law §§ 200, 240 (1), and 241 (6) as against all four defendants (Doc. 39-2, Mot. ex. A, Amended Summons & Compl.) Defendants, with the exception of Diversified Industries, answered and asserted cross claims against each other for indemnification and contribution. Foundations Group also

[9] Although the testimony is somewhat unclear, it seems that this was not the first time the excavator was operating when GCM workers were working at the base of the construction pit (Doc. 40 at 64 *et seq.* Cross Mot. ex. C, Baez-Rendon EBT 41).

commenced a third-party action against GCM Metal, plaintiff's employer seeking contractual and common-law indemnification.

The note of issue was filed on April 14, 2011. These motions and cross motion were timely filed thereafter.

LEGAL STANDARDS

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695 [1992], *rearg denied* 80 NY2d 918 [1992]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept 2000]). It is not the court's function to assess credibility (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]; *see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Where the movant meets its burden, the opposing party must then produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 153 [1st Dept 2012]). Where there is any doubt as to the existence of a triable issue of fact, summary

judgment should be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

NEGLIGENCE AND LABOR LAW § 200

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that the defendant owed him a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). The scope of any such duty of care varies with the foreseeability of the possible harm (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st 1987], citing *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]).

Negligence cases do not normally lend themselves to summary dismissal since the question of negligence, even if the parties agree as to the underlying facts, is a question for jury determination (*Villoch v Lindgren*, 269 AD2d 271, 273 [1st Dept 2000], citing *McCummings v New York City Tr. Auth.*, 81 NY2d 923, 926 [1993]).

Labor Law § 200 codifies the common-law duty imposed upon an owner or general contractor to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]). It will hold an owner or general contractor liable if it is shown that the owner and/or general contractor exercised a certain degree of supervisory control over the worker's activities (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). To support a finding of liability under Labor Law § 200, a plaintiff must show "that the defendant supervised and controlled the

plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition" (*Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 591 [1st Dept. 2009], citations omitted).

LABOR LAW §§ 240 (1), 241 (6)

Labor Law § 240 (1), sometimes referred to as the Scaffold Law, provides in pertinent part, that

> "[a]ll contractors and owners and their agents. . . , in the erection, demolition, repairing, altering . . . 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."

The purpose is to "protect workers by placing the 'ultimate responsibility' for work site safety on the owner and general contractor, instead of the workers themselves" (*Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The section imposes "absolute liability" on owners, contractors, and their agents for any breach of the statutory duty which proximately caused injury, and is interpreted liberally (*id.*). Once it is determined that the owner or contractor failed to provide the necessary safety devices required to give a worker "proper protection," absolute liability is "unavoidable," even if the injured worker contributed to the accident (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522 [1985]). The duty imposed is nondelegable and an owner or contractor who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (*Ross v Carter-Palmer Hydro-Elec. Co.*, *supra*, 81 NY2d at 500).

Labor Law § 241(6) concerns safety conditions in "areas in which construction, excavation or demolition work is being performed." It imposes a nondelegable duty upon

owners, contractors, and their agents to provide reasonable and adequate protection and safety to construction workers (*Ross,* 81 NY2d at 502). In order to impose liability under this section, the plaintiff must demonstrate that the defendant violated a provision of the Industrial Code containing concrete specifications with which defendants must comply (*Donovan v S & L Concrete Constr. Corp., Inc.,* 234 AD2d 336, 337 [2d Dept 1996]; *see also Ross v Curtis-Palmer Hydro-Elec. Co., supra*).

INDEMNIFICATION AND CONTRIBUTION

To establish a claim for common-law indemnification, the party seeking indemnity is required to prove both that it was not guilty of any negligence beyond the statutory Labor Law liability and that the proposed indemnitor was guilty of some negligence that contributed to the accident (*Correia v Professional Data Mgt. Inc.*, 259 AD2d 60, 65 [1st Dept 1999]; *see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009]). The party seeking indemnity may also obtain indemnity even in the absence of any negligence by the proposed indemnitor if that entity "had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 A.D.2d 556, 557 [2d Dept 2003]). A "party's (e.g., a general contractor's) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification. Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision" (*McCarthy v Turner Constr. Inc.,* 17 NY3d 369, 377 [2011]). "Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone." (*Id.*).

