Pendergast v Mutual Redevelopment Houses, Inc.
2017 NY Slip Op 30595(U)
March 28, 2017
Supreme Court, New York County
Docket Number: 157554/12
Judge: Sherry Klein Heitler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------x

WILLIAM PENDERGAST,

Plaintiff,

-against-

MUTUAL REDEVELOPMENT HOUSES, INC. and RC DOLNER LLC,

Defendants.

----------x

MUTUAL REDEVELOPMENT HOUSES, INC.

Third-Party Plaintiff,

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Third-Party Defendant

----------x

RC DOLNER, LLC

Second Third-Party Plaintiff,

-against-

MILLER MECHANICAL SYSTEMS, LLC

Second Third-Party Defendant

----------x

Index No. 157554/12
Motion Sequences 003, 004, 005

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Motion Sequence Nos. 003, 004, and 005 are consolidated for disposition herein.

In motion sequence 003, plaintiff William Pendergast ("Plaintiff" or "Mr. Pendergast") moves for summary judgment on his Labor Law 240(1) claim. In motion sequence 004, defendant/third-party plaintiff Mutual Redevelopment Houses, Inc. ("Mutual") moves pursuant to CPLR 3212 for summary judgment dismissing Plaintiff's complaint as against it and for contractual indemnification against defendant/second third-party plaintiff RC Dolner, LLC ("RC Dolner") and second third-party

[1]

defendant Miller Mechanical Systems, LLC ("Miller"). In motion sequence 005, RC Dolner moves pursuant to CPLR 3212 for summary judgment on its contractual indemnification claim against Miller. Plaintiff's motion is opposed by Mutual, RC Dolner, and Miller (collectively, "Defendants"). Mutual's motion is opposed by Plaintiff and opposed in part by Miller. RC Dolner's motion is opposed by Miller. Mutual is the owner of 315 Eighth Avenue in Manhattan, the premises where the accident at issue occurred. RC Dolner was the general contractor hired by Mutual to perform construction work at the premises. Miller, who was Plaintiff's employer, was the subcontractor engaged by RC Dolner to perform HVAC replacement work.

BACKGROUND

This Labor Law personal injury action arises from a July 13, 2012 accident which occurred when Plaintiff, a union steamfitter, allegedly was tasked to climb a ladder and tighten a valve at a height of about 10 to 15 feet above the floor in a compactor room[1] using an extension ladder. While reaching above his head to tighten the valve the ladder allegedly collapsed beneath him. Plaintiff claims that he fell 15 feet to the ground, causing him to sustain career-ending injuries.

Plaintiff commenced this action against Mutual and RC Dolner on October 24, 2012. The complaint alleges personal injuries sustained as the result of negligence and violations of Labor Law §§ 200, 240(1), and 241(6) by these defendants. On March 14, 2013 Mutual commenced a third-party action against third-party defendant Zurich American Insurance Company ("Zurich") which alleges that Zurich failed to accept the tender of Mutual's defense and refused to provide coverage for and indemnify Mutual in this matter. RC Dolner commenced a second third-party action against Miller on October 14, 2013. The second third-party complaint seeks contribution and common-law and contractual indemnification from Miller and alleges breach of contract by Miller for failing to procure

[1] Also referred to as the "garbage room" by the parties.

insurance. On June 16, 2014 the parties to the first third-party action filed a stipulation of discontinuance with prejudice dismissing Mutual's claims against Zurich.

The Plaintiff was deposed on April 15, 2015.[2] He testified that on the date of his accident he was working with his partner, senior steamfitter Arthur McKee. According to Plaintiff Mr. McKee instructed him to install a fitting in the ceiling in the garbage room using a 20-foot aluminum extension ladder which Mr. McKee had set up for him (Pendergast Deposition pp. 38-39):

Q. When you say he told you to use the ladder, did he actually provide the ladder to you?

A. He told me it was in the next room. He set it up.

Q. He set it up for you?

A. He told me the ladder was set up in the next room, to go in the next room and do the job he assigned me.

Q. Did you take your direction and supervision from Arty?

A. Yes.

Q. While you were working at this particular job site did anyone else give you direction or supervision in the performance of your work?

A. No. I took my direction from Arty, the senior fitter.

When Plaintiff entered the garbage room he saw the ladder leaning against the wall where the work was to be done. Plaintiff described the ladder as two separate ten-foot sections connected by slats to form a twenty-foot extension ladder. He positioned it against the wall at an angle such that the bottom of the ladder was over ten feet from the wall. The ladder was not secured to the wall (*id.* at 49, 79, 185-189). Prior to climbing the ladder Plaintiff made sure it was in "good shape" and sturdy enough so that the feet were flat against the floor (*id.* at 49-50, 52-53). He then climbed to the fourth rung from the top and proceeded to perform his duties (*id* at 55-56, 137-38, 143):

Q. How high were you up on the ladder when your accident occurred?

A. About 15 feet, three-quarters of the way.

Q. What happened then?

---

[2] A copy of Mr. Pendergast's deposition transcript is submitted as Plaintiff's exhibit 2 ("Pendergast Deposition").

A. I reached over and screwed the fitting on the joint, and then I took the pipe wrench, reached over my head to tighten up the fitting, and the ladder dropped out from underneath me, causing me to fall to the floor.

Q. When you say it dropped out – the bottom kicked out?

A. The ladder just fell out from underneath me.

Q. So the bottom legs of the ladder kicked away from the wall?

A. I do not know. The ladder just dropped out from underneath me, and I just dropped straight down. That's all I remember.

