SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JAMES MCDONOUGH

TP - 12

Plaintiff,

- against -

Present:
Hon. Thomas P. Aliotta

DELRIC CONSTRUCTION CO., INC., HENICK-LANE INC., JACOBS ENGINEERING, CITY OF NEW YORK, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, FRP SHEET METAL CONTRACTING CORP., NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATION SERVICES, MAYOR'S OFFICE OF CRIMINAL JUSTICE COORDINATOR, NEW YORK STATE UNIFIED COURT SYSTEM OFFICE OF COURT ADMINISTRATION,

DECISION and ORDER

Index No. 150892/2013

Defendants.

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JACOBS FACILITIES, INC., JACOBS PROJECT MANAGEMENT CO., and JACOBS ENGINEERING,

Motion Nos. : 530 - 004
1026 - 005
1041 - 006
1082 - 007
1096 - 008
1118 - 009
1128 - 010
1170 - 011

Third-Party Plaintiffs,

- against -

J.P. MECHANICAL INSULATION CONTRACTING, INC., J.P. MECHANICAL INSULATION CONTRACTING, INC. d/b/a J.P. MECHANICAL INSULATION, INC., and J.P. MECHANICAL INSULATION, INC.,

Third-Party Defendants.

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The following papers numbered 1 to 45 were fully submitted on the 18th day of May, 2016.

Papers Numbered

Plaintiff's Notice of Motion for Partial Summary Judgment on Liability under Labor Law §240, with Supporting Papers (dated February 3, 2016)..... 1

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

Upon the foregoing papers, the motions and cross motion are decided as follows.

Plaintiff James McDonough (hereinafter, "plaintiff") commenced this action to recover damages for personal injuries allegedly sustained on July 11, 2013 while in the employ of defendant/third-party plaintiff J.P. Mechanical Insulation Contracting, Inc. (hereinafter, "J.P."), as a mechanical insulator at the construction site of the new Courthouse being built at 26 Central Avenue on Staten Island.

Plaintiff maintains that on the day of the incident, he fell from one of numerous

wooden planks that spanned a ventilation shaft on the sixth floor of the above structure, causing him to plummet approximately thirty feet through the open air shaft, before landing on a piece of angle iron located two floors below, prior to being struck by one of the unsecured wooden planks that had also fallen down the open shaft. As a result, plaintiff claims to have sustained multiple injuries of a permanent and debilitating nature. It is further alleged that the so-called wooden scaffold or platform [1] from which plaintiff fell had no safety railing and was wobbly in nature having partially collapsed, and that the open ventilation shaft was inadequately barricaded.

As a result, plaintiff commenced this action against (i) the alleged owners of the project, *i.e.*, the Dormitory Authority of the State of New York (hereinafter, "DASNY") and the City of New York (hereinafter, the "City"); (ii) Delric Construction Co., Inc. (hereinafter, "Delric"), the prime contractor for general construction; (iii) Henick-Lane Inc. (hereinafter, "Henick-Lane"), the prime contractor for heating, ventilation and air conditioning; (iv) Henick's sheet metal subcontractor, FRP Sheet Metal Contracting Corp. (hereinafter, "FRP"), and (v) defendants/third-party plaintiffs Jacobs Engineering, Jacobs Facilities, Inc., and Jacobs Project Management Co. (hereinafter, collectively "Jacobs"), the purported construction manager. In his verified bill of particulars, plaintiff alleges, in relevant part, that each of the above defendants by and through their

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[1] It is plaintiff's contention that the two vertical planks "criss-crossing" over four to six horizontal planks is a type of platform or scaffold because it is intended to support a worker at an elevated height. He referred to the planks as "10-foot OSHA planks".

agents, servants and/or employees, was negligent in its ownership, maintenance, management, operation and/or control of the workplace; in causing and/or permitting a hazardous condition to exist; and in failing to provide plaintiff with adequate protection and safety devices in violation of Labor Law §§240(1), 241(6), 200 and certain OSHA regulations. In response, Jacobs commenced a third-party action against plaintiff's employer, J.P., for, *inter alia*, (1) contribution and common-law indemnification (plaintiff's first cause of action), (2) contractual indemnification, whether in whole or in part (plaintiff's second cause of action), and (3) breach of contract based upon J.P.'s alleged failure to procure commercial liability insurance coverage naming Jacobs as an additional insured (plaintiff's third cause of action).

Presently before the Court are (1) plaintiff's motion for partial summary judgment against Delric, Henick, Jacobs, the City of New York, DASNY and FRP (*i.e.*, the alleged owners, prime contractors and/or statutory agents) on the issue of liability as a matter of law for violating Labor Law §240(1); (2) the separate motions of defendants DASNY, Delric, Henick, FRP, Jacobs and third-party defendant J.P. for, as is relevant, summary judgment dismissing (a) plaintiff's claims under Labor Law §240(1), §241(6), §200 and for common-law negligence, (b) any and all cross-claims, and (c) the third-party complaint. In addition, these defendants seek summary judgment granting contractual indemnification in favor of each.

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

Plaintiff's Motion for Partial Summary Judgment

(Motion Sequence No. 004)

In support of plaintiff's motion for partial summary judgment on his Labor Law §240(1) claims, he submits, *inter alia*, (1) a copy of his deposition testimony, (2) the affidavits of the sole eyewitness, Ivica Begonja, and two co-workers who were present on the day of the accident, (3) the affidavit of plaintiff's expert, Herbert Heller, P.E., a licensed and registered professional construction engineer, who rendered an opinion regarding the four allegedly separate and distinct violations of Labor Law §240(1), (4) a concurring OSHA Citation and Notice of Penalty [2] issued by the U.S. Department of Labor Occupational Safety and Health Administration to J.P. Mechanical on September 17, 2013, and (5) a certain Decision and Order dated November 27, 2013 issued by the City of New York Environmental Control Board (hereinafter, "ECB"), after a hearing before an Administrative Law Judge (ALJ), who found that Delric was a "proper party under the charged section of law", and that the record before it contained substantial evidence "that the shaft [in question] was not properly planked at the time of the incident". However, that finding was subsequently reversed by the Board of Appeals,

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[2] The above Citation was issued to plaintiff's employer by the U.S. Department of Labor based on a finding that J.P. had violated 29 CFR 1926.501(b)(4)(I) in that "[e]ach employee on walking/working surfaces was not protected from falling through holes (including skylights), more than six feet (1.8 m) above [the] lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes" (*See* Plaintiff's Notice of Motion for Summary Judgment, Exhibit "QQ").

which exonerated Delric. [3]

To the extent relevant, plaintiff testified at his deposition that at the time in question he had been working on the sixth floor of the new building installing insulation on certain HVAC/air handler piping, and that immediately prior to the accident, he was in the process of attempting to retrieve certain wooden planks that had been lain across the subject air shaft on the sixth floor, because his men needed "something to span an open space" in order to perform their assigned tasks in another area of the sixth floor. [4] Plaintiff further testified that at the time in question he was wearing his safety harness with a six foot lanyard that was capable of attaching to a "tie-off hook" or other suitable "tie-off" anchor point, and was designed to ensure that any fall would not exceed six-feet. In addition, plaintiff testified that in order to determine how the wooden planks in the air shaft had been secured, he was required to see the far ends of the planks, none of

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[3] This Notice of Violation was issued by the ECB to Delric after an inspection of the accident site and a hearing at which a civil penalty was imposed upon the latter when it failed to establish that it maintained certain safeguards, "especially with regard to the planking" (*see* Decision and Order, Plaintiff's Notice of Motion for Summary Judgment, Exhibit "NN"). It is notable, however, this ECB Decision and Order was subsequently appealed by Delric and reversed by the Board of Appeals in a Decision and Order dated May 24, 2014, wherein it was found that Delric was not a responsible party "in light of the prime [contractor's] independent contractual relations under [the] Wicks Law, [*i.e.*, that] the Petitioner [the NYC Department of Buildings] ha[d] not shown that Respondent [Delric] was responsible for or in control of the work of the mechanical prime [contractor, Henick-Lane] and its subcontractor [J.P.] on the shaft at the time of the accident".

[4] In this regard, plaintiff testified at his deposition that he and his men "were going to take the planks from there [*i.e.*, the subject shaft] and make a platform so [his] men could safely proceed with their job" since they were unable "to get the man-lift up, [and] the ladders [would not] work".

which were visible without stepping onto them. Plaintiff also testified that when he first attempted to move the planks by hand, he found that they could not be moved. Having thus satisfied himself that they were "solid", he took two full strides about halfway (*i.e.*, six feet) across, before deciding to "go back" when he could not find an anchorage point on which to tie off his lanyard. According to plaintiff, at that moment, although he remained stationary, the planks began to wobble and then collapsed.

Plaintiff's deposition testimony to this effect is corroborated in the separate affidavits of three of his co-workers on the day in question, one of whom witnessed the accident. In principal part, the affiants observed, *inter alia*, (1) that there were no barricades around the side of the air shaft to the left of the elevator, a condition which had existed for approximately 1 ½ months prior to the incident; (2) that plaintiff was wearing a harness and lanyard at the time of his fall; (3) that there were a number of wooden planks resting across the open shaft; (4) that two of the planks were located "vertical[ly]" with a number of "horizontal" planks beneath them; [5] (5) that plaintiff "checked" the wooden planks for movement and found none; (6) that when plaintiff "got onto the vertical wooden planks he was looking to tie-off on an anchorage point" but was unable to locate any; (7) that there were "big open areas...on both sides of the vertical planks... more than enough space for his body to fall down the shaft on either

[5] According to plaintiff's expert, the "two vertical planks criss-crossing over four to six horizontal planks should be considered as a type of scaffold because it is intended to support a worker at an elevated height" (*see* Plaintiff's Notice of Motion for Summary Judgment, Exhibit "X").

side of the vertical planks"; (8) that plaintiff was standing on the vertical planks when they began to wobble, causing him to fall down the shaft through the "big open...space" noted previously; (9) that one of the planks fell down the shaft along with plaintiff; and (10) that he fell onto a metal beam or angle iron located on or near the fourth floor.

In view of the foregoing, plaintiff maintains that he is entitled to summary judgment on his Labor Law §240 (1) claims based upon defendants' alleged failure to provide him with proper protection from an elevated-related hazard. More specifically, he points to the four separate violations of the statute cited by his expert, and contends that each, standing alone, constitutes *a* proximate cause of his accident. In particular, plaintiff claims that defendants failed to provide him with the following proper safety devices, *i.e.*, (1) a sturdy and secure wooden scaffold situated over a thirty-foot open air shaft, (2) a protective guard or safety railing on said plank scaffold, (3) adequate anchorage tie-off points for plaintiff's lanyard, and (4) adequate barricades around all open sides of the thirty- foot hole. Plaintiff further argues that having established, prima facie, defendants' violation of Labor Law §240(1), any comparative negligence on his part is irrelevant, as a matter of law, to the absolute and nondelegable liability imposed by the statute.

It is well established that Labor Law §240(1) imposes upon owners, general contractors and their agents, a nondelegable duty to provide safety devices necessary to protect workers from the risks inherent in elevated work sites, the breach of which renders them strictly liable regardless of whether the work giving rise to plaintiff's

injury was performed by an independent contractor over which they exercised no supervision or control (*see* Barreto v Metroploitan Tr. Auth., 25 NY3d 426, 433; McCarthy v Turner Constr. Inc., 17 NY3d 369, 374; Bascombe v West 44th Street Hotel, LLC, 124 AD3d 812, 813). Accordingly, in order to prevail on a cause of action under Labor Law § 240(1), the plaintiff must establish (1) a violation of the statute and (2) that such violation was a contributing cause of his injuries (*see* Duda v Rouse Constr. Corp., 32 NY3d 405, 410; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287-289; Vivar v 441 Realty, LLC, 128 AD3d 810, 810).

Consonant with the foregoing, it is the opinion of this Court that plaintiff has met his initial burden of establishing, prima facie, his right to judgment as a matter of law on the issue of liability based on a violation of Labor Law §240(1), by producing legally sufficient evidence which demonstrates that he was not provided with adequate protection against the risks inherent in an elevated work site, as a result of which he was caused to fall in excess of thirty feet from the sixth floor through the partially un-barricaded opening of an air ventilation shaft, when one of the unsecured planks wobbled during his attempt to retrieve planks for his workers to use in connection with their assigned work in another area of the sixth floor. Based on these facts, it is the opinion of this Court that plaintiff has established that his injuries were the direct consequence of the unsafe conditions in the improperly barricaded or un- secured ventilation shaft and the absence of adequate protective devices to guard against a risk arising from a physically significant elevation differential (*see* Nicometi v Vineyards

of Fredonia, LLC, 25 NY2d 90, 96 [internal quotation marks omitted]; Jardin v A Very Special Place, Inc., 138 AD3d 927, 930; Doto v Astoria Energy II, LLC, 129 AD3d 660, 661-662).

