Macaluso v London Terrace Towers Owners, Inc.
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August 2, 2017
Supreme Court, New York County
Docket Number: 156639/2013
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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MICHAEL MACALUSO, Index No.: 156639/2013

Plaintiff,

-against-

LONDON TERRACE TOWERS OWNERS, INC., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, NEW YORK PLUMBING-HEATING-COOLING, CORP., BOARD OF MANAGERS OF THE LONDON TERRACE TOWERS CONDOMINIUM, JOHN CATSIMATIDIS, LONDON TERRACE LLC and RESIDENTIAL MANAGEMENT GROUP, LLC,

Defendants.

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Kalish, J.:

Motion sequence numbers 005, 007 and 008 are hereby consolidated for decision and decided as follows:

1) The defendant John Catsimatidis' motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims against him is granted.

2) The plaintiff Michael Macaluso's motion (motion sequence number 007), pursuant to CPLR 3212, for partial summary judgment is granted in his favor as to liability on plaintiff's Labor Law § 240 (1) claim against London Terrace, the Board and NY Plumbing.
Plaintiff's motion for partial summary judgement is otherwise denied.

3) The defendants London Terrace Towers Owners, Inc. ("London Terrace"), Board of Managers of the London Terrace Towers Condominium (the "Board"), Douglas Elliman Property Management and Residential Management Group, LLC's (together, "Elliman") (collectively, the "London defendants") motion (motion sequence number 008), pursuant to CPLR 3212, is granted to the extent that:
- Plaintiff's common-law negligence claims and Labor Law §§ 200 and 241 (6) claims and all cross claims against the London Defendants are hereby dismissed;
- Plaintiff's Labor Law § 240 (1) claim as against Elliman is dismissed;
- the portion of the London Defendants' motion for summary judgment in their favor on their contractual indemnification claim against defendant New York Plumbing-Heating-Cooling, Corp. ("NY Plumbing") is granted.

The London Defendants' motion for summary judgment is otherwise denied.

PROCEDURAL HISTORY

In the underlying Labor Law action, the Plaintiff seeks to recover damages for personal injuries he allegedly sustained while working as a plumber's helper on May 29, 2012. Plaintiff alleges in sum and substance that he was injured while removing a section of pipe located in the basement of 410 West 24th Street, New York, New York. Plaintiff alleges that while he was standing on an air conditioning unit, the pipe dropped and swung into him, knocking him to the ground. The Defendants move for summary judgment and the Plaintiff moves for partial summary judgment as follows:

1) In motion sequence number 005, defendant John Catsimatidis moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against him.

2) In motion sequence number 007, plaintiff Michael Macaluso moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the London defendants, NY Plumbing and Catsimatidis.

3) in motion sequence number 008, the London defendants move, pursuant to CPLR 3212, 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 contractual indemnification against NY Plumbing.

BACKGROUND

Plaintiff alleges that on the date of the accident, he was working for NY Plumbing as a plumber's helper. That morning, NY Plumbing dispatched plaintiff and a coworker, NY Plumbing mechanic Michael Gallagher, to a condominium/cooperative apartment complex (the "Complex"), in order to remove and replace a 10-foot section of rusted cast iron pipe (the "Pipe"), which was located in the basement of a Gristedes supermarket (the "Basement"). The Complex consisted of four separate buildings, with four separate addresses. London Terrace owned the cooperative apartments and the common elements of the Complex, but none of the Complex's condominiums. The Basement, where the accident allegedly occurred, was part of a condominium owned by Catsimatidis. Elliman served as the managing agent for the Complex.

In addition, London Terrace hired NY Plumbing, pursuant to a proposal, to perform "certain work for London Terrace Towers [and] Condo" (the London Terrace defendants' exhibits, exhibit B [B], the Proposal). It is undisputed that the Pipe was a common element of the Complex, and therefore, owned and maintained by London Terrace.

Deposition Testimonies and Affidavits

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed as a plumber's helper by either Day and Night or NY Plumbing. That morning, plaintiff and Gallagher were instructed by NY Plumbing to proceed to the Complex to "change a roof drain" (plaintiff's tr at 83). This task entailed removing and replacing the Pipe, as well as some fittings, from the ceiling located in the Basement. Plaintiff maintained that NY Plumbing supplied his safety equipment, tools and materials, and that Gallagher directed his work and determined what tools, equipment and supplies were to be used to perform said work.