* * * *

Q. Did you touch the ladder at all before you started to ascend it, to see if it was sturdy?

A. Yes.

Q. Did it appear to be sturdy?

A. Yes.

Q. Do you have a recollection of looking at the feet of the ladder?

A. Yes.

Q. When you looked at the feet of the ladder what did you see?

A. The two feet were secure to the floor.

* * * *

Q. To this day do you know why the ladder fell?

A. No.

Plaintiff did not know where the ladder came from and he did not discuss the ladder's origin with anyone after the accident (*id.* at 61).

Arthur McKee was deposed on December 11, 2015.[3] He testified that he knew the ladder he set up for the Plaintiff in the compactor room did not belong to Miller but decided to use it anyway because all of Miller's ladders were A-framed and did not go high enough for the job. The compactor room was locked, so Mr. McKee obtained the key from someone who he believed worked for RC Dolner (McKee Deposition pp. 56-58):

Q. When you went into that room, did you know in advance that there was a ladder there?

A. Yes.

Q. How did you know that there was a ladder there?

[3] A copy of Mr. McKee's deposition transcript is submitted as Plaintiff's exhibit 6 ("McKee Deposition").

A. It was laying on the ground there. . . .

Q. So where did you get the key to open the door?

A. I had to go to the janitor or whoever it was – or I saw someone from Dolner and asked them to get me the key, I don't really recall who opened – well, the people in Mutual Development opened the door. I got the key from them through somebody.

Q. Did you tell them why you needed access to the compactor room?

A. Yeah.

Q. What did you tell them?

A. I told them we had to clean the bottom of the risers and so we could start filling the system to test it.

Q. Is that – the somebody you told that to, is that somebody from RC Dolner, somebody from Mutual Redevelopment or both?

A. I would say it was Dolner.

Mr. McKee's decision to use the ladder he saw in the compactor room was a spontaneous one. He did not know if that ladder was supposed to be discarded and did not tell anyone from RC Dolner he planned to use it (*id.* p. 59):

Q. Do you know if that ladder was in the room to be discarded?

A. I don't know that, no.

Q. Was that the only ladder in that room?

A. Yes.

Q. Was that a spontaneous decision that you made to use that ladder?

A. Yes.

Q. Okay. And correct me if I'm wrong, was your decision to use that ladder based on the fact that the ladders that Miller had on the job site were located some distance from that compactor room?

A. Yes.

According to Mr. McKee the ground beneath where the ladder was placed was slippery from grease, so he set up the ladder at a 45 degree angle, made sure both feet had rubber footings, and tested the ladder to make sure it was in good working order before speaking with the Plaintiff (McKee Deposition pp. 20-21, 46, 60):

Q. Now, on July 13, 2012, you told – you stated that you sent Mr. – Pendergast went to the compactor room to the clean the piping?

A. Right.

Q. Did he have to use a ladder on that day?

A. Yes.

Q. What kind of ladder did he use?

A. It was a straight ladder that was in the room.

Q. Did you put the ladder in the room?

A. No. It was in the room.

Q. It was in the room before you got there?

A. Right.

Q. Do you know whose ladder it was?

A. I believe it belonged to the building there, whatever building.

Q. Mutual Redevelopment Houses?

A. Yes.

Q. Did you ever use that specific straight ladder?

A. No, I didn't. No.

Q. Did you set up that ladder for Mr. Pendergast?

A. Yes, I put the ladder there, yes.

Q. You did?

A. Uh-huh.

Q. Did you notice anything about that ladder?

A. No. It looked fine to me.

* * * *

Q. Can you describe the angle that the ladder was set up before Mr. Pendergast started using it, and by that I mean – do you know what I mean by that?

A. Yes. Forty – five degrees, approximately.

* * * *

Q. Did you do anything to the ladder to see if it was steady?

A. Yeah, I made sure that it was, you know, straight on the wall and it was good enough to go up, yeah. . . .

Q. Were there rubber feet on that ladder?

A. Yes.

Q. On both sides of the ladder?

A. Yes.

Mutual's assistant general manager, Mr. Ryan Dziedziech, was deposed on April 15, 2015.[4] Mr. Dziedziech testified that he was made aware of the accident shortly after it occurred, but had to wait approximately one hour before going to the compactor room. By that time Plaintiff had already been taken to the hospital and the ladder had been removed from the scene. Mr. Dziedziech does not know what happened to the ladder in question after the accident. He never met the Plaintiff or Mr. McKee and only saw the ladder in photographs. He does not know who owned the ladder in question but testified that it definitely did not belong to Mutual because all of the Mutual-owned ladders stored at this particular building were A-framed and had a Mutual symbol stencilled on them. When they were not in use the ladders were kept chained together in a locked room to prevent theft (Dziedziech Deposition, pp. 37-40).

According to Mr. Dziedziech the compactor room was not 15-20 feet high as testified to by the Plaintiff, but approximately 9.5 feet high (*id.* at 47). Several months after his deposition Mr. Dziedziech measured the compactor room and set forth his measurements and findings in an affidavit[5] wherein he avers that the distance from the compactor floor to the ceiling is just over 12 feet, and that the distance between the floor and the bottom of the pipe protruding from the ceiling is approximately 9 feet and 9 inches (Dziedziech Affidavit ¶¶ 4-6).

Mr. Andrew Clokey, a superintendent employed by RC Dolner, was deposed on October 6, 2015.[6] Like Mr. Dziedziech, Mr. Clokey was informed of the accident right after it happened but did not arrive at the compactor room until after Mr. Pendergast had been taken to the hospital. He could not definitely recall whether or not he saw the ladder (Clokey Deposition p. 56):

> Q. The ladder that you saw, do you know if that was a ladder that was involved in the accident?

---

[4] A copy of Mr. Dziedziech's deposition transcript is submitted as Plaintiff's exhibit 4.

[5] Mr. Dziedziech's affidavit, sworn to June 8, 2016, is annexed to the September 30, 2016 affirmation of Barbara Sheehan, Esq. as exhibit N.