At this juncture, it is worthy of note that the affidavit of plaintiff's expert has been challenged on the grounds, *inter alia*, that this out-of-state affidavit (1) is not accompanied by a certificate of conformity as required by CPLR 2309 (c), (2)that said affidavit is, therefore, inadmissible, (3) that his opinions are unreliable being based exclusively on generally accepted practices in the industry, and (4) that these opinions are speculative to the extent that they fail to identify any specific rules or standards upon which they are based. However, it has been held that he absence of a certificate of conformity has and will be deemed excusable (*see* Nandy v Albany Med. Ctr. Hosp., 155 AD2d 833; *see also* Connors, Practice Commentaries, Cons Laws of NY, Book 7B, C2309:3, p 169-170). For their part, all of the defendants have failed to submit experts' affidavits to refute the claims of plaintiff's expert.

Be that as it may, the various submissions tendered by defendants in opposition to plaintiff's prima facie showing are sufficient to raise triable issues of fact as to whether or not the plaintiff's actions may have been, as they suggest, the sole proximate cause of the accident (*see* Jardin v A Very Special Place, 138 AD3d at 930; Bascombe v West 44th Street Hotel, LLC, 124 AD3d at 813). In this regard, it is well established that although contributory negligence on plaintiff's part is not a defense to a claim under Labor Law §240(1) (*see* Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at

286), where a plaintiff's actions may be said to be the sole proximate cause of his injuries, liability under Labor Law §240(1) does not attach (*see* Robinson v East Med. Ctr., LLP, 6 NY3d 550, 554; Doto v Astoria Energy II, LLC, 129 AD3d at 662; Bascombe v West 44th St. Hotel, LLC, 124 AD3d at 812-813). For these purposes, a plaintiff's negligence is considered to be the sole proximate cause of an accident "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing the accident" (Gallagher v New York Post, 14 NY3d 83, 88; *see* Doto v Astoria Energy II, LLC, 129 AD3d at 662).

With regard to the issue of sole proximate cause, defendants point out that plaintiff had worked as a foreman for approximately twenty years prior to the subject accident and, as such, was responsible for ensuring that proper standards were observed by the workers under his supervision. More specifically, as evidenced by the deposition testimony of both plaintiff and his supervisor, Vincenzo Corrao, a foreman would be held responsible for (1) conducting "toolbox talk safety meetings" to address such safety topics as working at heights and fall protection equipment, (2) planning, directing and assigning work to J.P.'s employees at the job site, (3) designating where he and his crew would be working, and (4) deciding which safety and other equipment should be used in connection with such work. In addition, defendants point out that, on the day of the accident, neither plaintiff nor any other employee of J.P., had been assigned to work

in or near the sixth floor ventilation shaft, as evidenced by the deposition testimony of numerous witnesses, including plaintiff, himself, Henick-Lane's site supervisor (Terence McCarthy), and plaintiff's supervisor (Vincenzo Corrao).

Defendants further emphasize that the evidence before this Court clearly establishes that it was plaintiff's own decision in the role of foreman, to retrieve planking from the subject shaft and, as such, voluntarily and knowingly exposed himself to an elevation-related risk by venturing onto the wooden planks that spanned the opening of the ventilation shaft without first tying-off. In this regard, plaintiff testified that both J.P. Mechanical and Henick-Lane had a "requirement", "rule" and "practice" that all workers be tied off whenever they entered a shaft, and had received specific instructions regarding the location and identification of overhead tie-off points. Moreover, Jacobs' project manager, David Fox, testified that even in the absence of any so-called "removable barricades" partially blocking the ventilation shaft on the sixth floor (1) no one "would...be allowed to work in an open an open air shaft without the proper fall protection", and (2) it would be "improper" for a worker to be working in a shaft without being tied off.

In addition, plaintiff had testified that he was aware that harnesses, lanyards and retractable lanyards of various sizes up to forty-five feet were available at the job site, that he had previously utilized each of the various types of lanyards, including the longer lanyards in areas that were difficult to reach; and that he routinely tied-off before working in the ventilation shafts. For example, plaintiff testified as to his use of the

longer lanyards on multiple occasions to anchor himself from the sixth floor in order to perform work on the fifth floor below. In fairness, plaintiff acknowledged that, on such occasions, he would anchor his lanyard to pipes and horizontal I-beams which ran the length of the ceiling on the sixth floor, but that these same structural anchor points were unavailable to him on July 11, 2013 (*i.e.*, when the ducts on the sixth floor were being insulated by J.P.), since FRP's prior installation of ductwork had altered the available vertical work space in the subject ventilation shaft. Additionally, according to plaintiff, while certain other straps and tie-off anchorages that had been drilled into the concrete decking by FRP employees for use during their installation of the ducts, they were removed when FRP completed its work. Although various witnesses from Henick-Lane, Delric, Jacobs and FRP contradicted plaintiff, and identified numerous overhead anchor points (including, horizontal and vertical beams) that were available for plaintiff to tie-off in the immediate vicinity of the subject shaft on the day of his accident, plaintiff demurred, maintaining that such anchorage tie-offs or structural points were no longer extant and/or accessible on the date in question. However, plaintiff did concede that he was explicitly instructed by both his supervisor and Henick-Lane to "stay away" from that particular shaft prior to his fall.

In view of the foregoing, it is the Court's opinion that the proof tendered by defendants is sufficient to raise triable issues fatal to plaintiff's summary judgment motion. More specifically, defendants produced evidence that, *inter alia*, plaintiff unilaterally decided to enter the sixth floor ventilation shaft, where he had been assigned

no work; that he was instructed to "stay away" from said shaft, and that he stepped onto the wooden planks covering the opening of a ventilation shaft (1) without *first* tying-off, as he knew was required, and (2) in so doing, knowingly disregarded the explicit safety instructions and warnings of Henick-Lane and his own supervisor. [6] Accordingly, defendants have raised a triable issue of fact as to whether or not plaintiff's actions were the sole proximate cause of his accident (*see* Bascombe v West 44th Street Hotel, LLC, 124 AD3d at 813; Yedynak v Citnalta Constr. Corp., 22 AD3d 840, 841; *see generally* McCrea v Arnlie Realty Co., LLC, 140 AD3d 427, 428-429; Saavedra v 64 Annfield Court Corp., 137 AD3d 771, 772; Scofield v Avante Contr. Corp., 135 AD3d 929, 930-931; Lin v City of New York, 117 AD3d 913, 914; Negron v City of New York, 22 AD3d 546, 547).

In brief, it is beyond disputing that there is "conflicting evidence [in this case] regarding whether plaintiff was provided with adequate safety devices but failed to use them, which raises a triable issue of fact' on the issue of sole proximate cause (Quinones v Olmstead Props., Inc., 133 AD3d 87, 88-89). Additional triable issues of fact also appear to exist concerning (1) whether safe, alternative means of constructing a platform for himself and his workers were available to plaintiff on the day in question, and (2) whether his failure to use those means, if any, were the sole proximate cause of

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[6] To the extent relevant, plaintiff's supervisor at J.P. Mechanical, Vincenzo Corrao, testified that plaintiff was very experienced in the use of harnesses, lanyards, and the beam-clamp or tie-off strap methods of protection.

his injuries (*see* Quinones v Olmstead Properties, Inc., 133 AD3d at 90; Plass v Solotoff, 5 AD3d 365, 366-367).

Plaintiff's motion for summary judgment must also be denied with respect to defendants FRP (Henick-Lane's subcontractor) and Delric (the prime contractor for general construction) on the additional ground (*see infra*) that plaintiff has failed to establish, as a matter of law, that either of these defendants was a statutory agent of either the property owner or contractor within the meaning of Labor Law § 240(1). "A party is deemed to be an agent of the owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done at the location a plaintiff is injured" (Esteves-Rivas v W2001Z/15CPW Realty, LLC, 104 AD3d 802, 804 [quoting Perez v 347 Lorimer, LLC, 84 AD3d 911, 912]). Here, each of the foregoing defendants has adduced sufficient evidence of their lack of authority to exercise supervision, control or direction over plaintiff's work to raise a triable issue of fact (*see* Walls v Turner Constr. Co., 4 NY3d 861, 863-864; Barreto v Metropolitan Tr. Auth., 25 AD3d 426; *cf.* Sanchez v Metro Bldrs. Corp., 136 AD3d 783, 786).

The same cannot be said, however, of the remaining prime contractors, defendants Jacobs (the construction manager) and Henick-Lane (the mechanical contractor for, *e.g.*, heating, ventilation and air conditioning), as will be addressed in the context of their separate motions (*see infra*).

MCDONOUGH vs. DELRIC CONSTRUCTION CO., INC.

J.P. Mechanical's Motion for Summary Judgment

(Motion Sequence No. 006)

In moving for summary judgment dismissing Jacobs' third-party complaint, third-party defendant J.P. maintains that the former is not entitled to contractual indemnification (its second cause of action), as a matter of law, under the terms of J.P.'s "Global Agreement" with the prime contractor Henick-Lane, executed on January 30, 2013. More specifically, J.P. alleges that although the Global Agreement provides, in pertinent part, that the subcontractor (J.P.), shall "to the maximum extent permitted by law, defend, indemnify and hold harmless... the construction manager" (Jacobs), it explicitly limits J.P.'s obligation to indemnify "to any liability imposed over and above that percentage attributable to actual fault [on the part of an indemnitee]", and that "[u]nder no circumstance shall.... [J.P.] be require[d] to indemnify an indemnitee [Jacobs] for the indemnitee's own negligence or wrongdoing". In this regard, movant points out that General Obligations Law § 5-322.1 similarly prohibits a proposed indemnitee from being indemnified for its own negligence.

J.P. further relies upon a certain "Agreement with Subcontractor" [7] made on February 7, 2013, between itself and Henick-Lane, wherein J.P.'s obligation to

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[7] Notably, while said "Agreement with Subcontractor" between Henick-Lane, as Contractor, and J. P. Mechanical, as Subcontractor, requires the latter to "indemnify, hold harmless and defend Owner, Contractor, General Contractor, Architect...[and] agents, employees of any of them...", it does not specifically include the construction manager (Jacobs), or designate Jacobs as the "general contractor" and/or an "indemnitee".

indemnify Henick-Lane is said to "extend only to the percentage of negligence of [J.P.] or anyone directly or indirectly employed by [J.P.] or anyone for whose acts it may be [found] liable [*e.g.* the plaintiff/employee] in connection to such claim, damage, loss and expense".

With this established in support of its motion, J.P. maintains that Jacobs, the third-party plaintiff, is unable to demonstrate at this juncture that plaintiff's injuries can be attributed to any acts of negligence on the part of his employer, J.P., the proposed indemnitor, and/or that J.P. breached any duty owed to Jacobs. In this regard, J.P. argues that its freedom from negligence may be found in the uncontroverted deposition testimony of plaintiff, his supervisor (Vincenzo Corrao), and the other witnesses that were deposed in this action on behalf of Henick-Lane, Delric, FRP and DASNY. According to J.P., each of these witnesses testified, in pertinent part, that (1) as J.P.'s foreman, plaintiff reported directly to Henick-Lane's employees (Mike Modica and Terence McCarthy), who were allegedly on-site to direct and supervise plaintiff's work, (2) Henick-Lane was responsible for providing any tools and equipment (*e.g.* ladders, lanyards, harnesses, beam clamps and man-lifts) required by J.P. employees to perform their work, (3) both Jacobs and Henick-Lane had the authority to enforce safety standards and stop the work in the event of an unsafe condition, and (4) J.P. did not construct the platform at issue or perform any work in the subject ventilation shaft prior to plaintiff's accident, nor was it required to install, maintain or alter the missing perimeter protection for the shaft in question.

Moreover, J.P. maintains that since Jacobs was primarily responsible for overall safety at the job site, and was required to conduct daily and/or weekly safety inspections in order to evaluate and enforce the applicable safety regulations, it cannot seek contractual indemnification from J.P. for its own negligent acts or omissions, .*e.g.*, in failing to remedy or halt any unsafe conditions created by it or of which it had actual or constructive notice, as such would violate its obligation to provide workers with a safe place to work (*see* Mikelatos v Theofilaktidis, 105 AD3d 822, 823).

Based on the foregoing, plaintiff's employer, further maintains that Jacobs is not entitled to common-law indemnification and/or contribution from J.P., as a matter of law (the first cause of action in Jacobs' third-party complaint), and, in any event, that plaintiff's failure to sustain a "grave injury" under the Worker's Compensation Law §11, would operate both to bar Jacobs' third-party claims and/or any cross-claims against J.P. for either common-law contribution or indemnification.