Contractually based indemnity is governed of course by contract law, but also by General Obligations Law § 5-322.1, which provides in relevant part that,

> "1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent."

In contractual indemnification, the party seeking indemnity must only establish that it was free from any negligence and is liable solely based on statutory provisions (*Correia v Professional Data Mgt., Inc.*, 259 AD2d at 65).

Contribution is available when the injury is caused by actions or inactions of two or more tortfeasors; it is calculated by assessing the relative culpability of each (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003]). Where the contractual language is sufficiently clear that the intention to indemnify can be implied from the language and purpose of the entire agreement as well as the surrounding facts and circumstances, the proposed indemnitor will be entitled to full contractual indemnification for damages incurred in a personal injury action (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.* 70 NY2d 774, 777 (1987).

MOTION SEQ. 006

Defendant 250 Bowery Project moves for partial summary judgment, seeking summary dismissal of the complaint's negligence and Labor Law § 200 claims as against it. It establishes prima facie entitlement to summary judgment and dismissal of these two claims based on the clear intent of its contract with Foundations Group that the owner would have no supervisory function or control over the work at the construction site, and the lack of evidence derived from the deposition transcripts that it contributed to or caused plaintiff's injuries in any manner. That an owner's representative periodically visited the site does not establish control or supervision (*see Singh v Black Diamonds LLC*, 24 AD3d 138 [1st Dept 2005]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]). Therefore, the branch of its motion seeking summary judgment and dismissal of the Labor Law § 200 and common-law negligence claims is granted.

Remaining as causes of action against 250 Bowery are plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6). As noted above, these two statutes provide for vicarious liability, and owners and contractors will be held responsible even where they did not control or supervise the work (*Rizzuto v L.A. Wenger Contr. Co.*, *supra*, 90 NY2d at 348-350]). 250 Bowery Project seeks summary judgment granting its cross claims for contractual and common-law indemnification from the other defendants, as to these causes of action. By law, as the owner, 250 Bowery Project will be vicariously liable under Labor Law §§ 240 (1) and 246 (*id.*). Parties vicariously liable may be indemnified against damages and legal fees by the party or parties whose negligence actually caused the worker to suffer an injury (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]).

Although the other parties argue that there are questions of fact as to whether 250

Bowery Project is entirely blameless and entitled to indemnification, and that one or more of the defendants is without fault and not obligated to indemnify but rather entitled to common-law indemnification, none of them sufficiently alleges any active negligence, misconduct, supervision or control by 250 Bowery that would preclude granting its motion. Moreover, as discussed below the other defendants do not establish prima facie that they are without fault such that the contractual indemnification provisions would not apply.

The contract between 250 Bowery and Foundations Group clearly intends the latter to fully indemnify the former for any wrongdoing committed by Foundations or any of the contractors on the project under the type of circumstances alleged here. Accordingly, 250 Bowery Project is granted full and complete contractual indemnification over and against Foundations Group.

As there are questions of fact as to the possible liability of the other defendants which would trigger their contractual obligation to indemnify 250 Bowery Project, the branches of 250 Bowery's motion seeking summary judgment on its claims for contractual indemnification as by KBC Concrete and GCM Metal and its claims of common-law indemnification as to KBC, GCM is granted conditionally, with judgment held pending determination of the primary action (*see Masciotta v Morse Diesel, Intl., Inc.*, 303 AD2d 309, 310 [1st Dept 2003]).

Finally, as 250 Bowery Project has, by law, no liability other than vicarious liability, the branch of its motion seeking summary dismissal of all cross claims against it is granted to the extent they seek anything other than indemnification for vicarious liability.

Cross Motion for partial summary judgment

Plaintiff cross-moves for partial summary judgment on his claim against 250 Bowery Project and Foundations Group brought under Labor Law § 240 (1), which offers workers

protection "where the work involves risks related to differences in elevation," that is, either "elevated above" or "positioned below the area where materials or load are hoisted or secured" (*Thompson v St. Charles Condos.*, 303 AD2d 152, 153-154 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]; *Groves v Land's End Hous. Co.*, 80 NY2d 978, 980 [1992]).