[6] A copy of Mr. Clokey's deposition transcript is submitted as Plaintiff's exhibit 7 ("Clokey Deposition").

A. I don't recall really. I think if I saw it there, I am sure it was, but I don't recall. Actually I remember going there, but I don't recall very much about what I saw. I saw the room.

Most of Mr. Clokey's knowledge of Plaintiff's accident stems from conversations he had with another RC Dolner superintendent, Mr. Itzhak Zohar, who told him that Plaintiff's injury was caused by the fact that he set up the ladder upside-down (Clokey Deposition p. 63):

Q. What did Mr. Zohar tell you with regards to Mr. Pendergast's accident?

A. That Mr. Pendergast had used the ladder and that he fell off it because it was a broken ladder to begin with. It was used upside down, and he was shocked at the conditions, why this gentleman used a ladder in that way.

Q. Did Mr. Zohar tell you that Mr. Pendergast set up the ladder himself? . . .

A. I believe he did, yes.

Mr. Clokey believed that the ladder was owned by Mutual because it did not belong to any of the other contractors, but was not really sure of its origin (*id.* at 65-66, 88).

RC Dolner hired non-party Total Safety Consultants to provide site safety supervision. Total Safety Consultants' representative at this construction site, Mr. Stan Prince, was working on the date of Plaintiff's accident. According to Mr. Clokey, his job was to "go around and look for safety hazards" (*id.* at 90). Mr. Prince was deposed on April 21, 2016[7] regarding a report he created following Plaintiff's accident[8] (Prince Deposition, pp. 19-20):

Q. So tell me from your memory what do you remember happened?

A. Well, exactly what is in here. I was summoned that a worker had received an injury. In doing so, I ran to the place that he was injured. I cautioned off the area to make sure that evidence was not tampered with. When I got there the worker was on the floor. He seems to be in pain. 911 was contacted, they came on the jobsite and they started working on him. It appeared that there was a stepladder that the worker was using -- not a stepladder, but a straight ladder, that was not fully intact, that was in the boiler area where the worker was. The worker used that stepladder to obtain the height where he wanted to go, and in doing so, being that the floor was painted, slipped from under him and that caused the worker the injury when he landed on the concrete floor.

---

[7] A copy of Mr. Prince's deposition transcript is submitted as Plaintiff's exhibit 10 (Prince Deposition").

[8] Plaintiff's exhibit 11.

Upon arriving at the accident Mr. Prince immediately noticed that the ladder at issue was defective because it was missing certain parts (*id.* at 32-33, 35):

> Q. What was the right ladder that Mr. Pendergast should have been using to perform his job, to your understanding?
>
> A. Well, he could be using an A frame ladder that has to be extended and he could work up there. If he had to use a straight ladder, to use a straight ladder against the wall, I don't see that's a ladder he should use, to be honest with you.
>
> * * * *
>
> Q. Do you recall how long it took you, when you arrived, to determine that this ladder was defective?
>
> A. As soon as I got there about two minutes, I looked at the ladder to see the condition that it was because the worker fell on there.
>
> Q. Was its defects obvious to you after you walked in and you started examining the ladder?
>
> A. After a couple of minutes there, that's what I saw. Yeah, I started looking at the ladder and it appeared that it was incomplete. Certain parts of it was missing. As you could tell from the picture.

Mr. Prince did not speak with Plaintiff either before or after the accident. Like the other defense witnesses, Mr. Prince was unable to determine who owned the ladder (*id.* at 52):

> Q. When you went to the accident site, did you look over the ladder?
>
> A. Yes, I did.
>
> Q. Did you see any markings on it?
>
> A. No, I didn't. What kind of markings are you talking about?
>
> Q. Markings indicating whose ladder it might have been?
>
> A. No, I did not.

One of Miller's owners, Mr. David Miller, was deposed on behalf of his company.[9] Mr. Miller testified that he spent a significant portion of each day on the job site where he had between 60 and 100 workers at any given time. He supplied all of the necessary equipment for his employees. This included ladders that were stored in a fenced area outside of the building (Miller Deposition pp. 21-24):

[9] A copy of Mr. Miller's deposition transcript is submitted as Plaintiff's exhibit 8 ("Miller Deposition").

Q. Did the ladders Miller used on this job have any insignia or identification that identified them as your ladders?

A. All of our ladder and major tools were stenciled as Miller Mechanical Systems.

Q. The A-frame ladders, did the heights of the A-frame ladders vary?

A. It ranged from 6 to 14 feet. . . .

Q. Do you know if the Miller workers were given instructions at any time while they were working there about what they should do if they needed a ladder?

A. Specifically when they were hired for the project, they were basically given an indoctrination aside from the mandated safety indoctrination. . . . Each employee was well versed as to where all the equipment was stored on site.

Q. If Art McKey[10] and William Pendergast were working in Building 4 on the day of this accident, if they needed a ladder, would they be able to get it either from the fence area or the Conex storage facility?

A. Yes.

Miller personnel were directed to only use Miller's ladders in the course of their work. The company kept more than 20 eight-foot A-frame ladders at the construction site for this purpose (*id.* at 26):

Q. Were the Miller personnel on the job site ever instructed by Miller to only use Miller's ladders?

A. Yes, specifically and very clearly directed to all personnel. It was one of the – besides just our general policy, it was mandated by our insurance company and also our safety program. It was one of the specific items mandated by the owner that only equipment could be used – only equipment owned by the contractor could be used by that contractor.

Q. All of the men were aware of this; correct?

A. Yes.

Q. That would include Art McKey and William Pendergast?

A. Yes.

Upon learning of Plaintiff's accident Mr. Miller rushed to the compactor room where he found Plaintiff laying on top of the extension ladder. He observed that one of the rubber feet on the ladder was missing (Miller Deposition pp. 18-19, 22-23, 28-30).

