SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ANTONIO PALACIOS, Index No.: 111035/11

Plaintiff,

-against-

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., THE BIG APPLE CIRCUS, LTD., KARL'S EVENT RENTAL, INC., STAMFORD TENT & EQUIPMENT CO. and MAIN ATTRACTIONS, LLC.,

Defendants.

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Joan A. Madden, J.:

In this action arising out of personal injuries sustained by a worker, defendant Karl's Event Rental, Inc. (Karl's) moves for an order granting it summary judgment (i) dismissing the complaint and all cross claims against it, and (ii) on its cross claim for contractual indemnification against defendant the Big Apple Circus, Ltd. (Big Apple) (motion seq. no. 003). Plaintiff does not oppose the motion.

Defendants Lincoln Center for the Performing Arts, Inc. (Lincoln Center) and Big Apple (together, "the Lincoln Center defendants") oppose Karl's motion and separately move for summary judgment dismissing the complaint and all cross claims against them, as well as for summary judgment in their favor on their cross claim for common-law indemnification against Karl's (motion sequence number 004).[1] Plaintiff opposes the Lincoln defendants' motion to the extent it seeks to dismiss the complaint, and cross-moves for summary judgment in his favor on the Labor Law §§ 240 (1) and 241 (6) claims against the Lincoln Center defendants. Karl's opposes that part of the Lincoln Center defendants' motion that seeks summary judgment on the

[1]Motion sequence numbers 003 and 004 are consolidated for disposition.

cross claim against Karl's for common law indemnification.

BACKGROUND

Plaintiff alleges he was injured on October 18, 2010, when he fell from an elevated platform after tripping on tent material while working at Damrosch Park Lincoln Center in Manhattan (the Premises). On the day of the accident, Lincoln Center was the fee owner of the Premises where the accident occurred. Big Apple leased the Premises from Lincoln Center as a venue for its circus. Big Apple hired Karl's to erect auxiliary tents and the platform tent flooring for the circus.[2]

Plaintiff testified that, on the day of the accident, he was one of the crew members employed by nonparty Labor Ready, an entity hired by Big Apple to provide laborers to assist in erecting various tents for the circus. Plaintiff testified that he received all his work instructions from a supervisor from "the tent owners." (plaintiff's tr at 25, 56). Plaintiff could not identify the name of the tent owners or the supervisor, and he had never heard of Karl's (*id* at 48). He testified the he took orders from individuals wearing yellow hard hats (*id* at 25, 28, 58). At the time of the accident, plaintiff and his coworkers were involved in putting up the side of a plastic tent. He explained that the tents at the circus were erected on platforms. Just prior to the accident, plaintiff, who was standing near the edge of such a platform, was holding a ladder for a coworker, "so the other fellow would not fall down" (*id* at 29). Plaintiff testified that, when his coworker climbed down from the ladder, plaintiff "let the ladder go and . . . was about to grab the other tent to place it on the empty space [when he] tripped and [he] went down" (*id.*). Plaintiff

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[2] By decision and order dated June 21, 2013, the court dismissed the complaint and all cross claims against defendants Stamford Tent & Event Services, Inc. and Main Attractions, LLC.

explained that he fell off the platform flooring, which he knew was "[m]ore or less one meter sixty, because [his] measurement is one meter and it reach[ed] up to here on [him] [indicating]" (*id.* at 30). Plaintiff further explained that he fell off the platform, "because there was nothing for [him] to grab" (*id.* at 31).

Plaintiff testified that the tent roll that he tripped on was located on the platform to his right at the time that the ladder was set up (*id* at 33).. When asked if he actually saw it there at this time, plaintiff replied, "It must have been right on the ground because that was where I tripped, otherwise I would not have tripped" (*id.* at 34). Plaintiff stated that he was not provided with a harness or any other type of fall protection to prevent him from falling off the unguarded edge of the platform.