Plaintiff argues that given the work underway, he was exposed to a gravity-related hazard, namely the loose dirt and debris piled in on the ramp in the construction pit, and he should have been provided with a protective device. Although it is unclear whether the concrete debris was actively being hoisted at the time it fell, plaintiff contends the statute still applies, pointing to *Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619 (1st Dept 2008), which held that Labor Law § 240 (1) was applicable where a construction worker installing a window was hit by a cinder block that fell out of a column of cinder block located 10 feet above his work site; the column had previously been cut open in order that work could be done on interior pipes, but when the cutout was replaced, it was not cemented or secured in place. Plaintiff also points to *Orner v Port Auth. of N.Y. & N.J.*, 293 AD2d 517 (2d Dept 2002), another Labor Law § 240 case, in which an electrician working on the ground floor of a construction project was hit on his head and neck by unsecured roofing material that had fallen from the roof. Plaintiff further argues that he was not the sole proximate cause of his injury, as his foreman/supervisor directed him to continue to work, and he had no safety equipment other than his helmet which he could not wear while welding (*see Harris v City of N.Y.*, 83 AD3d 104 [1st Dept 2011] [plaintiff's foreman had negligently directed plaintiff to stand on a piece of wood in a particular manner which resulted in his injury]).

250 Bowery Project and Foundations Group argue in opposition that not every object that falls on a worker gives rise to the Labor Law § 240 (1) protections, citing *Narducci v Manhassat*

Bay Assoc., 96 NY2d 259 (2001) (neither glass falling from a window adjacent to where the worker was working, or a ceiling fixture being installed falling on the worker came under the Labor Law § 240 [1] protections). They further argues that only a "narrow class" of special hazards are covered by the statute, not "any and all perils," citing *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914 (1999) (worker stepped off ladder onto concealed lamp causing him to twist his ankle and fall: the hazard of the concealed lamp was separate and wholly unrelated to the danger that brought about the need for the worker's use of a ladder, and Labor Law § 240 [1] did not apply). They argue that digging and removing debris pose only an ordinary and usual danger that might arise at any construction site and does not bring about the need for a protective device.

The issue is not whether the injury resulted from an object falling on the worker, but "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" that is to say, "whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The plaintiff need only establish that he or she was not given "proper protection" (*Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011]). A plaintiff is not required to present evidence as to which safety devices would have prevented the injury sustained (*Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). Rather, the foreseeable risks of harm is what determines the type of protective device required (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007]; *see Fabrizi v 1095 Ave. of the Ams., LLC*, __ AD3d ___ , 2012 NY Slip Op. 6182, *** [1st Dept 2012, Concurrence]). The risk to be guarded against arises from "the force of the very heavy object's unchecked, or insufficiently checked, descent" without an adequate safety

device in place (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 603).

Plaintiff points to several cases where falling materials were found to be hazards covered under Labor Law § 240 (1). In *D'Antonio v Manhattan Contr. Corp.*, 93 AD3d 443, 444 (1st Dept 2012), the plaintiff was injured while installing temporary lighting when a conduit pipe that housed wiring partially detached from the wall and swung downward; there were triable issues of fact as to whether the conduit pipe constituted a falling object within the meaning of the statute, and whether the injury was caused by the absence or inadequacy of a safety device. In *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610 (2d Dept 2011), there was a question of fact as whether a brick that fell from "out of nowhere," injuring the plaintiff, a mason working on an exterior renovation project, should have been secured for purposes of the work being performed, given that the plaintiff was standing inside next to a window that had been removed. In *Kyu-To v Triangle Equities, LLC*, 84 AD3d 1058, 1059-1060 (2d Dept 2011), a laborer on the first floor of a five-story building in which demolition had begun, was hit on the head from above and found covered with building debris; in reversing the trial court's grant of the defendants' motion for a judgment as a matter of law, the Court found the jury had a rational basis to find that the laborer was injured by materials being removed from the demolition site and, given the nature and purpose of the work being performed at the time of his injury, that this material presented a significant risk of injury and should have been secured.