Turning, first, to the scope of the indemnification agreements in the matter at bar, it is well established that the language "to the fullest extent permitted by law...contemplates [only] partial indemnification", and is intended to limit a subcontractor's contractual indemnification obligation solely to the damages caused by its own negligence (*see* Brooks v Judlau Contr., Inc., 11 NY3d 204, 210 [wherein the Court of Appeals held that the phrase "to the fullest extent permitted by law" limits rather than expands a promisor's indemnification obligation and creates a "partial indemnification" obligation on behalf of a subcontractor/promisor by voiding (with

certain exceptions not relevant herein) any contractual provision purporting to require the promisor to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury or damage to property resulting from, *inter alia*, the negligence of the promisee, its agents or employees]). Accordingly, J.P.'s contractual obligation to indemnify Jacobs, the third-party plaintiff, "to the extent permitted by law" expressly limited J.P.'s liability to reimburse Jacobs for such claims, damages, losses and expenses for which Jacobs may be called upon to answer, to those claims, damages, losses or expenses "caused in whole or in part by any act or omission of the subcontractor [J.P.] or anyone employed by it" (*see* General Obligations Law § 5-322.1[1]).

Accordingly, as will be more fully addressed in the context of, *e.g.*, Jacobs' motion for summary judgment (Motion Sequence No. 010) and plaintiff's motion for partial summary judgment (Motion Sequence No. 004), the existence of triable issues of fact with regard to apportionment of the negligence, if any, to either or both J.P. and Jacobs for causing or contributing to plaintiff's accident, operate to preclude summary dismissal of Jacobs' third-party complaint. In other words, J.P.'s failure to establish, prima facie, that no negligence on the part of plaintiff caused or contributed to plaintiff's accident precludes dismissal of the third-party complaint.

As heretofore indicated, this failure requires that so much of J.P.'s motion which is for summary judgment dismissing Jacobs' third-party claim for contractual indemnification (Jacobs' second cause of action) be denied (*see* Seales v Trident

Structural Corp., 142 AD3d 1153, 12-13; *cf.* Tolpa v One Astoria Sq. LLC, 125 AD3d 755, 756-757; Mikelatos v Theofilaktidis, 105 AD3d at 824). So, too, must that branch of J.P.'s motion which is for summary judgment dismissing Jacobs' third cause of action, for breach of contract. Pertinently, J.P. does not address or dispute the sufficiency of Jacobs' third cause of action, which is predicated on its alleged breach of the Global Agreement to procure a blanket liability insurance policy covering all of the indemnity agreements contained therein.

As for the branch of J.P.'s motion which is for summary judgment dismissing the first cause of action in the third-party complaint, *i.e.*, for contribution and common-law indemnification, there does not appear to be any dispute that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11. As such, Jacobs is prohibited from seeking contribution and/or common-law indemnification from plaintiff's employer. Accordingly, this branch of J.P.'s motion for summary judgment must be granted, and the first cause of action of Jacobs' third-party complaint, severed and dismissed (*see* Brooks v Judlau Contracting, Inc., 11 NY3d at 208; Cocom-Tambriz v Surita Demolition Contr., Inc., 84 AD3d 1300, 1301).

Delric's Motion for Summary Judgment

(Motion Sequence No. 007)

Delric, the general construction manager, has moved for summary judgment dismissing the complaint and all cross-claims against it on the grounds that (1) it is not

an owner, contractor or agent thereof subject to liability under the Labor Law, (2) plaintiff's conduct was the sole proximate cause of his alleged injuries, (3) there was no violation of any applicable provision of the Industrial Code to support a cause of action under Labor Law 241(6), (4) it neither supervised, directed or controlled the means and methods of plaintiff's work, (5) plaintiff's accident was not caused by any dangerous condition on the premises, and (6) the moving defendant did not cause, create or have actual or constructive notice of the alleged dangerous condition upon which plaintiff purports to rely.

In addition, Delric seeks dismissal of the contractual indemnity cross-claims of Henick-Lane, the City defendants, Jacobs and J.P. on the grounds that it did not enter into any contractual agreement with these entities. Moreover, Delric maintains that DASNY is not entitled to contractual indemnity or "additional insured" coverage since plaintiff's accident did not arise out of the performance of its "general construction work". Finally, Delric seeks dismissal of the cross-claims of co-defendants Henick-Lane, Jacobs, DASNY, FRP and J.P. for common-law indemnity and contribution on the grounds that Delric was in no way negligent, and that it did not supervise, direct or control plaintiff's work.

In support of its motion, the moving defendant relies on the deposition testimony of DASNY's project manager, Gary Guttman, who testified that Delric was not hired as a general contractor, whose responsibilities "encompass[] the entire project of all the trades", but rather, was retained by DASNY as a "general construction manager" solely

to perform the dry wall installation, painting and general construction work. Mr. Guttman further testified that Jacobs was responsible for performing daily safety inspections and enforcing safety standards. Delric also maintains that the deposition testimony of its project manager, Frank Orlando, is uncontroverted insofar as it indicates that in 2013, Delric's authority to enforce safety standards at the job site was limited to its own employees, as compared to Jacobs, which had the authority to require *all* contractors to comply with work site safety standards, and shared the authority with DASNY to stop the work for unsafe conditions.

According to Mr. Orlando, in late 2011, Delric constructed the air shafts in the building "per the Henick-Lane shop drawings" and, "sometime in the end of 2011, 2012", Jacobs' project manager, Bill Smith, directed Delric to construct a "removable corral in the front [of the sixth floor air shaft]....because [of] the amount of work needed to get in and out of these areas". However, the witness maintained that Delric was not instructed to install any "tie-offs" or "anchor points" inside the air shafts, and that the erection of the perimeter barricades, was complete *prior* to January 1, 2013. He further testified that Delric bore no responsibility for maintaining the air shafts or the removable barricades. According to the witness, Henick-Lane was responsible for the maintenance of the physical air shafts through July 11, 2013, and employed carpenters for this purpose and to provide safety. Finally, Mr. Orlando also testified that Delric's work was inspected and accepted by Jacobs.

Based on this testimony, the moving defendant argues that while there is no

direct evidence before the Court to the effect that it performed any type of physical maintenance in the air shafts, several witnesses *have* testified that Henick-Lane performed work and/or maintenance therein, including the tightening of safety cables, re-attaching the safety netting to the concrete slab, setting up platforms, and making any required carpentry repairs. Moreover, while conceding that on the day of plaintiff's accident, Mr. Orlando did a "walk-through" of the areas where Delric was working, *i.e.*, the lower level and first, second and third floors, his "walk-through" did not include the sixth floor, since "Delric hadn't been on that floor on a daily basis in three months or more". According to Mr. Orlando, Delric did not place the planks in the subject air shaft and was not responsible for inspecting the planks that had been placed there by the other trades. In conclusion, he testified that it was his belief that the wooden planks at issue had been placed in the sixth floor air shaft by Henick-Lane.

As additional support, the moving defendant also relies on the deposition testimony of J.P.'s supervisor, Vincent Corrao, to the effect that J.P.'s employees received their instructions on how to perform their work *solely* from J.P., and that Delric (1) never instricted J.P.'s workers "where...and how to work", (2) never provided J.P,'s workers with training to do their jobs, and (3) never lent any tools or equipment to J.P.'s workers to perform their work.

In opposition to Delric's motion, it is alleged that this defendant was named on the building department permit for the courthouse construction project as the "general contractor", and is therefore liable as such under the Labor Law or, in the alternative, as

an agent of DASNY, with the authority to supervise and control both the area and activity which brought about plaintiff's injury. This included, *inter alia*, the air shaft on the sixth floor, its protective barricades, and the wooden platform located within the shaft.

At the outset, it is pertinent to note that the mere designation of Delric as the general contractor in the building permit is insufficient to raise a triable issue of fact as to whether or not it may be deemed a general contractor in the absence of evidence that Delric acted as such by, *e.g.*, hiring, firing, supervising and/or paying the subcontractors (*see* Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp., 125 AD3d 759, 760, *reversed and summary judgment denied*, __ NY3d __, 2016 NY Slip Op 07046; Martinez v 408-410 Greenwich St., LLC, 83 AD3d 674, 674-675; Kilmetis v Creative Pool & Spa, Inc. 74 AD3d 1289, 1290-1291).

Moreover, the opposing parties' reliance on a certain Decision and Order by the ECB dated November 27, 2013, finding Delric to be a general contractor, is also misguided, since that determination was subsequently reversed on administrative appeal in a Decision and Order dated May 24, 2014, wherein the Board of Appeals determined that "in light of the prime [contractor's] independent contractual relations under [the] Wicks Law,...[the NYC Department of Buildings] has not shown that ...[Delric] was responsible for or in control of the work [being performed in the shaft by] the mechanical prime [contractor, Henick-Lane,] and[/or] its subcontractor[, J.P.,]...at the time of [plaintiff's] accident...".

"As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 (1) or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" (Giovanniello v E.W. Howell, Co., LLC, 104 AD3d 812, 813, citing Barrios v City of New York, 75 AD3d 517, 518; *see* Myles v Claxton, 115 AD3d 654, 655). Furthermore, "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law [only] when it has supervisory control and authority over the work being done where a plaintiff is injured" (Fucci v Douglas S. Plotke, Jr., Inc., 124 AD3d 835, 836, citing Medina v R.M. Resources, 107 AD3d 859, 860].

Consonant with the foregoing principles, it is the opinion of this Court that Delric has established, prima facie, by the submission of uncontroverted evidence, that it (1) was not responsible for coordinating and supervising the court construction project, (2) was not vested with the concomitant authority to enforce safety standards on the construction site, (3) did not hire either Henick-Lane, the prime contractor for the installation of the heating, ventilation and air conditioning system (HVAC) or its subcontractor, J.P., plaintiff's employer, and (4) provided none of the equipment used in connection with plaintiff's work. Moreover, it is uncontroverted that neither the HVAC nor the insulation work in which plaintiff was engaged at the time of his accident had been delegated to Delric. In fact, there is no evidence before the court that Delric controlled, supervised or directed the methods or manner of the work that plaintiff was

performing at the time of his injury, or that it was vested with any such authority (*see* Rizzuto v L.A. Wenger Contr. Co., 91 NY2d at 352-353; Fucci v Douglas S. Plotke, Jr., Inc., 124 AD3d at 836; *cf.* Guanopatin v Flushing Acquisition Holdings, LLC, 127 AD3d 812, 813-814).

Accordingly, Delric has demonstrated, prima facie, that it cannot be deemed a general contractor or a statutory agent of the owner within the meaning of the Labor Law. Therefore, that branch of its motion which is for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6) and 200 must be granted (*see* Huerta v Three Star Constr. Co., Inc., 56 AD3d 613, 613, *lv denied* 12 NY3d 702; Utica Mut. Ins. Co. v Style Mgt. Assos. Corp., 125 AD3d at 760-761; Fucci v Douglas S. Plotke, Jr., Inc., 124 AD3d at 836; Martinez v 408- 410 Greenwich Street, LLC, 83 AD3d at 674; Kilmetis v Creative Pool and Spa, Inc. 74 AD3d at 1291).

In addition, although it is undisputed that Delric constructed the subject air shaft and installed the perimeter barricades at issue, no evidence has been adduced sufficient to raise a triable issue of fact as to whether, *e.g.*, the removable barriers were improperly installed, or Delric was in any way responsible for the placement of unsecured wooden planks across the opening of the shaft where plaintiff's accident occurred. To the contrary, Delric has submitted evidence sufficient to establish prima facie that it did not "create[] the dangerous condition that caused the accident or ha[ve] actual or constructive notice of the dangerous condition" extant in the sixth floor ventilation shaft (*see* Wejs v Heinbockel, 142 AD3d 990 [2nd Dept 2016] [internal citation omitted];

Fucci v Douglas S. Plotke, Jr., Inc., 124 AD3d at 836).

In opposition to defendant Delric's prima facie showing of its freedom from common-law negligence, plaintiff and its co-defendants have failed to raise a triable issue of fact (*see* Alvarez v Prospect Hosp., 68 NY2d 320, 324). More particularly, while the opposition to Delric's motion contends that there is conflicting testimony (and therefore a question of fact) regarding whether or not Delric was "individually or jointly" responsible for providing "fall protection at the shaft", and/or maintaining the subject air shaft and its perimeter protection in a reasonably safe condition, the foregoing is based on a misreading of the deposition testimony of Henick-Lane's witness, Terence McCarthy, and Jacobs witness, David Fox. Furthermore, in the opinion of this Court, the simple fact that Delric constructed the subject air shaft and installed the removable perimeter barricades prior to the commencement of plaintiff's work therein, is insufficient, standing alone, to raise a triable issue regarding the liability of this defendant for plaintiff's injuries. Thus, plaintiff's cause of action against Delric predicated on common-law negligence must also be dismissed.