Plaintiff further testified that Labor Ready issued his paychecks (*id* at 47). He did not receive any other benefits from Labor Ready aside from his wages (*id).* Plaintiff did not miss any work following the day of the accident, because he was able to perform sweeping work at the Labor Ready office (*id* at 53).. However, he did receive Workers' Compensation benefits for approximately 14 weeks following his surgery (*id* at 54).

Fernando Bautista testified that he served as Big Apple's "seat boss" on the day of the accident, and that his duties included making sure that the circus's seating system was properly set up, maintained and then taken down. (Bautista tr at 7). When asked to explain how the tents were elevated, Bautista replied, "[t]hey made like a scaffold and then on top they put plywood and then they put the tent up" (*id.* at 17). He estimated that the plywood floor was 40 inches high (*id*). Baustista testified that he did not know who plaintiff worked for (*id* at 40).[3]

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[3]Bautista also testified that he witnessed plaintiff falling four and one-half feet off a ladder to the plywood floor but did not see him fall off the elevated floor (*id* at 25). Neither side adopts Bautista's version of the accident. In any event, plaintiff is entitled to the protections of

George Strickland, Karl's Vice President for the Northeast Region, testified that Karl's provided nine support tents to the circus, as well as staging, carpet, flooring, doors, exit signs and other items (Stickland tr at 14, 25). According to Strickland , Karl's hired temporary workers from Labor Ready to assist in the assembly of the tents, and taking them down. (*id* at 15, 26, 28). Strickland testified Labor Ready workers were supervised, directed and instructed only by Karl's crew chief and not by someone from Big Apple Circus *(id* at 15, 29-30, 35-36). In addition, he testified that Karl's provided Labor Ready workers with all the equipment and tools needed to perform the subject work (*id* at 39). Karl's also had the authority to terminate Labor Ready workers (*id).*

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v*

Labor Law § 240 (1) under either version, because in both scenarios, defendants failed to provide plaintiff with a proper safety device to prevent him from falling (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent]).

Ceppos, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Karl's Motion

Karl's moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that plaintiff is Karl's "special employee" and therefore the plaintiff's claims asserted against it are barred as workers' compensation is plaintiff's exclusive remedy against his employer. Specifically, Karl's argues that the evidence, including the testimony of George Strickland, shows that plaintiff was a temporary worker hired from Labor Ready by Karl's and the Karl's supervised and controlled plaintiff's work, dictated his hours, could terminate him from his job and supplied him with tools and equipment. Karl's also relies on plaintiff's testimony that his instructions were give by "the tent owners." Karl's also submits an invoices between it and Labor Ready in connection with its use of Labor Ready's workers, including plaintiff. The invoice states, *inter alia*, that "[Karl's] and Labor Ready are considered 'Joint Employers' under Federal Minimum Wage and Hour Law." As plaintiff's special employer, Karl's argues that it is shielded from defendants' cross claims for common law indemnification, under Workers' Compensation Law § 11,[4] which precludes the assertion of such claims against an employer unless the employee has sustained a 'grave injury' which is not the

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[4]Workers' Compensation Law section 11 prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

case here.

Plaintiff does not oppose Karl's motion. As for the Lincoln Center defendants, they argue that there are issues of fact as the applicability of Workers' Compensation Law § 11 and specifically whether plaintiff is a "special employee" of Karl's based on plaintiff's testimony that Labor Ready issued his paychecks, that he reported the accident to Labor Ready and was paid workers' compensation as a result, and that he was unable to identify Karl's as entity employing the individuals supervising his work.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Here, there is no dispute that plaintiff did not suffer a grave injury for the purposes of Workers' Compensation Law § 11.[5] It is well settled that Workers Compensation shields an employer from common law claims arising from injuries sustained by its "special employees" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 560 [1991]). Likewise,

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[5]Notably, that plaintiff did not suffer a grave injury as a result of the accident, is evident from his bill of particulars which indicates that he sustained the following injuries:

> "Fracture of the lateral left fourth and fifth ribs;
> Comminuted impacted fracture of the distal radius of the left wrist with extension into the radiocarpal joint space;
> Acute ulnar styloid fracture of the left wrist:
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> * * *
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> Shortening of the left wrist;
> Shortening of the radius due to collapse of fragments;
> Hematoma around the left eye orbit with congestion of the conjuctiva;
> Postconcussion syndrome"

(plaintiff's cross motion, exhibit C, bill of particulars).

under Workers' Compensation Law § 11, claims against an employer for common law indemnification and contribution are barred. At issue here is whether plaintiff is a special employee of Karl's for the purposes of the workers' compensation law.