Here, while the plaintiff was certainly injured by the cement debris falling, as gravity would cause it to do, the debris is not a special hazard that comes under the purview of Labor Law § 240 (1). Plaintiff's work welding plates on the "floor" of the construction pit did not involve an inherent risk attributable to a height differential (*see Gonzalez v Turner Constr. Co.*, *supra,* 21 AD3d 832 [work of ironworker dismantling a rig did not involve significant inherent

risk because of an elevation differential, and Labor Law § 240 [1] did not apply). The risk in this situation is attributable to the presence of the excavator moving debris in the same area where plaintiff was working. The facts here are somewhat analogous to those in *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427 (1st Dept 2009), in which the plaintiff, cleaning the bathroom in an office undergoing renovation, was injured when a light fixture, apparently suspended from a beam after the drop ceiling's tiles and grids had been removed, fell and struck him on the head. That Court held that the suspended light fixture "did not pose an elevation-related risk of the kind that would be addressed by safety devices of the kinds enumerated in the statute" (63 AD3d at 428). At a construction site, there would appear always to be the risk of materials falling, and the Labor Law provides many examples of the types of protections that should be provided when there are particular risky hazards. Here, the best protection was for the excavator not to work in the same area where the plaintiff was working. Plaintiff does not establish that Labor Law § 240 (1) is applicable, and his cross motion is denied. As the defendants are entitled to summary dismissal of this cause of action, it is accordingly dismissed in its entirety (CPLR 3212 [b]).

MOTION SEQUENCE 007

Third-party defendant GCM Metal Industries moves for summary judgment and dismissal of the third-party complaint seeking contractual and common-law indemnification and defense and contribution on behalf of Foundations Group, as well as summary dismissal of the cross claims against it for indemnity and contribution.

As to the third-party complaint's claim for contractual indemnification, GCM Metal argues that the contract clause has not been triggered as there is no evidence that GCM Metal was in any way negligent. It argues that Foundations Group should have but did not sufficiently

oversee the work site so as to stop the unsafe practice of the excavator working in the same area at the same time as the GCM Metal workers; it also argues that the excavator operator appears to have improperly operated the machine to allow the "bucket" filled with dirt and debris to drop material in the wrong area. As to the third-party complaint's claim for common-law indemnification and defense and contribution, as well as the cross claims seeking indemnity and/or contribution, GCM Metal argues that they must all be summarily dismissed as section 11 of the Workers Compensation Law controls.

Section 11of the Workers Compensation Law provides that an employer will not be held liable for contribution or indemnity to "any third person" unless that "person" can establish that the employee sustained a grave injury as defined in the statute. Plaintiff has not alleged or shown a grave injury. Accordingly, GCM Metal's motion for summary dismissal of the cross claims seeking common-law indemnification and contribution are summarily dismissed.

This same section of the Workers Compensation Law provides, however, that there is "no bar" to a claim against an employer for indemnity or contribution if there is a contractual agreement in which the employer "had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (Workers Compensation Law § 11). GCM Metal does not explain why this section of the statute would not apply as to Foundations Group's third-party claim seeking contractual indemnification, as well as to 250 Bowery Project's claim.

In any event, GCM Metal does not establish entitlement to summary judgment and dismissal of the third-party complaint or that it has established entitlement to indemnification from another party. There is testimony that plaintiff's supervisor instructed plaintiff to keep working even with the excavator working nearby. There is a possible question of fact as to

whether GCM had a responsibility to report the problem of the excavator's location to Foundations Group.

In sum, the branch of GCM's motion seeking to dismiss the third-party complaint is denied, and the branch of its motion seeking dismissal of the cross claims by KBC Concrete is granted under Workers Compensation Law § 11.

MOTION SEQ. 008

Defendant KBC Concrete moves for summary judgment and dismissal of the complaint and all cross-claims as against it, for an order granting its cross claims for common-law indemnification from the other defendants, and for an order granting contractual indemnification as against codefendant Diversified Industries, Inc.