[10] Throughout the transcripts McKee is inadvertently spelled "McKey".

[10]

Mr. Miller testified that Plaintiff should not have used an extension ladder. An 8-10 foot A-frame ladder, many of which were available to Plaintiff, would have sufficed given that Plaintiff only needed to access an area between 9 and 11 feet off of the ground (*id* at 40-41). Mr. Miller does not know why Plaintiff used the ladder in question instead of retrieving a Miller ladder (*id.* at 33):

> Q. Did you learn anything else other than what you told us about why that ladder was used?
>
> A. I was told that the ladder was – after the accident I was told that the ladder was in the room and where Pendergast decided to use that ladder.
>
> Q. Who told you that?
>
> A. It was generally discussed with the shop steward on the job, and then also the deputy foreman, Robert Dowdell. He was the one that told me specifically the ladder was in that room.
>
> Q. Did he tell you how he learned that?
>
> A. I think he just knew from working in the area previously. He had seen that ladder in the room prior.

Based on the testimony in this case, Defendants assert that Mr. Pendergast was the sole proximate cause of his injuries and that this case should be dismissed accordingly.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish

the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

I. Plaintiff's Summary Judgment Motion - Labor Law 240(1)

Plaintiff argues that summary judgment in his favor is required based upon the undisputed fact that the accident was elevation-related and caused by the collapse of a defective ladder provided to him by his supervisor. Mutual, RC Dolner, and Miller all oppose on the ground that Plaintiff knew he was supposed to use a Miller A-frame ladder which was readily available, but chose instead to use a defective extension ladder which was meant to be discarded. Accordingly, Defendants argue that Plaintiff's motion must be denied because he was the sole proximate cause of his injuries.

Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they had actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross,* 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. A violation of this duty which proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or agent strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

Proximate cause is demonstrated by showing that a party's act or failure to act was a "substantial cause of the events which produced the injury." *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 (1980). A workplace accident can have more than one proximate cause. *Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 AD2d 384, 385 (1st Dept 2003). Thus, owners and contractors may be subject to absolute liability under Labor Law 240(1), regardless of an injured worker's contributory negligence (*see Bland v Manocherian*, 66 NY2d 452 [1985]), unless the plaintiff is the sole proximate cause of his injuries. *See Robinson v East Medical Center, LP*, 6 NY3d 550, 554 (2006). Where a plaintiff's action is the sole proximate cause of his injuries liability under Labor Law 240(1) does not attach. *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998).

"In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason", the Court of Appeals has "continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection. . . . Once the plaintiff makes a prime facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, n.8 (2003).

The testimony of Plaintiff and Mr. McKee is sufficient to make a *prima facie* showing of a Labor Law 240(1) violation. Plaintiff and Mr. McKee both testified that they inspected the extension ladder which was found in the garbage room and determined that it was in good working order. Mr. McKee set it up against the wall on an angle and it was stable. Plaintiff then climbed the ladder, reached over his head to tighten a valve, and the ladder collapsed beneath him. Defendants, however, have sufficiently raised an issue of fact whether Plaintiff's injuries were the result of his own acts and omissions.

A plaintiff may be deemed to be the sole proximate cause of his injuries where the "plaintiff had adequate safety devices available . . . knew both that they were available and that he was expected to use them . . . chose for no good reason not to do so", and would not have been injured had he used an adequate safety device. *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 (2004). In this case, there is evidence that Plaintiff and Mr. McKee used the extension ladder knowing that it was not an approved Miller ladder, that they were only supposed to use approved Miller A-frame ladders, and that they used this ladder simply because it was already in the garbage room.

Plaintiff nevertheless argues that he is entitled to summary judgment because he was directed to use the extension ladder by his supervising partner, Mr. McKee. In other words, Plaintiff alleges that he used the ladder because he had no choice. In this regard Plaintiff testified that he took direction only from Mr. McKee, his "senior fitter". However, Mr. McKee testified that he and Plaintiff were only partners, and while he gave Plaintiff "direction" because he was new to the job, he was not Plaintiff's supervisor or foreman (McKee Deposition pp. 13-14):

Q. Mr. Pendergast was your partner in July 2012?

A. Yes.

Q. Did you have any supervisory role over Mr. Pendergast?

A. Yes, because I was the senior member of the team, the two of us.

Q. And so what kind of responsibility does that mean as being supervisor?

A. I wasn't really a supervisor but being that he was fairly new in the business and I had the experience so I sort of knew -- I knew what had to be done.

Q. Did you constantly give him direction as to what to do?

A. Yeah. Yeah.

Q. But you weren't a foreman or anything like that?

A. No.

Mr. Miller confirmed that Mr. McKee had no supervisory authority and was never designated as a foreman or deputy foreman (Miller Deposition pp. 18-20, 46-47, 53-55, 57-58):

Q. In terms of the hierarchy of authority for Miller, would you be the most senior person on the job site?

A. Yes.

Q. Who would be immediately under you?

A. General foreman.

Q. Who was that?

A. Robert Vigada. . . .

Q. Who would be under Robert Vigada?

A. Deputy foreman. . . .

Q. Do you remember who would have been the deputy foreman for Building 4?

A. There were several. Robert Dowdell. . . . Kenneth Rich. Sean Laird. . . .Manny Ferrara. I think that would be it.

Q. What was the responsibility of the general foreman?

A. The general foreman is responsible for the day-to-day organization of and direction of all the labor on the job.

Q. What would be the responsibility of the deputy foreman?

A. The deputy foreman takes direction of the general foreman, whether it be for a specific area or a specific task that encompasses several areas. They would be in charge of the group of steamfitters responsible to complete that work. . . .