The balance of Delric's motion, *i.e.*, for summary judgment dismissing any cross-claims against it, must also be granted. In this regard, the cross-claims for contractual indemnification asserted by Henick-Lane, Jacobs, the City defendants and J.P. are subject to dismissal in the absence of any contractual agreements between Delric and any of these entities providing for indemnification. Moreover, Henick-Lane, Jacobs, the City defendants and J.P. are not specifically named as "indemnitees" in the prime

contract between DASNY and Delric. Furthermore, DASNY's cross-claim against Delric for contractual indemnification, as well as the cross-claims of Jacobs and DASNY for coverage as "additional insureds", must be dismissed since plaintiff's accident did not arise out of the performance of Delric's general construction "Work". [8] Finally, in view of this Court's dismissal of plaintiff's cause of action against Delric for common-law negligence, (1) any cross-claims asserted against it by its co-defendants for, *e.g.*, common-law indemnification and contribution, must also be dismissed, as must Henick-Lane's cross-claim against Delric for failing to procure "insurance coverage". Critically, there is no such contractual agreement between these parties, and the contract between DASNY and Delric does not identify Henick-Lane as an additional insured.

FRP's Motion for Summary Judgment

(Motion Sequence No. 008)

In its motion for summary judgment dismissing the complaint and all cross-claims against it, FRP, the subcontractor retained by Henick-Lane to install the sheet metal ducts in the building under construction, argues that since it was neither (1) an owner, contractor or statutory agent for purposes of Labor Law §§ 240(1) and 241(6), and (2) lacked the requisite authority to supervise or control plaintiff's work, it is not

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[8] The Contract between DASNY and Delric provides that Delric assumes the entire responsibility and liability for any and all damage and injury resulting, arising out of, or occurring in connection with the execution by the contractor (Delric) of "the work", as defined in said Contract, *i.e.*, "the performance of all obligations imposed upon [Delric] by the Contract".

subject to liability under any of these sections and/or common- law negligence. For present purposes, it is undisputed that FRP installed the sheet metal ducts in the shaft in question prior to plaintiff's accident.

In support of its motion, FRP submits the affidavit of its general foreman for the past 28 years, Steve Chapey, who was responsible for delegating the daily assignments to FRP's employees at the job site, where he had worked since February 6, 2011. In addition, it was his responsibility to prepare Daily Reports which described, *inter alia*, the work performed by FRP each day, the location of that work, and the delays, if any, affecting the work scheduled to be performed. To the extent relevant, photo copies of these Daily Reports for the period between June 1, 2012 through July 11, 2013 are annexed to FRP's motion papers.

As is pertinent here, Mr. Chapey attests that in October of 2012, the "roughing work" for the "duct installation" was performed from an aluminum scaffold known as a "pick" or a staging plank, which is composed of wooden boards some 20 feet long and 2 feet wide. Once this was completed, FRP's workers began the "finishing work", during which their need for the planks was no longer required. Accordingly, in October of 2012, all of these planks were allegedly collected and stacked near FRP's shanty, from which they were subsequently removed from the jobsite. In any event, Chapey attests that as of July 2013, "all of [FRP's] planks" had been removed. After reviewing a photograph that was allegedly taken after plaintiff's accident by David Fox, Mr. Chapey averred that the wooden plank depicted in the duct shaft was not the property of FRP,

nor had it been placed at that location by FRP employees. Moreover, he maintained that the ductwork depicted in that photograph was installed prior to October of 2012 (some nine months prior to plaintiff's accident), and that the planks installed by FRP while working in the shaft would have been surrounded by a "corral system barricade" with removable sections designed to allow FRP's workers to access the shaft. According to the witness, when FRP completed its work in the shaft, the barricade would have been left in place. In addition, he testified that FRP's workers had last used the south side of the shaft for access prior to October of 2012.

According to the affiant, FRP (1) had nothing to do with erecting or maintaining that barricade, (2) lacked exclusive control of the sixth floor shaft, which was accessible to other subcontractors (including electricians, carpenters and insulators) long after FRP had completed of its work, and (3) FRP did not direct, supervise or control any of the work performed in the shaft by any employees other than its own.

Pertinent in this regard, is so much of plaintiff's deposition testimony wherein he admits that although he had spoken to Chapey on the jobsite "quite a lot", the subject of those conversations was limited to the identification of which ducts was "ready" to be insulated by J.P. Thus, he never discussed any safety issues with FRP. According to plaintiff, neither he nor any member of his crew worked with FRP, and Chapey never provided plaintiff with any tools or materials to perform his work. Neither did FRP provide plaintiff or any other J.P. employee with supervision, direction or training. More particularly, plaintiff testified that following FRP's installation and "testing" of the

ductwork in the ventilation shafts, the job of insulating the necessary ducts and pipes was "released" or "turned over" to JP's employees. According to plaintiff, safety dictated that only one trade perform work in a shaft at any given time.

FRP further maintains that Chapey's affidavit and his Daily Reports are corroborated by the deposition testimony of FRP's vice president, Jeffrey Thompson, who was responsible for overseeing project management and progress for FRP. Although this witness lacked any knowledge as to when FRP's work in the shaft on the sixth floor had been completed, he testified that FRP's business records, *i.e.*, the Daily Reports prepared by Mr. Chapey, its field foreman,[9] would reveal when the installation of the ductwork on the sixth floor was performed, completed and "released" to J.P's insulators. Thompson also testified that FRP's workers installed the ductwork in the subject shaft during an unspecified two week period, after which it removed its planking and reinstalled the existing barricades in that shaft. According to the witness, those barricades had been provided by either "DASNY or whoever was managing the entire site". Thompson further noted that its Daily Reports also indicate that FRP performed additional work on the sixth floor "penthouse" between June 18, 2013 and July 1, 2013,

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[9] Notably, FRP's Daily Reports reveal that FRP (1) performed duct testing and/or duct pre-testing on the penthouse/6th floor between September 12, 2012 and October 3, 2012, (2) worked on the penthouse plenums between June 13, 2013 and June 25, 2013, (3) worked on the penthouse dampers between April 17, 2013 and April 26, 2013, and (4) worked on the penthouse seismic hangers between June 26, 2013 and July 1, 2013. However, upon its review of FRP's Daily Reports, the Court is unable to ascertain specifically when FRP completed the installation of the ductwork in the sixth floor ventilation shaft and released same to J.P.

in order to repair a large air plenum that had been damaged by Hurricane Sandy in November of 2012, and to install seismic hangers on the ductwork to prevent them from swaying in the event of earthquakes.[10] However, the witness testified that none of the Hurricane Sandy repair work took place in the particular air shaft where plaintiff's accident occurred. In addition, he testified that following the two-week period during which FRP performed the ductwork installation, FRP's employees performed no additional work in that particular shaft.

Finally, Thompson testified that it was not FRP's general custom and practice to set up planks and platforms in the air shafts in the "criss-cross" fashion noted by plaintiff; rather, their boards were positioned to lay "flat" on the concrete surface spanning the entire air shaft and were secured with straps onto anchors drilled into the concrete decks "that could be removed later". Upon the completion of FRP's work in an air shaft, it was customary that the staging planks would be dismantled and removed. According to Thompson, FRP either purchased its own wooden planks or rented them from a scaffold company.

In view of the foregoing, the seminal issue with regard to FRP's motion for summary judgment is whether this subcontractor established as a matter of law that it did not act as a "statutory agent" of either an owner or contractor within the meaning of

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[10] Notably, Henick-Lane's Daily Reports, which were prepared by its site supervisor, Terrence McCarthy, also indicate that FRP performed "Work Activities"on the penthouse floor between June 13, 2013 and June 28, 2013, that was described as "plenum repair", "plenum f/a tie in", "dampers" and "seismic".

the Labor Law. In this regard, it is well settled that such relationship arises only when the work delegated to a third-party carries with it the ability to control the activity which plaintiff was performing at the time he was injured (*see* Walls v Turner Constr. Co., 4 NY3d, 861, 863-864; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 293), *i.e.*, the authority to supervise that portion of the work that brought about the plaintiff's injury (*see* Rizzuto v L.A. Wenger Consr. Co., 91 NY2d 343, 353). "A defendant has the authority to supervise or control the work for purposes of [the] Labor Law...when that defendant bears the responsibility for the manner [or methods] in which the work is performed" (Ortega v Puccia, 57 AD3d 54, 61; *see* Walls v Turner Constr. Co., 4 NY3d at 863-864; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 293; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505).

Applying these principles here, it is the Court's opinion that FRP has met its initial burden on its motion for summary judgment and dismissal of the Labor Law and common-law negligence claims asserted against it by demonstrating, prima facie, and as a matter of law, that as a subcontractor for Henick-Lane, it had not been delegated any authority to supervise or control the manner or methods of the particular work in which plaintiff was engaged at the time of his injury, and/or to supply the equipment he used to undertake those tasks (*see* Russin v Louis N. Picciano & Son, 54 NY2d 311, 318; Tomyuk v Junefield Assoc., 57 AD3d 518, 520-521). Thus, FRP cannot be held liable as a statutory agent of either the property owner or any of the prime contractors relative to the foregoing species of common-law negligence (*cf.* Barreto v Metropolitan

Transportation Authority, 25 NY3d 426, 434). In opposition to FRP's motion, neither plaintiff nor any of the cross-moving defendants and/or the third-party defendant have raised a triable issue of fact as to whether or not FRP had any authority to supervise or control plaintiff's work (*see* Zuckerman v City of New York, 49 NY2d 557, 562; CPLR 3212[b]).

However, there exists an alternative ground for imposing liability under Labor Law § 200 and/or common-law negligence, as it is well established that landowners, contractors and their agents have a duty to provide workers with a reasonably safe place to work. As stated in Rizzuto v L.A. Wenger Constr. Co. (91 NY2d at 352), "an implicit precondition...[of the aforementioned] duty is that the party to be charged with that obligation have the *authority* [not only] to *control the activity bringing about the injury*[, as previously noted, or] *to enable it to avoid* or correct an unsafe condition". Thus, "[a] subcontractor may be held liable for [common-law] negligence [or under Labor Law § 200] where the work it performed created the condition that caused the plaintiff's injury, even if it did not possess any authority to supervise or control the plaintiff's work or work area" (Van Nostrand v Race & Rally Constr. Co., Inc., 114 AD3d 664, 666; Ortiz v I.B.K. Enters., Inc., 85 AD3d 1139, 1140; Poracki v St. Mary's R.C. Church, 82 AD3d 1192, 1195).

Consonant with the foregoing, it is the opinion of this Court that FRP has failed to meet its initial burden of establishing, prima facie, as a matter of law, that it did not create the hazardous condition that was a proximate cause of plaintiff's injuries. In this

regard, it cannot be said that the deposition testimony of Terence McCarthy, with or wihout FRP's Daily Reports, and the affidavit if Steve Chapey, are sufficient in and of themselves to eliminate triable issues of fact regarding, *inter alia*, (1) whether or when FRP's work in the subject shaft was completed, (2) when this subcontractor dismantled and removed its wooden planks from the sixth floor ventilation shaft, and (3) whether or not FRP's repair work on the penthouse plenums, dampers and siesmic hangers required its workers to access the subject shaft and/or set up staging planks in that area. [11]

As regards the above, neither Chapey's affidavit nor Thompson's deposition testimony indicate the source of the information they contain, or provide sufficient details or particulars relative to the nature, location and proximity of FRP's apparent work on the penthouse floor several weeks prior to plaintiff's accident. As such, FRP has failed to carry its initial burden of establishing that none of its employees performed any work in the subject ventilation shaft at a time relevant to plaintiff's injury that would have required its use of wooden planks, and if or when they may have been removed. In this regard, Chapey's averments concerning the completion of FRP's duct work "in October of 2012" and its alleged dismantling and removal of the "staging planks" constitute bare and unsubstantiated allegations which the photographs in evidence do not support. Also lacking is the presence of proof supportive of Thompson's testimony to the effect that none of the post-hurricane repair work required

[11] Of course, these issues are delineated as examples, and are not intended to be exclusive.

FRP's employees to access the air shaft where plaintiff fell, or the claim that following the installation of ductwork in the aforementioned shaft, no additional work was performed therein by FRP. Thus, the evidence upon which FRP purports to rely does not adequately establish, *inter alia*, whether or not the wooden planks in the subject shaft at the time of plaintiff's accident belonged to FRP and/or whether FRP left them behind upon the completion of its work in that area.