An independent contractor does not owe a duty of care to a non-contracting third party unless the contractor either created or increased an unreasonable risk of harm; or where the injured third party reasonably relied upon the contractor's continuing performance arising out of a contractual obligation, or where the contractor entirely displaced the other party's duty to maintain the premises safely (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept 2004]). As to the complaint's cause of action sounding in negligence, KBC Concrete argues that it should be summarily dismissed as KBC owed no duty to plaintiff based on its contract with Diversified Industries which transferred to Diversified the entire duty of the excavation work. It argues that Diversified owned the machines and did all the excavation work at the site, making it fully liable for any negligence found as to the excavator operator.

The problem here is that there is conflicting evidence about the presence and work of Diversified, despite the contract between the two parties. In particular, it is troubling that the

project manager's then-assistant manager Craig Gary who was regularly at the job site, testified that he was unaware that KBC Concrete had subcontracted any work and had not heard of Diversified Industries working on this project. At best, there is testimony from GMC Metal's foreman, Joseph Mattarelli, that he had seen Diversified Industries' trucks and men at the site. KBC has not proffered an affidavit from a Diversified officer attesting to its work for KBC at the Bowery Project site, nor has it obtained an affidavit from Joe Arubia, Foundations Group's then-project manager, from whom KBC's Chris Spirito allegedly received permission to subcontract. Even if there is no issue as to the subcontracting, under the terms of KBC Concrete's contract with Foundations Group, KBC remains responsible for any subcontractor's work. Therefore, summary judgment and dismissal of the negligence claim against KBC Metal is not merited.

The branch of KBC's motion for summary dismissal of the remaining Labor Law claims as against it is granted. Labor Law §§ 200 and 246 apply to owners, general contractors, and their agents, but not to subcontractors working at the same project. KBC Concrete was not an "agent" of the owner or of Foundations Group as defined in the statute because there is no evidence that it was delegated such duties (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 293 [2003]).

The branch of its motion seeking summary dismissal of the other parties' cross claims and the branch of its motion seeking summary judgment as to its cross claims for common-law indemnification from the other defendants are denied based on its failure to show that it bears no liability.

Finally, the branch of KCM Concrete's motion seeking summary judgment on its claim for contractual indemnification by Diversified Industries is procedurally improper, as Diversified has not answered the complaint.

MOTION SEQUENCE 009

Defendant/third party plaintiff Foundations Group, Inc., moves pursuant to CPLR 3212 for summary dismissal of the remaining claims in the complaint as against it, as well as all cross claims; for summary judgment on its cross claims seeking contractual indemnification against defendant KBC Concrete; for summary judgment on its cross claims against KBC Concrete and GCM Metal for breach of contract in their failure to procure insurance in favor of Foundations Group; and summary judgment on its third-party action as against third-party defendant GCM Metal Industries.

Its motion seeking summary dismissal of the remainder of the complaint is partially granted and otherwise denied. The branch of its motion seeking summary dismissal of the Labor Law § 200 and negligence claims is denied. The general rule is that when the alleged dangerous condition arises from the contractor's methods and the owner or project manager exercises no supervisory control over the operation, no liability will attach under common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [ ]). The testimony does not support Foundations' claims that it had no direct supervision of any of the contractors' work, although there is little question that it did not exercise supervision and control over plaintiff's work (*see Kittelstad v Losco Group, Inc.*, 92 AD3d 612, 613 [1st Dept. 2012] [contractor retained its authority to stop the work of a subcontractor, to make changes, additions or omissions to the work, and to demand that the subcontractor remedy defective or improper work; it also conducted safety meeting with the other trades]). The issue here is that there is testimony, admittedly not completely clear, from plaintiff, and seemingly echoed by GCM Metal's Frank Mattarella, that the excavator had more than once worked in the same area where plaintiff and GCM Metals were working, and that this is contrary to the statement by GCM

Metal's foreman that the industry standard is that others do not work in the same area as an excavator. Thus, Foundations' argument that this incident was a one-time, fleeting occurrence of which it had no knowledge or control over, is called into question. Craig Gary testified that he spent a large amount of time at the construction site on nearly a daily basis and he looked for safety compliance. If this practice of the excavator working close by GCM Metal, had occurred more than once prior to the day of plaintiff's accident, then therre is a question of fact as to whether Foundations Group had constructive if not actual knowledge of the practice, and could have corrected the work (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986] [necessary to show that the defendant had actual or constructive notice of the allegedly unsafe condition that caused the accident, and that it called attention to the specific hazardous condition, sufficient for corrective action to be taken]).