Plaintiff further testified that, when the men arrived at the Complex, the Complex's superintendent showed them to the Basement and identified the Pipe, which was attached to the ceiling. Plaintiff explained that "[t]he only support that the [P]ipe had in that room was one hanger" (*id.* at 106). Gallagher then used a ladder, which was already present in the area, to access the Pipe.

After making the decision that it was safe to cut the Pipe, and while standing on the ladder, Gallagher used a pipe cutter to make the first cut to the Pipe. Once the first section of the Pipe was cut, he turned his attention to a second section of the Pipe, which was located directly above an air conditioning unit (the "Unit"). At this time, plaintiff "mentioned [to Gallagher] that [they] should cut the [P]ipe in half and cut [it] in two separate pieces because . . . all the weight [would] drop in [his] arms" (*id.* at 110). He explained that "[a] ten foot l[o]ng [piece] of cast iron is extremely, extremely heavy especially when it's corroded . . . so it would be safer and securer to do it that way" (*id.* at 111). In response, Gallagher told plaintiff that "we [have] no

time and [have] to rush it" (*id.*).

Gallagher then directed plaintiff to stand on the Unit with him and "put [his] arms around the [P]ipe to brace for it to drop when he cut[] it" (*id.* at 112). At this time, the Pipe was located "directly over [his] head" and "above [him]" (*id.* at 116). Plaintiff also described the Pipe as being "slightly above [his] head" (*id.* at 117). Plaintiff explained that the accident occurred when Gallagher made the second cut to the Pipe. When cut, the Pipe "snapped and it swung [at him]" (*id.* at 124). Plaintiff also testified that "[the Pipe] dropped and went backwards . . . as soon as the thing dropped and it did not drop straight down, it dropped onto an angle into my lap and . . . crushed one of my arms" (*id.* at 130). When the Pipe struck plaintiff, it knocked him off the Unit.

Deposition Testimony of Ed Voyer (NY Plumbing's Field Supervisor)

Ed Voyer testified that he was NY Plumbing's field supervisor on the day of the accident, and that Day and Night is NY Plumbing's parent company. Voyer's duties as field supervisor included performing estimates and running jobs. He explained that, typically, Eze Betancourt, the residential manager of the Complex, called him whenever plumbing projects needed to be conducted there. On the day of the accident, Betancourt advised him that there was an active leak in the Basement. Betancourt then requested that Voyer prepare the Proposal for the pipe repair work, noting that London Terrace paid for the subject work.

Voyer also testified that plaintiff performed his work "under the direction of Mike Gallagher," and that no one from London Terrace "supervised" plaintiff's work (Voyer tr at 63).

Deposition Testimony of Eze Betancourt (The Complex's Residential Manager)

Betancourt testified that he served as the Complex's residential manager on the day of the accident, and that he was hired by London Terrace. He explained that, after being notified by Gristedes, a tenant, that the Pipe was leaking, he contacted NY Plumbing to remove and replace it. Betancourt maintained that he did not supply NY Plumbing with any supplies or materials to perform their work, and that he only inspected the Basement "when [the work] was done" (Betancourt tr at 63).

Betancourt further testified that, when plaintiff and Gallagher arrived at the Complex, he escorted them to the Basement and showed them where the Pipe was located. He explained that the Unit belonged to Gristedes, and that it was used "[s]olely for Gristedes[']s HVAC system" (*id.* at 29). Betancourt also maintained that the Pipe served the entire building, and, as such, it was "London Terrace's responsibility to maintain" (*id.* at 84).

Affidavit of Cynthia Graffeo (General Manager of the Complex)

In her affidavit, Cynthia Graffeo stated that, on the day of the accident, she was employed by Elliman, the management company for London Terrace Towers, as the general manager of the Complex. She explained that the Complex "contains approximately 685 residential cooperative units and approximately fifteen (15) commercial condominium units" (the London owners's notice of motion, exhibit A, Graffeo aff). She further explained that London Terrace owns only the "cooperative units" and "the common elements," and that it "does not own any of the commercial condominium units located at 410 West 24th Street" (*id.*). Neither London Terrace, the Board or Elliman owned the Basement where the accident occurred.