A motion for summary judgment dismissing causes of action sounding in common-law negligence and/or a violation of section 200 of the Labor Law requires the movant to make a prima facie showing that it neither created the dangerous condition alleged to have caused plaintiff's injury or had actual or constructive notice thereof. Accordingly, FRP has failed to establish its entitlement to judgment as a matter of law dismissing plaintiff's causes of action against it under Labor Law § 200 and/or for common-law negligence (*see* Doto v Astoria Energy II, LLC, 129 AD3d at 663-664). As a result, triable issues of fact exist as to whether or not FRP's purported failure to properly perform its contractual obligations as the sheet metal subcontractor can be found to have (1) "launched a force or instrument of harm", (2) caused or created a hazardous condition at the work site, or (3) had actual or constructive notice thereof, any of which might impose upon it a duty of care towards the injured plaintiff (*see* H.R. Moch Co. v Rensselaer Water Co., 247 NY 160, 168 [1928]; Marquez v L & M Development Partners, Inc., 141 AD3d 694, 699; Bauerlein v Salvation Army, 74 AD3d 852, 856).

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Also subject to denial are those branches of said motion which are for summary judgment dismissing any cross claims for contractual indemnification.[12] and/or breach of contract.[13] This subcontractor's "percentage of negligence", if any, has yet to be determined, and its bare assertion that "it purchased the requisite insurance", is legally insufficient, standing alone, to warrant dismissal at this stage of the proceedings, where the amount of insurance procured by the moving defendant has yet to be disclosed, and no damages been awarded against FRP.

Henick-Lane's Cross Motion for Partial Summary Judgment

(Motion Sequence No. 009)

Henick-Lane, the prime contractor for heating, ventilation and air conditioning, cross-moves for partial summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and so much of his Labor Law §241(6) claim as is predicated upon the alleged

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[12] Pursuant to a certain "Agreement with Subcontractor" dated January 13, 2012 between Henick-Lane and FRP, the latter agreed ,"[t]o the extent permitted by law", to indemnify, hold harmless and defend "Owner, Contractor, General Contractor...agent, employees of any of them and any other parties required by contract from and against all claims, losses and expenses including but not limited to attorney's fees arising out of or resulting from the performance of the agreement, provided any such claim, damage, loss or expense....is caused in whole or in part by any act or omission of the Subcontractor [FRP] or anyone directly or indirectly employed by it...Notwithstanding the foregoing, Subcontractor's obligation to indemnify...shall extend only to the percentage of negligence of Subcontractor or anyone directly or indirectly employed by it..."

[13] Pursuant to the foregoing "Agreement with Subcontractor", FRP was also required to procure and maintain commercial general liability insurance coverage, naming "Henick-Lane, General Contractor, Owner and all other parties required of the General Contractor" as additional insureds.

violation of Rule 23 of the New York State Industrial Code, *i.e.*,12 NYCRR §§ 23-1.7(a), (a)(1) and (2); 23-1.7(b), (b)(1) and (b)(1)(iii); 23-1.7(c); 23-1.7(e)(2); 23-1.15; 23-1.16; 23-1.17; 23-1.22; 23-2.5; and 23-5.1. Notably, Henick-Lane is not seeking the dismissal of plaintiff's Labor Law § 200 and common-law negligence claims.

In support of its cross motion, Henick-Lane maintains that plaintiff's accident does not fall within the purview of Labor Law § 240 because his assigned work activity, *i.e.*, insulating the HVAC ducts, did not present an elevation-related risk,[14] and his designated work site was located seventy feet away from the ventilation shaft where the accident occurred. It is further alleged that since the use of a protective device enumerated in Labor Law § 240(1) was not warranted for the work which plaintiff was required to perform, he cannot claim the protection of that statute. Stated differently, it is claimed that the wooden planks were not furnished as a safety device for plaintiff to perform his designated task, which did not require plaintiff to perform pipe or duct insulation work *in the subject shaft*.

In any event, Henick-Lane contends that the record is devoid of any evidence that the wooden planks accessed by plaintiff were erected, furnished or intended to function

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[14] As a frame of reference, the cross movant maintains that our courts have held that "a work site is 'elevated' within the meaning of the statute where the required work itself must be performed at an elevation...such that one of the devices enumerated in the statute will safely allow the worker to perform the task" (D'Egidio v Frontier Ins. Co., 270 AD2d 763, 765; *see* Ames v Norstar Bldg. Corp., 19 AD3d 1016, 1017 ["a work site is elevated within the meaning of [Labor Law § 240(1)] where the required work itself must be performed at an elevation, *i.e.*., at the upper elevation differential, such that one of the devices enumerated in the statute will safely allow the worker to perform the task"]).

as a work platform or scaffold. To the contrary, Henick-Lane points to that part of plaintiff's deposition testimony which is alleged to demonstrate that J.P.'s workers (including plaintiff) *never* used or stood on any planks in any of the shafts on the sixth floor prior to the date of plaintiff's accident. In support, the cross movant points to a certain photograph of one of the planks in the subject shaft which is purported to indicate that the planks in the shaft at the time of plaintiff's accident did not constitute and were never intended to be used as a work platform (*see* Henick's Motion, Exhibit "C").

In addition, the cross movant maintains (as has its co-defendants), that plaintiff's own actions were the sole proximate cause of his accident. In this regard, Henick-Lane notes that Labor Law § 240(1) was never intended to protect a worker such as plaintiff, who voluntarily and deliberately exposes himself to an elevation-related risk by deciding to venture outside the designated workspace into an area where he was not supposed to be without, *e.g.*, tying-off, as he knew was required. Hence, plaintiff is claimed to have disregarded explicit safety instructions and the warnings of his supervisor when the accident occurred. [15]

Turning first to Heick-Lane's seminal proposition that plaintiff's accident does not fall within the purview of Labor Law § 240(1), this Court is not disposed to reach the issue in view of the triable issues of fact that exist as to whether or not plaintiff's

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[15] *See* Footnote 6.

actions were the sole proximate cause of his accident. At his deposition, plaintiff testified that his decision to enter the shaft was necessary to retrieve the wooden planks in order to construct a platform from which his workers could install the required insulation elsewhere on the sixth floor. Accordingly, were it to be found by the triers of fact that plaintiff's presence in the ventilation shaft was "in furtherance of his task", and that he was injured while undertaking to furnish his crew with a "prerequisite" to their continuing efforts to complete the required work of insulating the nearby ductwork, risers and piping, the protections of Labor Law § 240(1) would clearly be implicated (*see* Saint v Syracuse Supply Co., 25 NY3d 117, 125-126).

Pertinently, the Court of Appeals has repeatedly emphasized that the statute in question is to be liberally construed to accomplish its intended purpose, and in this context that "[i]t is neither pragmatic nor consistent with the spirit ...[thereof] to isolate the moment of injury and ignore the general context of the work" (Saint v Syracuse Supply Co., 25 NY3d at 124 [internal quotation marks omitted]; *see* Cullen v AT&T, Inc., 140 AD3d 1588, 1590). Accordingly, it has been held to be unnecessary that an employee be actually working on his [or her] assigned duties at the time of the injury, so long as the task in which he or she was engaged at the time was "necessary and incidental" to the work the employee was hired to perform (*see* Gowans v Otis Marshall Farms, Inc., 85 AD3d 1704, 1705). Stated otherwise, the relevant inquiry here is whether plaintiff had been hired to take any part in the work furnishing the occasion of the injury. Thus, it is no defense to plaintiff's recovery under the Labor Law that it

was not necessary for him to be at the location where he sustained his injury (*id.* at 1705).

Also relevant to Henick-Lane's liability under Labor Law §§ 240(1) and §241(6) is plaintiff's uncontroverted deposition testimony that the movant's carpenters had been directed to (1) "address the shafts", *i.e.*, "preparing the floors [and] making [wooden] platform[s] in the shafts for [plaintiff and his crew] to work in", and (2) inform plaintiff when a platform in a shaft was complete in order for plaintiff's crew to commence their work. According to plaintiff, it was his understanding that the purpose of the wooden planks in the ventilation shafts was to provide a secure work platform to stand and work on while he and his crew insulated the ductwork, risers and the piping in the ventilation shafts, and that his co-workers had previously stood on such platforms in the ventilation shafts on the other floors for the purpose indicated. Although plaintiff was unaware of (1) who installed the wooden planks in the subject shaft, (2) who provided those planks, and (3) when they were installed, he testified that Henick-Lane's carpenters had set up wooden platforms in the ventilation shafts on the lower floors, and that he "noticed" the planking in the subject shaft for the first time when he was given permission to work on the sixth floor, *i.e.*, in "May [or] early June [of 2013]" when the floor was "released to [him]". [16]

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[16] Nevertheless, Henick-Lane and certain of the other defendants contend that the wooden planks in the sixth floor ventilation shaft were never intended to serve as a platform, staging or scaffold within the meaning of Labor Law § 240(1).

Based on, *inter alia*, the existence of triable issues of fact as to whether, *e.g.*, a violation of Labor Law § 240(1) "was a proximate cause of the incident or whether plaintiff's conduct was the sole proximate cause" (Vivar v 441 Realty, LLC, 128 AD3d 810, 810-811), it is the Court's opinion that Henick-Lane has failed to established its prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240(1) claims against it, *i.e.*, that the evidence adduced by this defendant was insufficient to accomplish its intended purpose.

As for the branch of Henick-Lane's cross motion which is for summary judgment dismissing plaintiff's Labor Law §241(6) cause of action, it has repeatedly been held that this statute imposes a nondelegable duty on owners, contractors and their agents to provide workers with a safe workplace, and applies to *all* areas in which construction, excavation or demolition is being performed (*see* Rizzuto v L.A. Wenger Constr. Co., 91 NY2d at 348; Marshall v Glenman Indus. & Commercial Contr. Corp., 117 AD3d 1124, 1126). Moreover, it is well settled that a plaintiff who seeks to assert a Labor Law §241(6) cause of action must demonstrate the violation of a specific standard of conduct related to safety under Rule 23 of New York's Industrial Code, *i.e.*, that the "concrete specifications" of such rules and regulations were violated, and that such violations were proximately related to his or her injury (*see* Ross v Curtis-Palmer Hydro Elec. Co., 81 NY2d 494, 505; *see* Klimowicz v Powell Cove Assoc., LLC, 111 AD3d 605, 606-607).

Consonant with the foregoing, it is clear that certain of the regulations set forth

in plaintiff's supplemental bill of particulars do not "fit[] squarely within the largely unchallenged version of events described by plaintiff" (Marshall v Glenman Indus. & Commercial Contr. Corp., 117 AD3d at 1126). In particular, (1) 12 NYCRR 23-1.7(a)(1), entitled "Overhead hazards", (2) 12 NYCRR 23-1.7(c), entitled "Drowning hazards", (3) 12 NYCRR 23-1.7(e)(2), entitled "Working areas" (referring to accumulations of dirt and debris, scattered tools and materials, and sharp projections), and (4) 12 NYCRR 23-1.17, entitled "Life nets", are *per se* inapplicable to the undisputed facts of this case in the absence of any legally sufficient evidence, such as experts' affidavits, providing to the contrary. As such, Henick-Lanes cross motion for partial summary judgment must be granted to the extent that the alleged violation of the foregoing Industrial Code provisions be severed and dismissed (*see* Vatavuk v Genting NY, LLC, __ AD3d __, 2016 NY Slip Op 05988; Allan v DHL Express [USA], Inc., 99 AD3d 828, 831: Moncayo v Curtis Partition Corp., 106 AD3d 963, 965).

As for the remaining Industrial Code provisions cited by plaintiff, Henick-Lane has failed to demonstrate prima facie that those regulations are inapplicable to the facts of this case; were not violated (*see* Ross v Curtis-Palmer Hydro Elec. Co., 81 NY2d at 501-504; Vivar v 441 Realty, LLC, 128 AD3d at 811; Przyborowski v A & M Cook, LLC, 120 AD3d 651, 654; Klimowicz v Powell Cove Assoc., LLC, 111 AD3d at 606-607); or that said violations were not a proximate cause of plaintiff's injury (*see* Klimowicz v Powell Cove Assoc., LLC, 111 AD3d at 607). Accordingly, Henick-Lane's cross motion for partial summary judgment dismissing plaintiff's causes of

action pleaded under Labor Law §§ 240(1) and 241(6) is granted to the extent of dismissing so much of that cause of action as is asserted against it under Labor Law § 241(6) is based on the alleged violation of 12 NYCRR §§ 23-1.7(a)(1); (c); (e)(2) and 23-1.17; the balance of the cross motion is denied.