The First Department has written that:

> "While the determination of an employee's status is usually a question of fact (*see e.g. Stone v Bigley Bros.*, 309 NY 132 [1955]; *Irwin v Klein*, 271 NY 477 [1936]), the Court of Appeals has held that the 'determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact' (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557-558 [1991]; *see also Fallone v Misericordia Hosp.*, 23 AD2d 222 [1965], *affd* 17 NY2d 648 [1966]). Among the various factors considered in determining special employment status, of which no single factor is determinative, 'a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work' (*Thompson*, 78 NY2d at 558)"

(*Suarez v Food Emporium, Inc.*, 16 AD3d 152, 153 [1st Dept 2005]; *see also Williams v General Elec. Co.*, 8 AD3d 866, 867 [3d Dept 2004]).

Here, Karl's has made a prima facie showing that plaintiff was its special employee by pointing to evidence that Labor Ready's workers, including plaintiff. were exclusively supervised, directed and instructed by Karl's crew chief, and that Karl's provided Labor Ready's workers with all the equipment and tools needed to perform the work, and had the authority to terminate Labor Ready workers. Moreover, the invoice between Labor Ready and Karl's identifying the workers "as joint employers" of the two entities provides further supports Karl's position that plaintiff was its special employee.

Furthermore, the Lincoln Center defendants have not controverted this showing based on evidence that plaintiff received his paychecks from Labor Ready. In fact, it has been held that "a worker may have more than one employer for purposes of section 11 of the Workers' Compensation Law" (*See Bradford v. Air La Carte*, 79 AD 2d 553, 554 [1st Dept 1980][internal

citations omitted]). In addition, while plaintiff was unable to identify Karl's as the entity supervising his work, his deposition testimony that he was supervised exclusively by the "tent owners" who wore yellow hard hats is not inconsistent with evidence submitted by Karl's that it supervised plaintiff's work.

Accordingly, Karl's is entitled to summary judgment dismissing the complaint against it and, pursuant to Workers' Compensation Law § 11, the Lincoln Center defendants' cross claims for common law indemnification are also dismissed.

With respect to Karl's motion for summary judgment in its favor on its cross claim for contractual indemnification against Big Apple, which the Lincoln Center defendants oppose, and separately move to dismiss, the court notes that a party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). Moreover, "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

In the proposal (the Proposal), which breaks down the equipment leased by Karl's to Big Apple, it is stated, "All terms and conditions per standard Karl's Event Rental contract" (the Rental Contract) (Karl's notice of motion, exhibit H, the Proposal). The indemnification provision contained in the Rental Contract states, in pertinent part, as follows:

> "Notwithstanding any other contract provision in the Contract, [Big Apple] fully, finally and forever waives, releases, and discharges, and further agrees to

> indemnify, defend and hold harmless [Karl's] . . . from and against any and all claims . . . damages, causes of action, liabilities, losses, and expenses, including reasonable attorneys' fees . . . arising out of this Contract[6]"

(Karl's notice of motion, exhibit I, the Rental Contract).

Here, plaintiff was injured when he fell off a platform that Karl's rented to Big Apple pursuant to the Proposal and Rental Contract. Thus, as the accident arose out of the Rental Contract with Big Apple, Karl's is entitled to summary judgment in its favor on its cross claim for contractual indemnification against Big Apple. It should be noted that, while, in opposition, Big Apple argues that Karl's cross claim for contractual indemnification should be dismissed, because it was not negligent, as set forth previously, the subject indemnification provision covers claims "arising out of this Contract." Therefore, it is not necessary for Karl's to prove that defendants were negligent in order to be entitled to indemnification from Big Apple.