The Labor Law § 240 (1) claim has previously been dismissed. As to the Industrial Code violations that make up plaintiff's Labor Law § 241 (6) claim, summary judgment and dismissal is appropriate as to those not contested by plaintiff in his opposition to the motion. Thus, the claims alleging violations of the Industrial Code sections 23-1.5; 23-1.15; 23-1.33; 23-6.1; 23-6.2; 23-6.3, 23-8.1; 23-8.5; 23-9.1, and 23-9.5 are summarily dismissed.

As to the remaining sections of the Industrial Code claimed at issue by plaintiff, Foundations' motion for summary dismissal of section 23-1.8 (c), concerning personal protection equipment, is granted; that plaintiff was not or could not wear his hard hat while welding was not the proximate cause of the injury to his back, and therefore his claim that the code provision was violated is without force. Dismissal is also granted as to section 23-4.1, concerning requirements for excavation operations; plaintiff's argument that subsection (a) pertains to the excavation pit is too broad of a reading of this section which concerns the duty to

keep the structures surrounding a construction site safely positioned by the use of underpinning, bracing and the like, along with daily inspections. In addition, Industrial Code section 23-9.4 has been held to be too general a provision to support a Labor Law § 246 (1) claim (*see Scott v Westmore Fuel Co., Inc.* __ AD3d ___, 947 NYS2d 15, NY Slip Op. 4698 [1st Dept. 2012]; *Robinson v County of Nassau*, 84 AD3d 919, 920-921 [2d Dept 2011]). It is therefore dismissed.

Remaining are two sections. Section 23-4.2 requires keeping the sides and areas adjacent to excavation sites clear of loose rock and other material. Foundations Group argues that because plaintiff testified he did not know where the cement debris came from, and no one else at the site knows either, it is mere conjecture that the debris came from the side or area adjacent to the excavation site. Notably, the accident report completed by its assistant project manager described the debris as falling from the ramp. There is therefore at least a question of fact as to whether the Code section is applicable, and summary dismissal is denied. Section 23-1.7 (a) requires that there be protection from overhead hazards. Foundations Group argues that if this section were applicable to the facts in this case, the entirety of the excavation site would have to be the covered with "tightly laid sound planks at least two inches think full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength [and the] overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot," as stated in the Code section. Foundations has not provided an expert's affidavit establishing that this Code section mandates that any site must be completely protected, or whether a localized protective scaffold built with the materials described in the Code section would be sufficient. Summary dismissal of this section is also denied.

The branches of Foundations Group's motion seeking summary judgment on its cross

claims against KBC Concrete and GCM Metal for contractual indemnification is granted conditionally with judgment held pending determination of the primary action (*see Masciotta v Morse Diesel, Intl., Inc., supra,* 303 AD2d at 310). Its claims for common-law indemnity from KBC Concrete and GCM Metal are denied without prejudice as there remain questions of fact as to who bears actual liability.

Finally, Foundations Group also seeks summary judgment on its claims that GCM and KBC breached their contractual obligations by failing to procure insurance naming Foundations as an additional insured, and that they are accordingly responsible for reimbursing all damages, including attorney's fees and expenses, incurred by Foundations to date.[10] In support of this branch of its motion, it provides a copy of a December 14, 2009 document from KBC's insurer describing the coverage provided, making no mention of Foundations Group as a third-party beneficiary (Doc. 69, Mot. ex. S). It also provides a copy of a March 13, 2008 letter from GCM Metal's insurer stating that Foundations Group was not an added insured to GCM's policy, but even if it were, the claim would be denied because the matter was reported late, other policy provisions would preclude coverage, and the insurer found no liability on the part of its insured (Doc. 71, Mot. ex. T).