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

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against the London defendants, NY Plumbing and Catsimatidis. In their separate motions, the London defendants and Catsimatidis both respectively move for summary judgment dismissing said claim against them.

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 as follows:

> "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, as the owner of the Premises where the accident occurred, London Terrace may be liable for plaintiff's injuries under both Labor Law §§ 240 (1) and 241 (6). However, it must be determined as to whether the Board, Elliman, NY Plumbing and Catsimatidis may also be liable for plaintiff's injuries as owners or agents of the owner.

As to the Board, "a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers" (*Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48 [1st Dept 2016]; *see also Pekelnaya v Allyn*, 25 AD3d 111, 120-121 [1st Dept 2005] [where the plaintiff was injured when he was struck by a section of chain-link fence that fell from the roof of a condominium, individual unit owners were not held liable for the plaintiff's injuries which resulted from "a defect in a common element," and which was solely under the control of the board of managers]). Thus, as the Labor Law § 240 (1) claim arises from the removal of the Pipe, a common element, the Board is a proper Labor Law defendant.

As to Elliman, the management company, and NY Plumbing, the plumbing subcontractor, it must be determined as to whether they may be liable for plaintiff's injuries under Labor Law § 240 (1) as an agent of the owner. Importantly,

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, Elliman may not be held liable under Labor Law §§ 240 (1), or 241 (6), for that matter, because it did not supervise and/or control the injury-producing work, i.e., the removal of the Pipe from the ceiling of the Basement. However, as the record indicates that NY Plumbing did supervise said work, NY Plumbing may be held liable for plaintiff's injuries as an agent of the owner. To that effect, both plaintiff and Voyer testified that plaintiff's work was supervised by

Gallagher, a NY Plumbing mechanic, and that Gallagher specifically directed plaintiff to utilize the Unit to reach the Pipe. Plaintiff also testified that NY Plumbing supplied his safety equipment at the site.

As to whether Catsimatidis can be deemed an owner of the Pipe for the purposes of the statute, it should be noted that "[t]he meaning of 'owners' under Labor Law § 240 (1) . . . has not been limited to titleholders but has 'been held to encompass [an entity] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 737 [2d Dept 2008]; *Lacey v Long Is. Light. Co.*, 293 AD2d 718, 718-719 [2d Dept 2002]). "[O]wnership of the premises where the accident occurred - standing alone - is not enough to impose liability under [the] Labor Law . . . where the property owner did not contract for the work resulting in the plaintiff's injuries . . . . Rather, . . . [there must be] some nexus between the owner and the worker" (*Morton v State of New York*, 15 NY3d 50, 50 [2010]; *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 52 [2004]).

Here, it is undisputed that, while the Pipe was located in Catsimatidis's Basement, the Pipe was, nevertheless, a common element of the Complex. As a common element, the Pipe was owned by London Terrace and maintained by London Terrace and the Board. Moreover, Catsimatidis did not contract for the subject pipe repair work; rather, Betancourt contracted for the subject work on behalf of London Terrace and the Board. Accordingly, as Catsimatidis was not an owner, general contractor or agent, he is not a proper Labor Law defendant.

Accordingly, the Court finds that Elliman and Catsimatidis are not proper Labor Law defendants, and are therefore are entitled to dismissal of the Plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against them.

For the remainder of the instant decision, any references to plaintiff's Labor Law claims will only be addressed in regard to London Terrace, the Board and NY Plumbing.

In the underlying action, plaintiff may recover damages from London Terrace, the Board and NY Plumbing for their violation of Labor Law § 240 (1) under a falling objects theory, since the Pipe that dropped and then swung into plaintiff "was 'a load that required securing for the purposes of the undertaking at the time it fell'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him, while being hoisted to the top of the building, was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

London Terrace, the Board and NY Plumbing argue that Labor Law § 240 (1) does not apply to the facts of this case, because, to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). They maintain that, in the underlying case, the Pipe did not fall on plaintiff, it merely swung laterally into him. This argument fails, however, because plaintiff clearly testified that the

Pipe was situated slightly above him at the time of the accident, and that it "dropped and went backwards . . . as soon as the thing dropped and it did not drop straight down, it dropped onto an angle into my lap and . . . crushed one of my arms" (plaintiff's tr at 130).