Accordingly, Karl's is entitled to summary judgment as to liability on its contractual indemnification claim against Big Apple.[7] As the complaint and cross claims against it have been dismissed, the cross claim will be limited to reasonable attorneys' fee or expenses incurred by Karl's arising out of this action.

The Lincoln Defendants' Motion and Plaintiff's Cross Motion

As a preliminary matter, contrary to defendants' argument, it cannot be said that plaintiff's cross motion is untimely. As stated in the preliminary conference order dated April 26, 2012, the parties had had 60 days from the filing of the note of issue to move for summary

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[6]As the indemnification clause is contained in a equipment lease agreement as opposed to a construction contract, General Obligations Law § 5-322.1 is not implicated.

[7]While Karl's asserted a cross claim for contractual indemnification against Lincoln Center it does not seek any relief on this cross claim, presumably since there is no evidence of any agreement by Lincoln Center to indemnify Karl's. Likewise, Karl's seeks no relief in connection with its cross claim for common law indemnification.

judgment. As the note of issue was filed on July 1, 2015, the time for moving for summary judgment expired on September 1, 2015. Plaintiff filed his cross motion on September 21, 2015. However,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion [internal citations omitted]"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, plaintiff seeks partial summary judgment with respect to his Labor Law §§ 240 (1) and 241 (6) causes of action, and defendants have moved for dismissal of these same claims. Therefore, as the Labor Law §§ 240 (1) and 241 (6) claims are the subject of the Lincoln Center defendants' timely motion, plaintiff's cross motion will be considered.

Labor Law § 240 (1) Claim

The Lincoln Center defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Plaintiff cross-moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against these defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, contrary to Lincoln defendants' argument, the facts of this case fall within the purview of Labor Law § 240 (1), because the tent that plaintiff was assisting in assembling at the time of the accident can be considered the erection or construction of a "structure" for the purposes of the statute. Case law has defined a structure as "'any production or piece of work

artificially built up or composed of parts joined together in some definite manner'" (*Joblon v Solow*, 91 NY2d 457, 464 [1998], quoting *Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *see McCoy v Kirsch*, 99 AD3d 13, 14 [2d Dept 2012] [wedding chupah, which "was a 10-foot-high device made of pipe, wood, and a fabric canopy at its top," that fell on the plaintiff was a structure for the purposes of Labor Law § 240 (1)]; *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 333 [2d Dept 2000] [the exhibit, "which was composed of interlocking parts," fell within the definition of "'structure' under Labor Law § 240 (1)"]). In determining whether an item a structure, the court may consider a number of relevant factors including, but not necessarily limited to, its "size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist. However, no one factor should be deemed controlling" (*McCoy v Kirsch*, 99 AD3d at 16-17).

Here, considering its purpose, size, composition and interconnecting parts, the tent at issue in this case is deemed to be a structure for the purposes of Labor Law § 240 (1) liability. Moreover, insofar as the Lincoln Center defendants argue that plaintiff was not injured while engaged in a protected activity because he was reaching for a another tent roll when he fell, as opposed to engaging in the installation of the tent, such narrow reading of the Labor Law is contrary to the purposes of the statute designed to protect workers from elevation risks and unsupported by any case law (*see John v Baharestani*, 281 AD2d 114, 117 [1st Dept 2001])

The Lincoln Center defendants next argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because an issue of fact exists as to whether plaintiff was the sole proximate cause of his accident. To that effect, they argue that plaintiff was aware that the tent material was present on the platform, and yet, he chose to work near it. "When the defendant

presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

However, defendants' argument that plaintiff was the sole proximate cause of his accident fails, as they "failed to provide an adequate safety device in the first instance" (*Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]). In any event, plaintiff's alleged conduct goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly

secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, the Lincoln Center defendants are not entitled to dismissal of the Labor Law § 240 (1) claim against them, and plaintiff is entitled to partial summary judgment as to liability on Labor Law § 240 claim against these defendants.