Jacobs' Motion for Summary Judgment

(Motion Sequence No. 010)

Defendant/third-party plaintiff, Jacobs, moves for, *inter alia*, summary judgment (1) dismissing plaintiff's causes of action against it under Labor Law §§240(1), 241(6), 200, and for common-law negligence, (2) granting its cross-claim against defendant Henick-Lane for (a) contractual and common-law indemnification, including attorney's fees, costs and expenses incurred in the defense of this action and (b) the failure to procure the required insurance coverage, and (3) on its third-party claim against third-party defendant J.P. for (a) contractual and common-law indemnification, including attorney's fees, costs and expenses incurred in the defense of this action and (b) failure to procure the required insurance coverage.

In support of its motion, Jacobs maintains that it was retained by DASNY to provide construction management services for the Staten Island courthouse project, and *not* as a contractor to supervise, direct and/or control the means and methods employed by the respective construction workers in order to fulfill their obligations on the project. In this regard, Jacobs points out that since the Staten Island Courthouse project

constituted a public works project with a cost of over $3,000,000.00, it was necessary to "bid out" the work pursuant to Finance Law §135 (the so-called "Wick's Law"), resulting in the hiring of multiple prime contractors, but no "general contractor" answerable for the project as a whole. Pertinently, compliance with the statute required DASNY to retain separate "prime contractors" for (1) general construction work, (2) plumbing, (3) HVAC and (4) electrical work. As a result, Jacobs maintains that, as a matter of law, there was no general contractor on the project at the time of plaintiff's accident upon which liability under Labor Law §§ 240(1), 241(6) and 200 could be imposed.

In further support, Jacobs submits a copy of its "Construction Phase Contract" with the project owner, DASNY, executed by the parties in or about June of 2006. According to Jacobs, this Contract did not oblige it to perform the duties of either a contractor or general contractor, and it is on this basis that Jacobs purports to establish that it was not authorized to exercise any supervision, direction or control over the means and methods of the work performed by the prime contractors, their subcontractors, and, most particularly, the work giving rise to plaintiff's accident. As a result, Jacobs argues that liability under Labor Law §§ 240(1), 241(6), 200, and for common-law negligence can not be imposed upon it on the grounds that it was a "general contractor" within the meaning of the Labor Law.

Furthermore, with regard to any claim that it might be deemed liable as a statutory agent of the owner, Jacobs relies on another provision in its Contract with

DASNY, providing that:

> [t]he relationship created by this Contract between the OWNER [DASNY] and CONSTRUCTION MANAGER [Jacobs] is one of [an] independent CONSTRUCTION MANAGER and is in no way to be construed as creating any agency relationship between the OWNER and the CONSTRUCTION MANAGER nor is it to be construed as, in any way or under any circumstances, creating or appointing the CONSTRUCTION MANAGER as an agent of the OWNER for any purpose whatsoever. [17]

In reliance upon the foregoing, Jacobs contends that it has established prima facie, and as a matter of law, that it cannot be deemed a "statutory agent" of the owner within the meaning of the Labor Law.

In support of Jacobs' contention that it did not exercise any supervision, direction or control over the means and methods of the work giving rise to plaintiff's injuries, it submits the affidavit of its project engineer, David Fox, concerning the construction manager's "scope of services and activities on the project". In his affidavit, Fox attests that Jacobs' role was to provide "project oversight for DASNY", rather than "to actually build the project", and that the reason for its retention was to ensure that the contractors hired to actually build the courthouse did so in accordance with the approved plans, and in "coordinati[on with] the work of the various prime contractors". Fox further attests that Jacobs (1) never supervised, directed or controlled the means and methods of plaintiff's work, or provided him with any tools or equipment, (2) did not construct the

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[17] Contract [Construction Phase], Appendix "D", "Additional Items", No. 15, entitled "Owner-Construction Manager Relationship".

"mechanical equipment opening", *i.e.*, the ventilation shaft at issue, and (3) did not construct any platforms or barricades at or near the location of the shaft where the accident occurred.

In addition, responding to the assertion of any claims against Jacobs based on the principles of common-law negligence, *i.e.*, for an "unsafe condition" existing on the premises, Jacobs asserts, as a matter of law, that it owed no duty of care arising out of its contract with DASNY to any non-contracting third-party (such as plaintiff) since it neither (1) affirmatively created any unreasonable risk of harm that caused plaintiff's injury by launching "a force or instrument of harm"; (2) caused plaintiff to become injured as the result of his reasonable reliance on Jacobs continued performance of its contractual obligations, nor (3) entirely displaced DASNY's duty to maintain the premises in a reasonably safe condition. Rather, it is argued that the undisputed facts in this case clearly negate plaintiff's claim that, notwithstanding his status as a stranger to Jacobs contract with DASNY, the former assumed no general duty of care for the benefit of plaintiff or any other third-party who might sustain an injury as the result of any unsafe condition.

In any event, Jacobs contends that the principle of *stare decisis* warrants this Court's recognition, as persuasive authority, of that certain Decision and Order of the Honorable Judith N. McMahon, dated July 19, 2013, in an action entitled Gonzalez v Delric Construction Co., Inc. , et al, (Index No. 102193/2011), wherein an iron worker fell into an unguarded pit on September 7, 2010, at the same construction site during the

initial phase of the same project, and relative to which Jacobs had been engaged as the construction manager under a contract that is claimed to be indistinguishable from that at bar. In that case, Justice McMahon held that the moving defendant (Jacobs) (1) did "not qualify as an owner/general contractor or statutory agent", (2) "did not have supervisory authority over [plaintiff's] manner of work", and (3) "did not bear responsibility for the manner in which the work was performed." Consonant with he above, Jacobs argues that this Court should follow Gonzalez and dismiss plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims against it on the same basis. This Court cannot agree.

Although Jacobs maintains that its contract with DASNY in the instant matter is the "very same contract" as that at issue in Gonzalez, Justice McMahon's Decision and Order is silent with regard to the express terms of said contract relative to Jacobs' responsibilities during the initial phase of the project, which took place three years prior to plaintiff's accident. As such, this Court cannot assume, in the absence of any relevant evidence, that the functions, duties and responsibilities of, *e.g.*, Jacobs and the various defendants, remained the same during the subsequent "construction phase" of the project. Pertinent to the foregoing is the deposition testimony of Delric's project manager, Frank Orlando, who stated that "in the beginning", *Delric* was responsible for safety, but that "Jacobs took over the safety on the project...sometime in 2011", after the accident in Gonzalez. In any event, Jacobs' reliance upon Justice McMahon's Decision and Order in the prior action is misguided to the extent that it is claimed to represent

controlling authority, as the diverse opinions rendered by trial-level courts are not binding *inter se*, *i.e.*, on courts of equal jurisdiction.

Turning to the seminal issue proffered in opposition to Jacobs' motion, it is argued that, as the construction manager, Jacobs was statutorily liable for violations of the Labor Law as a *de facto* general contractor and/or an agent of the project's owner. In this regard, it may be worthwhile to note that during the "Construction Phase" of its Contract with DASNY, Jacobs was responsible for, *inter alia*, coordinating the trades and other aspects of the construction, conducting site inspections, overseeing the work and correcting any unsafe conditions. Thus, the deposition testimony of several witnesses, who, like David Fox (Jacobs' project engineer), indicates that at the time of plaintiff's accident, Jacobs was responsible for safety oversight and had the authority to stop the work of any contractor, subcontractor or the employees of either if an immediate risk of harm was perceived.

It is well established "[a]s a general rule, a separate prime contractor is not liable under Labor Law §§ 240(1) or 241(6) for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as [said] contractor has not been delegated the authority to oversee and control the activities of the injured worker" (Barrios v City of New York, 75 AD3d 517, 518; *see* Russin v Louis N. Picciano & Son, 54 NY2d 311, 317-318 [wherein the Court held that "prime contractors incur no liability for personal injuries arising out of work not specifically delegated to them"]; Bennett v Hucke, 131 AD3d 993, 994-995, *affirmed in part* 28 NY3d 964

[2016]; Giovanniello v E.W. Howell, Co. LLC, 104 AD3d 812, 813). "However, where a separate prime contractor has been delegated the authority to supervise and control a plaintiff's work, the contractor becomes a statutory agent of the owner or general contractor" within the meaning of the Labor Law, and is liable as such (Barrios v City of New York, 75 AD3d at 518 [internal quotation marks omitted], citing Russin v Louis N. Picciano & Son, 54 NY2d at 318; *see* Walls v Turner Constr. Co., 4 NY3d 861, 863-864; Bennett v Hucke, 131 AD3d at 994). [18]

Somewhat similarly, with regard to a construction manager's liability under Labor Law §§240(1) and 241(6), although it is generally not considered a contractor responsible for the safety of the workers at a construction site, if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises, it may nonetheless become responsible as a statutory agent of either (*see* Walls v Turner Construction Co., 4 NY3d at 863-864; Bennett v Hucke, 131 AD3d at 994; Campoverde v Sound Hous., LLC, 116 AD3d 897, 897-898). "When the work giving rise to [the duty to conform to the requirements of, *e.g.*, section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory agent of the owner or general contractor" (Walls v Turner Construction Co., 4 NY3d at 864 [internal

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[18] Although termed "nondelegable" by statute, the duty to conform to the requirements of Labor Law §§ 240(1) and 241(6) may, in fact, be delegated to a third party (*see* Russin v Louis N. Picciano & Son, 54 NY2d at 317-318).

quotation marks omitted]; *see* Russin v Louis N. Picciano & Son, 54 NY2d at 318; Bennett v Hucke, 131 AD3d at 994-995).

Accordingly, "[t]he label of 'construction manager' versus 'general contractor' is not necessarily determinative" (Walls v Turner Constr. Co., 4 NY3d at 864; *see* Myles v Claxton, 115 AD3d 654, 655). Instead, the core inquiry is whether or not that defendant had the "authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Myles v Claxton, 115 AD3d at 655, quoting Rodriguez v JMB Architecture, LLC, 82 AD3d 949, 951).

Here, and pursuant to the express terms of DASNY's contract with Jacobs, the latter had been delegated the authority to oversee and control the work of the various prime contractors and subcontractors, especially with respect to safety issues (*see* Barrios v City of New York, 75 AD3d at 518-519). In particular, reference may be made to that portion of Jacobs' contract with DASNY entitled "Scope of Services - Construction Phase" (Appendix "A"), under which Jacobs was specifically empowered to serve as "the Owner's chief representative...and maintain liaison amongst the Owner, the Architect and all Contractors"...to develop a project Procedures Manual within the scope of the Construction Contracts...[and to] implement said manual and enforce the procedures". In addition, the Contract required Jacobs to both fully comply with all applicable laws, rules and regulations of the New York State Department of Labor, as well as DASNY's safety inspection program, and facilitate scheduled and unannounced inspections of the job site.

Moreover, Jacobs' Contract with DASNY also contained numerous provisions relative to "Accident Prevention" and the "Protection of Lives and Health", wherein Jacobs was required, *inter alia*, to (1) take every precaution against injuries to persons and for the safety of persons engaged in the performance of work on the job site, (2) establish and maintain safety procedures in connection with the work and make daily inspections of the construction site, (3) conduct safety meetings with all prime contractors and their subcontractors, (4) review compliance with the safety precautions and programs, (5) give the prime contractors and subcontractors immediate written notice of any deficiency and require the correction of any safety violation before the work continues, and (6) prepare and deliver to the project owner, DASNY, a job specific site-safety plan (entitled "Hazard Assessment Safety Action Plan") in which Jacobs was required to make daily observations of the safety practices of all prime contractors and subcontractors' work activities, and to check their compliance with municipal, state and federal safety requirements. Notably, this Safety Plan specifically provided that Jacobs was to establish and maintain, at all times, safety procedures in connection with the work as required by the New York Labor Law and regulations of the Occupational Safety and Health Act (OSHA).

This delegation of authority to oversee and control the work of the various prime contractors and subcontractors, especially with respect to safety issues (*see* Barrios v City of New York, 75 AD3d at 519), is evidenced by the further deposition testimony of project engineer David Fox, who maintained that Jacobs' general role as a construction

manager entailed (1) "construction oversight...making sure that the contractors construct the project according to the construction documents...[and] construction specifications", (2) "coordinat[ing] the multiple prime contractors...[and] the work", and (3) "safety oversight", whereby Jacobs was obligated to conduct daily safety inspections to address "typical construction [safety] issues", such as personal protective equipment and fall protection, reviewing the work being done, and making sure that the various contractors complied with established safety plans. Mr. Fox also testified that at the time of plaintiff's accident in 2013, Jacobs had the authority to stop the work if there was a risk of imminent danger or harm to any "employee", and had the additional authority to review the contractors safety policies and inspect their work to ensure compliance with their own procedures; sponsor safety orientations; perform daily safety inspections of the entire job site; and conduct bi-weekly safety meetings which addressed the issue of certain workers who were not wearing personal protective equipment and fall protection. On this last point, Jacobs was authorized to require immediate correction by the contractor.