Even in the event that the Pipe fell only a short distance, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by falling metal pipes, which stood 10-feet tall and measured four inches in diameter. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that "the 'elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent'" (*id.* at 10, quoting *Runner* at 605; *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Runner* and *Wilinski* to the underlying action, not only is plaintiff not precluded from recovery simply because the Pipe may have fallen only a short distance before swinging laterally into him, but, given the significant amount of force that the subject 40 to 60 pound cast iron object generated during its fall, his accident "'*ar[ose] from a physically significant elevation differential*'" (*Wilinski*, 18 NY3d at 10, quoting *Runner*, 13 NY3d at 603).

Further, Labor Law § 240 (1) is applicable to the underlying accident as there were no protective devices, such as hangers, nets or ropes, to secure the Pipe from falling as it was being cut. In the underlying action Plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*Wilinski*, 18 NY3d at 10 [citation omitted]).

In addition, the Court finds that plaintiff has established a prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim, by showing that the Unit that he was working on at the time of the accident, served as "the functional equivalent of a scaffold and failed to provide adequate protection for the elevation-related work he was performing" (*Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009]; *see also Beharry v Public Stor., Inc.*, 36 AD3d 574, 574 [2d Dept 2007] ["'metal decking' was a 'safety device' within the meaning of Labor Law § 240 (1)," because it "served as a functional equivalent of a ladder"]; *Keefe v E & D Specialty Stands*, 259 AD2d 994, 994 [4th Dept 1999] [Labor Law § 240 (1) liability where bleachers, which were being used as "the functional equivalent of a ladder," failed to protect plaintiff from falling from his elevated workplace]).

Further, in light of the fact that it was foreseeable that the Pipe might prematurely release during its removal, additional safety devices, such as a harness or a safety device with railings were necessary to prevent the plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

The subject defendants further argue that plaintiff's recalcitrance in utilizing the Unit as a scaffold, rather than choosing a different safety device, makes him the sole proximate cause of his accident. They assert that, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]).

However, these defendants have not sufficiently established that the underlying action is one in which "(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

Moreover, not only was plaintiff specifically directed by Gallagher to use the Unit, despite plaintiff's concerns that it would be unsafe to do so, plaintiff was under no duty to fetch an alternate safety device, because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). To that effect, "workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

In any event, any alleged negligence on plaintiff's part in utilizing the Unit as a scaffold to perform his work 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]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [Court noted that "[e]ven if there were admissible evidence [that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner'] the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[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.*, 1 NY3d 280, 290 [2003]). 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" (*Tavarez v Weissman*,

297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Finally, London Terrace and the Board assert that plaintiff is not entitled to recover on the Labor Law § 240 (1) claim, because there were inconsistencies in his account of how he fell (*see Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 670 [2d Dept 2011]). "Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented" (*Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1st Dept 1993]).

However, the minor inconsistencies in plaintiff's testimony, as put forth by London Terrace and the Board, "[do] not relate to a material issue," and, thus, they do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Laconte*, 80 AD3d at 671; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

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" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citation omitted]). "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*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

Accordingly, the Court finds that plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against London Terrace, the Board and NY Plumbing, and London Terrace and the Board are not entitled to dismissal of the same.

Plaintiff's Labor Law § 241 (6) Claim

London Terrace and the Board move for summary judgment dismissing the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) 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:
>
> * * *
>
> (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' for workers" (*Ross,* 81 NY2d at 501). 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.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.7 (b) (1) (i) and (iii) (c), plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon these sections. As such Plaintiff's Labor Law § 241 (6) claims are deemed abandoned, with the exception of his Labor Law § 241 (6)'s claims based upon alleged violations of Industrial Code sections 23-1.7 (b) (1) (i) and (iii) (c) (*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]).