The Labor Law § 241 (6) Claim Against the Lincoln Center Defendants

The Lincoln Center defendants move for summary judgment dismissing the Labor Law § 241 (6) claim. Plaintiff cross-moves for partial summary judgment in his favor as to liability on the Labor Law § 241 (6) claim against these defendants.

Labor Law § 241 provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate

> protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty "on owners and contractors to 'provide reasonable and adequate protection and safety' to workers" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502. However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

In his bill of particulars, plaintiff claims that violations of Industrial Code sections 23-1.16 and 23-1.21 proximately caused his accident.

Initially, Industrial Code 12 NYCRR 23-1.16 is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]; *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]).

However, the rules set forth by section 23-1.16, which sets standards for "[s]afety belts, harnesses, tail lines and lifelines," do not apply here, because plaintiff was not provided with any of these safety devices (*see Forschner v Jucca Co.*, 63 AD3d 996, 998-999 [2d Dept 2009]).

Thus, the Lincoln Center defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16.

Plaintiff asserts that Industrial Code 12 NYCRR 23-1.21, which sets forth a variety of standards for the safety of ladders, applies to the facts of this case. However, as plaintiff asserts that his accident was caused when he fell off the elevated platform after tripping on tent material,

rather than from a fall from a ladder, a violation of section 23-1.21 could not be the proximate cause of his injuries. Thus, defendants are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on section 23-1.21.

Accordingly, the Lincoln Center defendants are entitled to summary judgment dismissing plaintiff's claims under Labor Law § 241(6).

The Common-Law Negligence and Labor Law § 200 Claims Against the Lincoln Center Defendants

The Lincoln Center defendants also move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or

constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over the plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input into the method of moving the beam]).

Here, plaintiff does not oppose, or even address, that part of the Lincoln Center defendants' motion seeking to dismiss the common-law negligence and Labor Law § 200 claims against them. Thus, as said claims are deemed abandoned, these defendants are entitled to dismissal of said claims against them (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 783 n 1 [3d Dept 2003]).

In any event, the claims are unavailing as to the extent it can be said that the accident was caused by a dangerous condition at the workplace, there is no evidence that the Lincoln Center caused or created such condition or knew about it. Likewise, to the extent it can be argued that the Labor Law § 200 the claim was the result of the means and methods used in plaintiff's work

there is no evidence that the Lincoln Center defendants supervised or controlled this work.[8]

Accordingly, the Lincoln Center defendants are entitled to summary judgment dismissing plaintiff's negligence and Labor Law § 200 claims.

CONCLUSION

In view of the above, it is

ORDERED that defendant Karl's Event Rental, Inc.'s (Karl's) motion (motion sequence number 003) for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims are dismissed as against Karl's, and the Clerk is directed to enter judgment accordingly in favor of Karl's; and it is further

ORDERED that the part of Karl's motion for summary judgment in its favor on its contractual indemnity cross claim against defendant Big Apple Circus, Ltd. (Big Apple) is granted as to liability for reasonable attorneys' fees and expenses with the amount to be determined at the time of trial; and it is further

ORDERED that the parts of defendants Lincoln Center for the Performing Arts, Inc. (Lincoln Center) and Big Apple's motion (motion sequence number 004) for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims against them, as well as Karl's cross claim for common-law indemnification against them and Karl's cross claim for contractual indemnification against Lincoln Center, are granted, and these claims are severed and dismissed as against these defendants, and the motion is otherwise denied; and it is further

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[8]At oral argument, plaintiff argued that the Lincoln Center defendants were liable under § 200 as Big Apple's foreman saw the accident and therefore had responsibility for it. This argument is without merit in the absence of evidence that Big Apple supervised or controlled plaintiff's work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877).

ORDERED that plaintiff Antonio Palacios's cross motion for summary judgment as to liability in his favor on the Labor Law § 240 (1) claim against defendants Lincoln Center and Big Apple is granted, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: April 27, 2016

J.S.C.