The foregoing is corroborated by the deposition testimony of DASNY's project manager (Gary Guttman), Delric's project manager (Frank Orlando), Henick-Lane's site supervisor (Terence McCarthy) and plaintiff himself. To the extent relevant, these witnesses testified that it was Jacobs' responsibility to oversee the entire project, and in furtherance thereof, it had been delegated supervisory authority over the prime contractors, the authority to coordinate the work of the various trades and the duty to

ensure the safety of the job site, including the sixth floor, *on a daily basis*. They also testified that Jacobs' safety inspectors would physically observe the work methods of all of the trades at the construction site, conduct daily and weekly safety inspections, make sure that all of the subcontractors complied with work-site safety standards, and that they had the authority to enforce these safety standards and even stop the work. [19] Finally, Guttman (DASNY's witness) testified that prior to and at the time of plaintiff's accident, Jacobs possessed "immediate supervisory authority" over the prime contractors, while Guttman, Orlando (Delric's witness) and McCarthy (Henick-Lane's witness) each testified that they reported any safety issues, including fall protection, perimeter protection, and other unsafe conditions at the job site, directly to Jacobs.

In view of the foregoing, it is evident that triable issues of fact exist, at a minimum, with regard to whether or not (1) Jacobs, a contractually designated "prime contractor" and construction manager for the project, had been delegated and/or assumed the duties of a general contractor for purposes of the Labor Law (*see* Guanopatin v Flushing Acquisition Holdings, LLC, 127 AD3d 812, 813-814 [wherein the court held that "[a] party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law §240(1)....[if it had] the authority to exercise control over the work, not whether it

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[19] As plaintiff points out, Jacobs ability to stop the work is best demonstrated by the fact that it issued a Stop Work Order after plaintiff's accident "letting all the contractors know that the project was closed until further notice".

actually exercised that right"];[20] *see also* Myles v Claxton, 115 AD3d at 655), and/or (2) based on the functions which Jacobs performed, whether it may be deemed a statutory agent of the project owner within the meaning of Labor Law §§ 240(1) and 241(6) (*see* Rodriguez v JMB Architecture, LLC, 82 AD3d 949, 951-952; Barrios v City of New York, 75 AD3d at 519; Tomyuk v Junefield Assoc., 57 AD3d at 520; Lodato v Greyhawk N.A., LLC, 39 AD3d 491, 493). As previously noted, Jacobs alleged contractual status as an "independent construction manager...[with no] *agency* relationship to DASNY [emphasis supplied]" is not determinative of this issue.

Accordingly, Jacobs has failed to establish its prima facie entitlement to judgment as a matter of law, and the branch of its summary judgment motion which is to dismiss plaintiff's causes of action against it under Labor Law §§ 240(1) and 241(6) must be denied (*see* Campoverde v Sound Hous., LLC, 116 AD3d at 898; *cf.* Marquez v L & M Dev. Partners, Inc., 141 AD3d 694, 697-698).

As for the branch of Jacobs' motion which is for summary judgment dismissing plaintiff's claim under Labor Law §200 and common-law negligence, it is well established that Labor Law §200 represents a codification of the common-law duty of landowners, contractors, and their agents to provide workers with a reasonably safe place to work (*see* Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352). More

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[20] In this regard, the Construction Phase Contract between DASNY and Jacobs provides, in pertinent part, that "[t]he Construction Manager may propose and engage Subcontractors....to perform services required under [said] Contract".

specifically, "[c]ases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed (*see* Ortega v Puccia, 57 AD3d 54,61)" (Torres v City of New York, 127 AD3d 1163, 1165; *see* Sanchez v Metro Bldrs. Corp., 136 AD3d 783, 787).

Thus, "[t]o be held liable under Labor Law §200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work...[But, w]here a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition [existing]on the premises, a defendant may be [held] liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (Garcia v Market Assoc., 123 AD3d 661, 664 [internal citations and quotation marks omitted]; *see* Wejs v Heinbockel, 142 AD3d 990).

As a result, assuming, *arguendo*, that plaintiff's accident occurred due to a dangerous condition existing on the premises, Jacobs could be held liable in common-law negligence and under Labor Law §200 for the alleged dangerous condition only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it (*see* Doto v Astoria Energy II, LLC, 129 AD3d 660, 663; Rojas v Schwartz, 74 AD3d 1046, 1047, quoting Martinez v City of New york, 73 AD3d 993, 998; Wejs v Heinbockel, 142 AD3d 990, *supra*; Kolari v Whitestone

Constr. Corp., 138 AD3d 1070, 1071; Bennett v Hucke, 131 AD3d at 995; Torres v St. Francis Coll., 129 AD3d 1058, 1061). However, in order to support a finding of liability under Labor Law §200, it is not necessary to adduce evidence of an owner or general contractor's supervision and control over the manner and methods of plaintiff's work when the injury occurs; rather, it is control over the work site which is key, and whether or not the owner or general contractor created the condition which caused the injury or had actual or constructive notice of the hazardous condition (*see* Murphy v Columbia University, 4 AD3d 200, 201-202).

Accordingly, it is the opinion of this Court that the defendant Jacobs has failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the causes of action against it predicated on common-law negligence and/or the violation of Labor Law §200 (*see* Kolari v Whitestone Constr. Corp., 138 AD3d at 1071-1072). Pertinently in this regard, Jacobs' project engineer, David Fox, admitted having observed "barricading" and "wood planks" in the sixth floor ventilation shaft prior to plaintiff's accident, but could not recall whether (1) there were any anchorage or tie-off points above the area, (2) the wood planks were affixed, and (3)if all three sides of the shaft were barricaded. In brief, given Jacobs' contractual obligations, *inter alia*, to provide site workers with a safe work place, and/or its obligation to conduct daily safety inspections, this defendant has failed to establish, as a matter of law, that it did not have actual or constructive notice of the alleged dangerous conditions existing in the sixth floor ventilation shaft at the time of plaintiff's accident.

On the other hand, it is the opinion of this Court that Jacobs cannot be held liable under Labor Law §200 and common-law negligence for injuries arising from the means or methods of plaintiff's insulation work, since there is insufficient evidence before the court to establish that Jacobs had the authority to exercise supervision and control over either (*see* Marquez v L & M Dev. Partners, Inc., 141 AD3d at 698; Sanchez v Metro Bldrs. Corp., 136 AD3d at 787). In fact, the testimony adduced during depositions is to the contrary.

Turning to those branches of Jacobs' motion which are for summary judgment on its claims for contractual indemnification against plaintiff's employer, J.P., [21] and Henick-Lane (the prime contractor for HVAC work), it is claimed that as an intended third-party beneficiary of the DASNY/Henick-Lane prime contract, dated August 31, 2009, and the Henick-Lane/J.P. contracts (*i.e.*, the "Agreement with Subcontractor" dated February 7, 2013, and the "Global Agreement" dated January 30, 2013), it appears that Henick-Lane agreed to (1) indemnify Jacobs, (2) assume its defense and (3) pay on Jacobs' behalf any and all losses, expense, damage or injury occurring in connection with Henick-Lane's performance of the HVAC work. Similarly, it appears

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[21] New York's Worker's Compensation Law §11 permits third-party indemnification claims against employers where such claim is based upon a provision in a written contract entered into prior to the accident by which the employer expressly agrees to provide indemnification (*see* Rodrigues v N & S Bldg. Constrs. Inc., 5 NY3d 427). Furthermore, General Obligations Law § 5-322.1 does not prohibit contractual indemnification where, as here, the parties agreement requires indemnification "[t]o the fullest extent of the law" (*see* Brooks v Judlau Contr. Inc., 11 NY3d 204; Ulrich v Motor Parkway Props., LLC, 84 AD3d 1221).

that J.P. (Henick-Lane's subcontractor) agreed "to the maximum extent permitted by law", to defend, indemnify, and hold harmless the construction manager (Jacobs) from all liabilities, damages, expenses, actions, claims, including reasonable attorney's fees, relating to the subcontractor's work.

"[I]t is axiomatic that a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (Bleich v Metropolitan Mgt., LLC, 132 AD3d 933, 934, citing Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 [internal quotation marks omitted]; *see* General Obligations Law §5-322.1; Mikelatos v Theofilaktidis, 105 AD3d 822, 823). Moreover, while "[a] court may render a conditional judgment on the issue of indemnity pending the determination of liability in the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (George v Marshalls of MA, Inc. , 61 AD3d 931, 932). "[t]o obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity...[must] establish that it was free from any negligence and [may be] held liable solely by virtue of...statutory [or vicarious] liability" (Jamindar v Uniondale Union Free School Dist., 90 AD3d 612, 616 [internal citation and quotation marks omitted]; *see* Arriola v City of New York, 128 AD3d 747, 750; Jardin v A Very Special Place, Inc., 138 AD3d 927, 931).

In keeping with the foregoing, before the indemnification obligations in the contracts at issue can be "triggered" (*see* Tolpa v One Astoria Sq., LLC, 125 AD3d 755, 756; Mikelatos v Theofilaktidis, 105 AD3d at 824), Jacobs, the proposed indemnitee, must demonstrate that plaintiff's injuries were not caused in whole or in part by any negligence on its part (*see e.g.* Seales v Trident Structural Corp., 142 AD3d 1153). In this regard, the DASNY/Henick-Lane Contract specifically provides that Henick-Lane shall not be obligated to indemnify the construction manager (Jacobs) for its own negligence. Similarly, the Global Agreement between Henick-Lane and J.P. provides, in pertinent part, that "[u]nder no circumstances shall [said] Agreement be interpreted to require [the] Subcontractor to indemnify an Indemnitee for the Indemnitee's own negligence or wrongdoing".

In view of this Court's prior finding that Jacobs had failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the causes of action asserted against it pursuant to, *e.g.*, Labor Law §200 and common-law negligence, triable issues of fact exist with regard to (1) Jacobs' freedom from any negligence that may have contributed to the cause of plaintiff's accident (*see* Mikelatos v Theofilaktidis, 105 AD3d at 824), or (2) whether Jacobs' liability, if any may be found, arises "solely by virtue of statutory or vicarious liability" (Arriola v City of New York, 128 AD3d at 750; Van Nostrand v Race & Rally Constr. Co., Inc., 114 AD3d 664, 667). In any event, where, as here, there are triable issues of fact regarding the proposed indemnitee's negligence, a conditional order of summary judgment for

contractual indemnification must be denied as premature (*see* Jamindar v Uniondale Union Free School Dist., 90 AD3d at 616-617).

Accordingly, Jacobs is not entitled to summary judgment on (1) its cross claim against defendant Henick-Lane for contractual indemnification, or (2) its third-party claim against third-party defendant J.P. for like relief (*see* Jardin v A Very Special Place, Inc., 138 AD3d at 930-931; Bleich v Metropolitan Mgt., LLC, 132 AD3d at 934-935; *cf.* Tolpa v One Astoria Sq., LLC, 125 AD3d at 756-757).

Finally, as for that further branch of Jacobs' motion which is for summary judgment on its cross claim and third-party claim against Henick-Lane and J.P., respectively, for breach of contract based on their failure to procure insurance on its behalf, it is well settled that "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (DiBuono v Abbey, LLC, 83 AD3d 650, 652, quoting Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership, 304 AD2d 738, 739 [internal quotation marks omitted]; *see* Marques v L & M Dev. Partners, Inc., 141 AD3d at 701).

At the outset, the Court must note that Jacobs has failed to tender any legally sufficient evidence in support of its allegation that Henick-Lane and/or J.P. did not procure insurance coverage in its favor. Moreover, Henick-Lane has submitted a photo copy of a certain "Certificate of Liability Insurance", effective March 7, 2013, relating

to its HVAC contract with DASNY, designating Henick-Lane as the named insured, and purporting to designate DASNY as a "Certificate Holder" and an "additional insured", along with the City of New York and the "construction manager", which are also named as additional insureds.

Although Jacobs is named as "construction manager" in its contract with DASNY, the unauthenticated photocopy raises an issue of fact as to whether or not the required insurance coverage was procured on behalf of Jacobs in accordance with their respective contracts. In any event, this branch of Jacobs motion must be denied as premature since it has yet to be determined whether the alleged failure to procure insurance coverage has caused Jacobs to incur any losses (*see* Souare v Port Auth. of N.Y. & N.J., 125 AD3d 494, 495).