Accordingly,the Court finds that London Terrace and the Board are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated upon those abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i)

Industrial Code section 23-1.7 (b) (1) (i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to form a basis for plaintiff's Labor Law § 241 (6) claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Specifically, section 12 NYCRR 23-1.7 (b) (1) (i) and (iii) (c) state as follows:

"(b) Falling hazards
(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

* * *

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

* * *

(c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Here, the provisions of Industrial Code 12 NYCRR 23-1.7 (b) do not apply to the facts of this case, "as that regulation applies to safety devices for hazardous openings, and not to an elevated hazard" (*Forschner v Jucca Co.*, 63 AD3d 996, 999 [2d Dept 2009]).

Accordingly, the Court finds that London Terrace and the Board are entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.7 (b) (1) (i) and (iii) (c).

Plaintiff's Common-law Negligence and Labor Law § 200 Claims

In their separate motions, the London defendants and Catsimatidis move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 (1) states, in pertinent part, as follows:

> "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."

In the underlying action, plaintiff does not oppose that part of the London defendants' and Catsimatidis's motions seeking dismissal of the common-law negligence and Labor Law § 200 claims against them.

Accordingly, the Court finds that these defendants are entitled to dismissal of Plaintiff common-law negligence and Labor Law § 200 claims as against them.

The London Defendants' Cross Claim for Contractual Indemnification Against NY Plumbing

The London defendants move for summary judgment in their favor on their cross claim for contractual indemnification against NY Plumbing. "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]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Additional Facts Relevant to this Issue:

As noted previously, the Proposal provides that NY Plumbing perform "certain work for London Terrace Towers [and] Condo." At oral argument, held on June 29, 2017, counsel for the London defendants acknowledged that the word, "Condo," in the Proposal, refers to the Board. That said, the Proposal was signed only by NY Plumbing and London Terrace representatives.

In addition, the Proposal contains an indemnification provision, which provides, in pertinent part, as follows:

> "To the fullest extent permitted by law, [NY Plumbing] agrees to indemnify, defend and hold harmless Owner and/or Managing Agent from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries . . . arising out of or in connection with the performance of the work of [NY Plumbing], its agents, servants, subcontractors or employees . . . . This agreement to indemnify specifically contemplates full indemnity in the event of liability imposed against the Owner and/or Managing Agent either causing or contributing to the underlying claim. In that event, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault, whether by statute, by operation of law or otherwise"

(*id.*).

As discussed previously, plaintiff was injured while performing work that fell within the terms of the Proposal. In addition, it is clear that plaintiff was working as a special employee of NY Plumbing at the time of the accident. Accordingly, the Court finds that the London defendants have established prima facie that the underlying accident arose out of NY Plumbing's work.

In opposition, NY Plumbing argues that it does not owe the London defendants full indemnification, because an issue of fact exists as to whether any negligence on the part of the London defendants caused or contributed to the accident. However, as the London defendants did not supervise the subject work in any way, nor were they charged with supplying any safety devices for the performance of that work, it cannot be said that any negligence on their part caused or contributed to the accident.

Accordingly, the Court finds that the London defendants are entitled to summary judgment in their favor on their cross claim for contractual indemnification against NY Plumbing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant John Catsimatidis's (Catsimatidis) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims against him is granted, and these claims and cross claims are dismissed as to Catsimatidis, with costs and disbursements to Catsimatidis as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Catsimatidis; and it is further

ORDERED that the parts of plaintiff Michael Macaluso's motion (motion sequence number 007), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against London Terrace, the Board and NY Plumbing is granted, and the motion is otherwise denied.

ORDERED that the parts of London Terrace Towers Owners, Inc. (London Terrace), Board of Managers of the London Terrace Towers Condominium (the Board), Douglas Elliman Property Management and Residential Management Group, LLC's (together, Elliman) (collectively, the London defendants) motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims and all cross claims against them, as well as the Labor Law § 240 (1) claim as against Elliman, are granted, and it is further

ORDERED that the part of the London defendants' motion seeking summary judgment in their favor on their contractual indemnification claim against defendant New York Plumbing-Heating-Cooling, Corp. is granted, and the motion is otherwise denied.

The foregoing constituted the order and decision of the Court.

Dated: Aug 2, 2017

ENTER:

HON. ROBERT D. KALISH
J.S.C.