Q. Are you familiar with an individual by the name of Art Mckey?

A. Yes, I am.

Q. Who is Art McKey?

A. A steamfitter in our employ on that job.

Q. Do you know if, on the date of the accident, he was William Pendergast's partner?

A. I believe he was. I am not positive, but yes I believe he was.

* * * *

Q. What was the relationship between Mr. McKee and Mr. Pendergast? . . .

A. They were partners. A gang.

Q. Did you ever – well, was it known to you prior to the accident that Mr. McKey [sic] gave direction, supervision to Mr. Pendergast on a daily basis? . . .

A. No.

Q. After the accident, was it made known to you he was giving direction or supervision to Mr. Pendergast on a daily basis? . . .

A. No.

* * * *

Q. Would you agree, Mr. Miller that all direction and supervision of the means and methods of Miller Mechanical's work came from the foreman? . . .

A. All direction to our men to employees of Miller Mechanical Systems would either come from myself, the general foreman or the deputy foreman. . . .

Q. Do you know who directed and supervised, if anyone, was directing Mr. Pendergast's work at the time of this incident?

A. At the time of the incident, he was alone.

Q. Who assigned him that particular task he was performing at the time of this accident?

A. I wouldn't know specifically that. Specifically that task to physically go up a ladder to hook up a hose, usually the direction isn't that specific. It was the general task of that day which was, as I said, we were filling, draining, and flushing risers that would have been given by Robert Dowdell.

Q. The policy and procedures regarding the use of only Miller Mechanical ladders, your foreman were aware of that?

A. Yes. . . .

Q. Mr. McKey was aware of those policies and procedures?

A. Yes.

Q. And Mr. Pendergast?

A. Yes, he was.

* * * *

Q. If you assume that Art McKey had more experience than the plaintiff, Mr. Pendergast, as between the two of them, who would have given direction to who if it was needed? . . .

A. Complicated question. Local 638 is a two-man trade. Typically, you are working in teams of two men. There is, unless one of the gang, one of the steamfitters in a gang is designated as a foreman or deputy foreman, there is no other authorization for one to direct the other to do anything.

In addition to questions regarding the relationship between the Plaintiff, Mr. McKee, and Miller, specifically whether Mr. McKee had the authority to direct Plaintiff's work and whether Plaintiff was led to believe so, there remain material questions about the type of ladder Plaintiff used, its ownership, the condition of the ladder, and the manner in which the ladder was used. Both Plaintiff and Mr. McKee testified that the ladder was in working order prior to the accident. By contrast, Mr. Prince observed that that the ladder was defective because it was missing pieces needed to properly extend it. It may have also been missing an important stabilization piece, in the absence of which the ladder was likely to collapse (Prince Deposition pp. 24-25):

Q. What do you recall about the description of the ladder?

A. The ladder appeared to be dismantled.

Q. What do you mean by that?

A. Well, a straight ladder has two sections when you open it so you can lock it, put it against the building, or whatever you're doing, to secure it. This ladder was a straight ladder that apparently the other side was missing. It is my understanding that the ladder was in the room that was used by the worker. The ladder had a piece missing, the rubber that was on the floor, it was the hard metal piece – not the metal, but the hard plastic piece. So, of course, you put that on the floor and it's painted you're asking for danger.

Moreover, it is not clear whether the ladder was set up properly. Mr. McKee testified that he leaned the ladder against the wall and tested it to make sure it was sturdy (McKee Deposition pp. 28-29). When Mr. Prince arrived on the scene after the accident he noticed the top portion of the ladder to be further away from the wall, implying that the ladder was leaned against the wall upside-down.

Finally, whether Miller provided an adequate safety device for Plaintiff's work is in dispute. According to Mr. Miller his company provided all of the tools and equipment the steamfitters needed to perform their job, including many fiberglass A-frame ladders of various lengths from 6 to 14 feet, and Plaintiff knew such ladders were kept in a designated storage area to which Plaintiff had access. Based upon his testimony that the compactor room was 15 to 20 feet high, Plaintiff, who is 6 feet and 3 inches tall, asserts that none of Miller's ladders were tall enough to reach the height needed to do his work. However, all of the other witnesses, including Mr. McKee, testified that the compactor room was between 10 to 12 feet high and that the pipe Plaintiff was assigned to work on was even lower than that, between 9.5 and 9.9 feet high. Their collective testimony is supported by the measurements taken by Mr. Dziedzieck.

The cases Plaintiff relies upon in support of his summary judgment motion are inapposite. For example, Plaintiff relies upon *Stankey v Tishman Constr. Corp of NY*, 131 AD3d 430 (1st Dept 2015) to show that Plaintiff's knowing use of a ladder without a proper footing only goes to comparative fault and is not a defense to a claim based upon Labor Law 240(1). Unlike this case, the *Stankey* court actually found that the defendants failed to provide the plaintiff with adequate safety devices and that

there was no evidence plaintiff refused to use the safety devices provided to him. Here, whether Plaintiff had access to but chose not to use an adequate A-frame ladder is in dispute.

Plaintiff's reliance upon *Harris v City of New York*, 83 AD3d 104 (1st Dept 2011) is also misplaced. In that case, the court held that the plaintiff could not be the sole proximate cause of his injuries because he was directed by his foreman to stand on top of a piece of wood in order to keep it in place. While Mr. McKee may have told Plaintiff to perform his duties using the unorthodox extension ladder in the compactor room, he was not Plaintiff's foreman, and whether he had the authority to direct Plaintiff's work is questionable.