DASNY'S Motion and Amended Motion for Summary Judgment

(Motion Sequence No. 005 and 011)

In a motion and amended motion [22], the project owner, DASNY, has moved to dismiss plaintiff's Labor Law § 200 claims as against it [23], and for summary judgment

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[22] DASNY's amended motion (No. 011) addresses its cross-claims as against third-party defendant J.P., which were inadvertently omitted from DASNY's original motion (No. 005).

[23] In its notice of motion and amended notice of motion, DASNY does not seek dismissal of plaintiff's common-law negligence claim; however, the principles of law that apply to the Labor Law § 200 claims asserted against this defendant/owner are the same as would be applied to the common-law negligence claims against it.

against (1) co-defendants Henick-Lane and Jacobs, and (2) third-party defendant J.P. on DASNY's cross-claim for contractual indemnification [24].

Turning, first, to the branch of DASNY's motion which is to dismiss plaintiff's Labor Law § 200 claim (the second cause of action), the movant maintains that, where, as here, the plaintiff's injuries allegedly arose from the manner in which the work was performed, the Court of Appeals has held that the owner may be held liable *only* if it exercised supervision, direction or control over the injury-producing work. Furthermore, DASNY maintains that an owner who merely possesses general supervisory authority over a work site, and/or is vested with a general duty to ensure compliance with safety regulations and has the authority to stop the work for safety violations may not be held liable under Labor Law § 200 unless it controls or directs the plaintiff's work.

Consonant with these principles, and in support of dismissal, DASNY submits the affidavit of its Director of Construction for the project, Michael Stabulas, who attests that the terms of its respective contracts with each of the prime contractors, provide that DASNY (1) is neither the general contractor for the project, nor its site safety manager; (2) did not participate in the hiring of any of the subcontractors; and (3)

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[24] As for DASNY's purported cross-claim as against third-party defendant J.P., the Court is aware that said cross-claim has not been interposed in accordance with CPLR 3019 (d), which requires that service of a cross-claim upon a person not a party shall be by service of a summons and answer containing the cross-claim (*see* CPLR 3019 [d]). However, notwithstanding that J.P. correctly argues that DASNY's cross-claim against it for contractual indemnification is procedurally improper, in order to advance the action, the Court will nevertheless address the merits of said cross-claim.

did not directly or indirectly supervise, instruct or control either plaintiff's work, that of his employer (J.P.), or any of the prime contractors and/or their subcontractors.

In further support, DASNY points to the deposition testimony of, *inter alia*, (1) Gary Guttman, DASNY's project manager, who testified that DASNY did not supervise the work of the prime contractors, and had no authority to enforce safety standards on the job site; (2) Terence McCarthy, Henick-Lane's site supervisor, who testified that he conducted "daily walkthroughs", *i.e.*, inspections, with regard to unsafe conditions and that he on behalf of his employer had the authority to stop a subcontractor's work if unsafe work practices were observed; (3) Vincent Corrao, J.P.'s supervisor, who testified that its employees received directions and instructions as to the performance of their work *only* from J.P.; (4) David Fox, Jacobs' project manager, who testified that Jacobs also conducted daily safety inspections and had the authority to stop the work in the event of "an immediate threat to someone's life"; (5) plaintiff, who testified that only his supervisor instructed him as to the work he was expected to perform on the day of his accident (although he was sometimes required to "report" to certain employees of Henick-Lane, *e.g.*, Terence McCarthy and Mike Modica); and (6) Frank Orlando (Delric's project manager), who testified that, insofar as he was aware, only Jacobs and DASNY had the authority to stop the work for unsafe conditions at the time of plaintiff's injury

Based on this evidence, DASNY contends that it has sustained its burden of demonstrating, prima facie, that it neither directed or controlled plaintiff's work, and

that it did not create any alleged dangerous condition on the premises or have actual or constructive notice of it. As a result, DASNY contends that plaintiff's Labor Law § 200 claims as against it must be dismissed. [25]

In opposition to the motion, it is alleged that DASNY has not met its initial evidentiary burden through the introduction of proof sufficient to eliminate questions of fact as to whether it had actual or constructive notice of the alleged hazardous condition of, *inter alia*, the perimeter barricade surrounding the subject shaft, and/or the wooden planks located therein. In this regard, it is argued that since plaintiff claims that he was injured as a result of certain dangerous conditions on the work site, DASNY, the property owner, may be held liable under Labor Law § 200 and/or common-law negligence if it had actual or constructive notice of the purported hazard, *irrespective* of whether or not DASNY supervised or directed plaintiff's work, and that DASNY has failed to demonstrate as a matter of law that it lacked either.

More specifically, it is argued in opposition to DASNY's motion to dismiss plaintiff's Labor Law § 200 claim, that when a hazardous condition is the purported cause of a worker's injury, an owner may be held liable if it either created the dangerous condition on the premises, or failed to remedy same within a reasonable time after the acquisition of actual or constructive notice of its existence (*see* Chowdhury v Rodriguez, 57 AD3d 121, 123). In this regard, it is noted by the opponents of DASNY's

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[25] DASNY further maintains that the same is true of plaintiff's claim for damages predicated on common-law negligence.

motion that in their deposition testimony, both Jacobs' witness (David Fox) and Henick-Lane's witness (Terence McCarthy) testified that DASNY employed a safety representative who conducted safety inspections of the entire site on a monthly basis. Moreover, it appears that one such inspection was conducted on July 8, 2013, just three days prior to plaintiff's accident, as evidenced by Jacobs' "Foreman's Meeting Minutes" dated July 8, 2013, which reads as follows: "Jacobs informed everyone that a safety walk-thru [sic] with DASNY [was] being done [that day] & they will follow up as to the outcome". The opposing parties further note that Jacobs' witness (David Fox) and Delric's witness (Frank Orlando) testified that DASNY had the authority to stop the work in the event of an unsafe condition on the premises, and that DASNY's own witness (Gary Guttman) testified that he was on site at the courthouse project every day, and would "walk the site" with his project manager, Steve Clay, as well as performing "site walkthroughs" with Jacobs' employees on an "irregular" basis. In this regard, it should be noted that David Fox (Jacobs' project manager) testified that DASNY's "general safety inspections", *i.e.*, the "walk-throughs", were conducted by Pete Scala (DASNY's "safety rep") monthly or bi-monthly with the assistance of Jacobs' representative, Chris Csoka.

Pertinently, plaintiff also testified that when he "was doing the air-handler unit" on the sixth floor, he observed a certain representative of DASNY (its project manager, Steven Clay) on "one occasion...walking the job". According to plaintiff, this occurred "three weeks before [his] accident". Plaintiff further testified that was in May or June of

2013 when he first observed that the subject ventilation shaft was "wide open",and that the perimeter barricade along the right side of the shaft was missing. It was this observation which prompted him to warn his workers to "stay away from the big hole". Also claimed to be worthy of note is the testimony of Delric's project manager (Frank Orlando), who stated that on Monday or Tuesday of the week of plaintiff's accident, "DASNY's inspectors [*e.g.*, Pete Scala] were up on the sixth floor and did a full blown report, from the roof down to the lower level...[which indicated that] there were no notations of any safety issues on the sixth floor".

In combination, it is alleged by DASNY's opponents that the foregoing evidence directly contradicts DASNY's claim that it did not have any employees at the construction site who were responsible for health and safety. Additionally, Delric's project manager testified that (1) DASNY's inspectors reported "no...safety issues on the sixth floor" following an inspection conducted on the Monday or Tuesday preceding plaintiff's accident, and (2) the ventilation shaft was observed to be "wide open" in May or June of 2013. Accordingly, it is claimed that an issue of fact has been shown to exist as to the property owner's actual or constructive notice of the alleged hazardous condition sufficiently in advance of plaintiff's fall to reasonably allow for the elimination of the hazard prior to plaintiff's accident.

It is well established that"[w]here, as here, a plaintiff contends that an accident occurred because of a dangerous condition existing on the worksite, an owner moving for summary judgment dismissing causes of action alleging common-law negligence

and/or a violation of Labor Law § 200 must make a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of [it]" (Doto v Astoria Energy II, LLC, 129 AD3d at 663, quoting Costa v Sterling Equip., Inc., 123 AD3d 649, 650 [internal quotation marks omitted]; Chilinski v LMJ Contr., Inc. 137 AD3d 1185, 1187-1188; Korostynskyy v 416 Kings Hwy., LLC, 136 AD3d 758, 759).

In accordance with these principles, it is the Court's opinion that DASNY has failed to establish its prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 200 cause of action by failing to eliminate all issues of fact as to whether this property owner and/or its agents are chargeable with actual or constructive notice of the alleged dangerous condition presented by, *inter alia*, the incompletely barricaded ventilation shaft on the sixth floor, and, if so, whether it failed to remedy that hazard within a reasonable amount of time after the acquisition of such notice (*see* Kolari v Whitestone Constr. Corp., 138 AD3d 1070, 1071-1072; Korostynskyy v 416 Kings Hw., LLC, 136 AD3d at 759-760; Costa v Sterling Equip., Inc., 123 AD3d 649, 649-650; Caiazzo v Mark Jospeh Contr., Inc., 119 AD3d 718, 722).

With this established, that branch of DASNY's motion which is for summary judgment against Henick-Lane, Jacobs, and J.P. for contractual indemnification is premature. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (Muevecela v 117 Kent Avenue, LLC, 129 AD3d 797, 798, quoting Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662; *see*

also General Obligations Law § 5-322.1; Chilinski v LMJ Contr., Inc., 137 AD3d 1185, 1187-1188). In the matter at bar, since a triable issue of fact exists as to the property owner's freedom from negligence in the happening of plaintiff's accident, *i.e.*, whether DASNY knew or should have known of the allegedly dangerous condition of the worksite, its motion for summary judgment on its cross-claims for contractual indemnification must be denied (*see* Muevecela v 117 Kent Avenue, LLC, 129 AD3d at 798-799; Arriola v City of New York, 128 AD3d 747, 748-749; Konsky v Escada Hair Salon, Inc., 113 AD3d 656, 658-659).

Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is denied; and it is further

ORDERED, that the motion of third-party defendant J.P. Mechanical Insulation Contracting, Inc. for summary judgment dismissing the third-party complaint as against it is granted as to the first cause of action for contribution and common-law indemnification only; and it is further

ORDERED, that said cause of action is severed from the third-party complaint and dismissed; and it is further

ORDERED, that he balance of the motion is denied; and it is further

ORDERED, that the motion of defendant Delric Construction Co., Inc. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED, that said causes of action are hereby severed and dismissed; and it is further

ORDERED, that so much of the motion of defendant FRP Sheet Metal Contracting Corp. as is for summary judgment dismissing the complaint and all cross claims against it is granted solely to the extent that plaintiff's claims against it are predicated on alleged violations of Labor Law §§ 240 (1), 241 (6) and 200; and it is further

ORDERED, that said causes of action are severed and dismissed; and it is further

ORDERED, that the balance of said motion is denied; and it is further

ORDERED, that so much of defendant Henick-Lane Inc.'s motion which is for summary judgment dismissing plaintiff's Labor Law § 241 (6) claims against it is granted insofar as predicated upon breaches of sections 23-1.7(a)(1); (c); (e)(2); and 1.17 of the Industrial Code (12 NYCRR §§ 23-1.7 and 23-1.17); and it is further

ORDERED, that these purported violations are stricken from the complaint; and it is further

ORDERED, that the balance of Henick-Lane Inc.'s motion is denied; and it is further

ORDERED, that so much of the motion of defendant/third-party plaintiff Jacobs Engineering as is for summary judgment dismissing the complaint and all cross claims asserted against it, as well as those further branches of its motion which are for summary judgment on its cross claims against Henick-Lane Inc. and its third-party

complaint against third-party defendant J.P. Mechanical Insulation Contracting, Inc. are denied; and it is further

ORDERED, that so much of the motion of the Dormitory Authority Of The State of New York's motion as is for summary judgment dismissing plaintiff's causes of action against it under Labor Law § 200 and for common-law negligence are denied; and it is further

ORDERED, that the further branch of the Dormitory Authority Of The State of New York's motion as is for summary judgment on its cross claims for contractual indemnification as against defendant Henick-Lane Inc., defendant/third-party plaintiff Jacobs Engineering and third-party defendant J.P. Mechanical Insulation Contracting, Inc. are denied as premature; and it is further

ORDERED, that the Clerk enter judgment accordingly.

ENTER,

Dated:

DEC 2 1 2016

J.S.C.
HON. THOMAS P. ALIOTTA
JUSTICE OF THE SUPREME COURT

GRANTED
JAN 17 2017

STEPHEN J. FIALA

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