KBC Concrete does not address this branch of Foundations Group's motion (Doc. 100, Suhail Affirm. in Opp). GCM Metal's Memorandum of Law in Opposition contends that the issue is not whether or not GCM bought the insurance coverage, but that GCM's insurer stated it would have denied the claim on several grounds, including that Foundations' tender was untimely (Doc. 96 at 5-7, Memo of Law in Opp. Gleicher Affirm. in Opp., Point II). The

[10]Although Foundations requests a hearing to assess outstanding attorney's fees (Doc. 46 at 10-11, Memo of Law), it does not mention this relief in its Notice of Motion (Doc. 45).

conclusion is that both KBC and GCM breached the terms of their contracts with Foundations Group.

In *Kinney v G.W. Lisk Co.Inc.*, 76 NY2d 215 (1990), the Court of Appeals held that a subcontractor who had agreed to procure insurance for the benefit of a general contractor and then failed to do so was liable for all the resulting damages, including the general contractor's liability to the plaintiff. So too here, where the parties have breached this term of their contracts, Foundations is entitled to damages, including attorney's fees. This branch of its motion is granted, and damages will be assessed at the time of trial.

As discussed above, plaintiff's cross motion seeking summary judgment on its Labor Law § 240 (1) claim is denied and the claim is dismissed in its entirety.

It is

ORDERED that in motion Sequence 006, defendant 250 Bowery Project LLC's motion for summary judgment is granted and the Labor Law §§ 200 and 240 (1) claims, and the negligence claim are dismissed as against movant; its motion for summary dismissal of all cross claims against it is granted other than those seeking indemnification for vicarious liability; summary dismissal is conditionally granted with respect to movant's claims for contractual indemnification as against KBC Concrete Corp. and GCM Metal Industries, Inc., and its claims for common-law indemnification as against KBC Concrete and GCM Metal, with judgment held pending determination of the primary action; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety, and the cause of action sounding in Labor Law § 240 (1) is dismissed as against both 250 Bowery Project LLC and Foundations Group Inc., pursuant to CPLR 3212 (b); and it is further

ORDERED that in motion Sequence 007, third-party defendant's motion for summary

judgment and dismissal of the third party complaint is denied; the branch of its motion seeking summary dismissal of the cross claims against it is granted to the extent that KBC Concrete's cross claim for contribution and indemnification is dismissed; and it is further

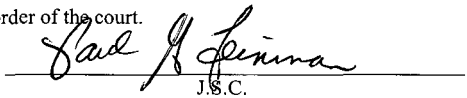
ORDERED that in motion Sequence 008, KBC Concrete Corp.'s motion for summary judgment and dismissal of the complaint is granted to the extent that the Labor Law §§ 200, 240 (1) and 246 claims are dismissed as against it, and is otherwise denied; and the branches of its motion seeking summary dismissal of the cross claims against it, seeking summary judgment as to its cross claims for common-law indemnification, and seeking contractual indemnification from Diversified Industries, Inc., are denied; and it is further

ORDERED that in motion Sequence 009, defendant Foundations Group, Inc.'s motion for summary dismissal of the complaint is granted to the extent that the Labor Law § 240 (1) claim is dismissed and the Labor Law § 241 (6) claim is narrowed so that remaining at issue are Industrial Code sections 23-1.7 and 23-4.2, and the other sections claimed in the bill of particulars are dismissed; the branch of its motion seeking summary judgment on its cross claims against KBC Concrete Corp. and GCM Metal industries, Inc. is granted conditionally with judgment held pending determination of the primary action; its claims for common-law indemnity are denied without prejudice; and its claims for summary judgment on its claims that KBC Concrete and GCM Metal breached their contracts with Foundations Group is granted, with damages to be assessed at the time of trial; and it is further

ORDERED that the clerk of the court is to enter judgment accordingly; and the remainder of the complaint is severed and continued under this index number.

This constitutes the decision and order of the court.

Dated: October 2, 2012
New York, New York



J.S.C.