Felker v Corning, Inc., 90 NY2d 219 (1997), *Hoffman v SJP TS, LLC*, 111 AD3d 467 (1st Dept 2013), and *Fernandez v BBD Developers, LLC*, 103 AD3d 554 (1st Dept 2013) are all distinguishable on their facts. In *Felker*, the plaintiff fell as he reached from a step ladder over an elevated alcove wall. It was this unique situation and the "contractor's complete failure to provide any safety device to plaintiff to protect him from this . . . risk of falling over the alcove wall and through the suspended ceiling to the floor below that leads to liability." *Id.* at 224. The *Hoffman* plaintiff was assigned to perform caulking work at a height of approximately 35 feet. Because of the configuration of the lobby, the lift provided to him could not be placed adjacent to the wall, leaving a three foot gap between the plaintiff and the surface that needed caulking. This required the plaintiff to lean over the railing to operate the caulking gun. The plaintiff in *Fernandez* was directed by his supervisor to remove 500 pound steel beams from a construction site by cutting them with a torch and letting them drop down to the floor level below. His supervisor helped him fasten the rope to the safety belt, and directed him to tie it to one of the beams that was not being removed. No one measured the rope to ensure it was shorter than the distance to the ground and when one of the beams somehow hit the security rope plaintiff was pulled backwards onto the concrete floor 15 feet below. In all of these cases the

defendants failed to provide the Plaintiff with adequate safety devices. Whether Defendants in this case provided Plaintiff with an adequate safety device is an open question.

In sum, whether Plaintiff was the sole proximate cause of his injuries cannot be determined as a matter of law due to the existence of a number of material unresolved questions of fact. These include whether a legitimate supervisory relationship existed between Plaintiff and Mr. McKee, whether Miller, Mutual, and RC Dolner had appropriate safety devices available at the workplace, whether the ceiling was too high to use any of the A-frame ladders at the site, whether the extension ladder Plaintiff used was in good condition as Plaintiff claims or defective because it was missing parts and footing, whether Mr. McKee or Plaintiff placed the ladder upside down, and whether there was adequate safety training concerning the use of ladders at the site. All of these questions have to be answered by a jury before it can be determined whether Plaintiff was the sole proximate cause of his injuries. Accordingly, Plaintiff's motion for summary judgment on its Labor Law 240(1) claim must be denied.

II. Mutual's Summary Judgment Motion

Mutual moves for summary judgment dismissing Plaintiff's negligence and Labor Law §§ 200, 240(1), and 241(6) claims against it. As the court has already determined that there are triable issues of fact regarding Plaintiff's Labor Law 240(1) claims, the court will only address Mutual's arguments with respect to Labor Law 241(6) and Labor Law 200.

Like Labor Law 240(1), Labor Law 241(6) imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers. It provides that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * * *

> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a Labor Law § 241(6) cause of action a plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Plaintiff's Labor Law 241(6) cause of action is predicated upon the Defendants' alleged violation of 12 NYCRR 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.21, 23-2, 23-3, 23-4, 23-5, and 23-6. Of all of these regulations, Plaintiff's papers on this motion only make reference to 12 NYCRR 23-1.21(b)(3)(iv) and 23-1.21(b)(4)(iv) and Plaintiff's Labor Law 241(6) claims predicated on the remaining Industrial Code provisions are hereby dismissed.

Respectively, 12 NYCRR 23-1.21(b)(3)(iv) and 23-1.21(b)(4)(iv) provide:

> All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist . . . if it has any flaw or defect of material that may cause ladder failure.
>
> * * * *
>
> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

While both provisions are specific enough to support a Labor Law 241(6) claim,[11] Mutual contends that neither of these provisions apply to this case because Plaintiff chose to use a discarded ladder meant for the trash knowing he was only supposed to use equipment provided by his employer.

---

[11] See *Vargas v New York City Tr. Auth.*, 60 AD3d 438, 440 (1st Dept 2009); *De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 (1st Dept 2001); *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 (2d Dept 2006).

At this point, it is unclear who owned the ladder and how it made its way into the compactor room. But there are clearly questions of fact whether the ladder lacked a rubber foot and whether it was just one half of a full extension ladder. Thus, a reasonable jury could determine that the ladder was defective and that defendants violated 12 NYCRR 23-1.21(b)(3)(iv) accordingly. Mutual's argument that Mr. Pendergast cannot testify that the ladder was in good working order on the one hand and now claim it was defective to the court on the other is cogent but ultimately not determinative of this issue as a matter of law.

Mutual's argument regarding 12 NYCRR 23-1.21(b)(4)(iv) is that Plaintiff could not have stood on ladder rungs between six and ten feet off the floor because the pipe on which the Plaintiff was working was less than ten feet above the floor based on Mr. Dziedziech's measurements. The problem with this argument for summary judgment purposes is that Mr. Dziedziech measured the compactor room several months after he gave his deposition and set forth his findings in an affidavit which Plaintiff has not had the opportunity to cross-examine. Even were the court to assume the pipe was only 10 feet high that does not mean Plaintiff must have been standing less than six feet above the floor when he fell, especially given the testimony that the ladder was placed on an angle. In light of the conflicting testimony and evidence on this issue, the question of whether defendants violated 12 NYCRR 23-1.21(b)(4)(iv) is best left to a jury, and the motion to dismiss Plaintiff's Labor Law 241(6) claim must also be denied.

Labor Law § 200[12], which does not impose a nondelegable duty, codifies the common law duty imposed upon owners and general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law § 200 claims are generally predicated upon a

[12] Labor Law § 200 provides in relevant part that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

two-pronged showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

As for the first prong, Plaintiff has failed to show that Mutual had the authority to control Plaintiff's work. There is no evidence presented that Mutual exercised any actual control over the manner in which the work in question was performed. Plaintiff himself acknowledged that he received his instructions strictly from Mr. McKee.

With respect to the second prong, Plaintiff asserts that Mutual failed to maintain the property in a reasonably safe manner and that his injury was a foreseeable result of its decision to place a defective ladder in the compactor room. *Gronski v County of Monroe*, 18 NY3d 374, 379 (2011) (landowner owes a duty of care to maintain his or her property in a reasonably safe condition); *Higgins v 1790 Broadway Assocs.*, 261 AD2d 223, 224 (1st Dept 1999) (property owner must "maintain the premises in reasonably safe condition, with foreseeability being the measure of that proprietary duty."). Summary judgment is inappropriate if "fault could be predicated upon [the owner's] actual or constructive notice of a dangerous condition". *Artoglous v Gene Scappy Realty Corp.*, 57 AD3d 460, 462 (2d Dept 2008) (quoting *Cruz v Kowal Indus.* 267 AD2d 271, 272 (2d Dept 1999). "Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . ." *Atashi v Fred-Doug, 117 LLC*, 87 AD3d 455, 456 (1st Dept 2011). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

In terms of actual notice Plaintiff claims that Mutual owned the ladder. Plaintiff's only support for this claim is a reference to a single line of Mr. McKee's testimony wherein he states he believed the ladder belonged to the building owner. The remainder of Mr. McKee's testimony makes clear that his belief was just an assumption (McKee Deposition p. 61-62):

Q. Other than the fact that, that compactor room was locked and the ladder was in the compactor room, was there anything else that suggested to you that, that ladder at some time belonged to Mutual Redevelopment?

A. Yes.

Q. What's that?

A. Well, being that the door was locked, no one else had access to it.

Q. Do you know if at any time prior to this Mutual gave access to that room to some other contractor to put the ladder there?

A. I wouldn't know that.

Q. So follow along with me, would I be fair in saying that you made an assumption that because the ladder was in that room and that room was kept locked, that it must be Mutual's ladder?

A. Correct, yes.

Q. But you – other than that, you have no basis for saying it was Mutual's ladder?

A. No.

Plaintiff's claim of constructive notice – "it is foreseeable that a ladder placed in a room that [Mutual] knew plaintiff's employer had contracted work to perform would be used by Miller employees"[13] – is equally speculative. The ladder, whether or not it was defective, appears to have been lying down in the locked compactor room amongst bags of garbage, not in a lobby or hallway. There is no evidence that Mutual knew or should have known that work would be performed there. Plaintiff's position is even more untenable considering Mr. McKee's testimony that he knew the steamfitters were only supposed to use approved A-frame Miller ladders, not extension ladders of unknown origin. Also, accepting the testimony of both Mr. McKee and Mr. Pendergast that the ladder appeared to be in good working order before they used it, any defects that did exist would have be latent. Constructive notice

[13] Affirmation of Adam Levien Esq. dated September 9, 2016, p. 31.

cannot be imputed where a defect is latent, i.e., where the defect is of such a nature that it would not be discoverable even upon a reasonable inspection. *See Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305, 308 (1st Dept 2000); *Utica Mut. Ins. Co. v Brooklyn Navy Yard Dev. Corp.*, 131 AD3d 470, 472 (2d Dept 2015); *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857 (4th Dept 2005).

Higgins v 1790 Broadway Assocs., 261 AD2d 223 (1st Dept 1999), upon which Plaintiff relies to show otherwise, is not to the contrary. In *Higgins*, the plaintiff used a defective ladder stored in a building to gain access to the roof of an elevator cab and was injured when one of the rungs broke. Unlike this case, in *Higgins* there was strong evidence that the building owner supplied the ladder, knew it was defective, and expected it to be used on an ongoing basis. Not surprisingly, the court held that "[a]s it was reasonably foreseeable that a worker might use the defective ladder and sustain injury, its presence in the building clearly constituted a dangerous condition." *Id.* at 225. There is no such evidence present in this case. Inasmuch as the ladder was placed on the floor in a locked garbage room and stored away from all of the approved equipment, it is questionable whether it was meant to be used on an ongoing basis. As such Plaintiff has failed to show that Mutual breached its duty to maintain the building in a reasonably safe manner and Plaintiff's Labor Law 200 and common-law claims against Mutual are dismissed accordingly.

III. Mutual's Motion for Contractual Indemnification

"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]). The party seeking contractual indemnification need only establish that it was free from any active negligence and was held liable solely by virtue of its vicarious liability. *De La Rosa v Philip Morris Mgmt. Corp.*, 303 AD2d 190, 193 (1st Dept 2003).

Mutual argues that it is entitled to contractual indemnification for this action from RC Dolner and Miller as per the terms of the contract between Mutual and RC Dolner dated July 12, 2012[14] and the Indemnification and Insurance Agreement between RC Dolner and Miller dated July 2, 2012[15]. As is relevant to this issue, Mutual's RC Dolner Agreement provides (¶ 9.12):

> To the fullest extent permitted by law, the contractor shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

The Miller Insurance and Indemnification Agreement provides in relevant part (p. 4):

> To the fullest extent permitted by law, Subcontractor agrees to indemnify, defend and hold harmless, Owner, RC Dolner LLC . . . from and against any and all losses, claims, suits, damages, liabilities, attorney's fees . . . directly or indirectly arising out of, alleged to arise out of in connection with or as a consequence of the performance or non-performance of the Work, excluding only Damages specifically attributable to and only to the extent caused by the negligence of the party seeking indemnification. Without limiting the scope of the foregoing language, Subcontractor understands and agrees that Subcontractor's obligation to indemnify imposed by this paragraph shall apply to and cover liability imposed or sought to be imposed against Indemnitees or any one or more of them solely by reason of statute, operation of law or otherwise, and without regard to negligence or fault, including, without limitation, liability arising from or out of the use of . . . ladders . . . or other such devices.

Such Agreement also obligated Miller to name Mutual and RC Dolner as additional insureds on its insurance policies (*id.* at p. 3).

In opposition to Mutual's claim for indemnification, Miller argues that Mutual was an active tortfeasor because it owned the ladder and/or failed to properly discard or safeguard the ladder. This is pure speculation. As discussed above, Mr. McKee's testimony that Mutual owned the ladder was nothing more than an assumption with no basis in fact. There is nothing else in the record to show that

---

[14] Affirmation of Kevin P. Westerman, Esq. dated August 4, 2016, exhibit R ("RC Dolner Agreement").

[15] *Id.*, exhibit T ("Miller Insurance and Indemnification Agreement").

Mutual owned or even knew of the ladder. There is also undisputed testimony that all of Mutual's ladders were identified by a Mutual emblem and stored in another location. Plaintiff's contention that Mutual allowed a defective condition to persist is therefore untenable. For these reasons, and as set forth above, summary judgment dismissing Plaintiff's Labor Law 200 and common-law negligence claims against Mutual was granted. As there is no evidence Mutual violated Labor Law 240(1) or Labor 241(6), any liability that may be imposed upon Mutual thereunder would be vicarious in nature and would not inhibit Mutual's bid for contractual indemnification. *See Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 (1990); *Morin v Hamlet Golf Dev. Corp.*, 270 AD2d 321 (2d Dept 2000) ("It is well settled that a general contractor who has been held vicariously liable under Labor Law § 240(1) is entitled to full common-law indemnification from the party actually at fault so long as the general contractor can show that it did not direct, control, or supervise the work being performed."); *Negroni v East 67th St. Owners, Inc.*, 249 AD2d 79, 81 (1st Dept 1998). In light of the foregoing, Mutual is entitled to contractual indemnification from RC Dolner and Miller as per the terms of their respective agreements.

IV. RC Dolner's Motion for Conditional Summary Judgment

RC Dolner seeks an order granting it conditional summary judgment against Miller on its claim for contractual indemnification for the full amount of any verdict or judgment Plaintiff may obtain in this action against RC Dolner.

Miller executed the Insurance and Indemnification Agreement on July 2, 2012, before Plaintiff's accident occurred. That Agreement required Miller to obtain insurance on behalf of RC Dolner and to name RC Dolner as an additional insured on its commercial general liability policy and on Miller's excess and umbrella policies. Subsequent to Plaintiff's accident, on September 21, 2012, Miller executed a subcontractor agreement with RC Dolner[16], the indemnification provision of which

[16] Affirmation of Michael Lenoff, Esq. dated July 19, 2016, exhibit I ("Miller Subcontract").

virtually follows the language of the July 2, 2012 Insurance and Indemnification Agreement (Miller Subcontract, p. 20):

> To the fullest extent permitted by law, Subcontractor agrees to indemnify, defend and hold harmless Indemnitees, from and against any and all losses, claims, suits, damages, liabilities. . . directly or indirectly arising out of, alleged to arise out of or in connection with or as a consequence of the performance or non-performance of the Work or such Subcontractor's respective agents, subcontractors or employees pursuant to this Agreement, including any additional work performed by Subcontractor as required by this Agreement by change order or otherwise . . . except to the extent such damages are caused by the negligence of an Indemnitee. The indemnification obligations contained in this Article 22 shall not be construed to negate, abridge or otherwise reduce any other right or indemnity which would otherwise exist as to any Indemnified Party.

The Miller Subcontract also requires Miller to obtain insurance and to name both Mutual and RC Dolner as additional insureds on those policies (*id.*). There is no dispute that Miller Subcontract is enforceable and that it requires Miller to indemnify RC Dolner for any accident that occurs on the job site arising out of Miller's work so long as RC Dolner's negligence did not contribute to the accident.

As it did on the motion for contractual indemnification, Miller argues that there are questions of fact regarding the ownership of the ladder. While it may be true that the ownership and origin of the ladder itself cannot now be determined as a matter of law, any claim that the ladder was owned by RC Dolner is speculative. But there remains a colorable issue whether RC Dolner knew or should have known that a defective ladder was in the compactor room and whether it had the authority to prevent Plaintiff from using it. The testimony shows that RC Dolner's site superintendent, Mr. Clokey, and its site safety professional, Mr. Prince, were charged with responsibility for safety at the construction site. The compactor room was kept locked by Mutual, but there is evidence that RC Dolner knew Miller employees would be working there on the date of the accident given Mr. McKee's testimony that he sought assistance in obtaining access to the locked compactor room by contacting an RC Dolner employee. Plaintiff argues RC Dolner should have inspected the compactor room to make sure there were no safety issues. In response RC Dolner asserts that had Miller not abrogated its responsibility to provide Plaintiff and Mr. McKee with proper ladders in the first place the accident would not have

occurred. Regardless, RC Dolner was contractually responsible for safety at the construction site and knew or should have known Miller employees would be working in the compactor room. Given these facts and circumstances, a jury could find that RC Dolner and/or its agent were negligent in failing to take steps to ensure that the room was safe to work in.

CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that Mutual's summary judgment motion is granted with respect to Plaintiff's Labor Law 200 and Labor Law 241(6) claims against it, except those Labor Law 241(6) claims which are predicated on violations of 12 NYCRR 23-1.21(b)(3)(iv) and 12 NYCRR 23-1.21(b)(4)(iv), as to which provisions summary judgment is denied; and it is further

ORDERED that Mutual's summary judgment motion is otherwise denied; and it is further

ORDERED that Mutual's motion for contractual indemnification is granted; and it is further

ORDERED that RC Dolner and Miller shall indemnify and defend Mutual as per the terms of their respective agreements; and it is further

ORDERED that any cross-claims by RC Dolner and Miller against Mutual are hereby dismissed; and it is hereby

ORDERED that RC Dolner's motion for conditional summary judgment is denied, without prejudice.

The Clerk of the Court shall mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 3-28-17

SHERRY KLEIN HEITLER, J.S.C.

[28]