At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of December, 2023.

P R E S E N T:

Hon. Debra Silber, Justice

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MIGUEL ANGEL MENDOZA, [1]

Plaintiff,

-against-

DECISION / ORDER

204 FORSYTH STREET, LLC, FOUNDATIONS INTERIOR DESIGN CORP., STONE AGE EQUIPMENT, INC., and FOUNDATIONS GROUP I, INC.,

Index No. 504573/2019

Mot. Seq. # 4 & 5

Defendants.

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204 FORSYTH STREET, LLC, FOUNDATIONS INTERIOR DESIGN CORP., and FOUNDATIONS GROUP I, INC.,

Third-Party Plaintiffs,

-against-

LOGOZZO BROTHERS CONSTRUCTION CORP.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affidavits (Affirmations), and Exhibits Annexed	101-129; 137-168
Opposing Affidavits (Affirmations) and Exhibits Annexed	169-180; 224-228; 229-234; 247-254; 283-284

[1] The caption herein conforms to the amended caption set forth in the Court's order, dated August 7, 2023 (NYSCEF Doc No. 288). In that order, Foundations Group, Inc. and Men of Steel Enterprises, Inc. were removed from the caption.

Reply Affirmations and Exhibits Annexed 266-267; 268-269

Upon the foregoing papers in this consolidated action to recover damages for personal injuries, plaintiff Miguel Angel Mendoza Lugardo, suing herein as Miguel Angel Mendoza (plaintiff), moves for an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability on all of his causes of action against all defendants (motion sequence number 4). Defendant/third-party plaintiff 204 Forsyth Street, LLC (Forsyth), together with defendants/third-party plaintiffs Foundations Interior Design Corp., and Foundations Group I, Inc. (hereinafter, collectively, Foundations), jointly cross-move ("F&F" for Forsyth jointly with Foundations) for an order, pursuant to CPLR 2004, extending their time to cross-move for summary judgment and, upon granting such extension, for an order, pursuant to CPLR 3212, dismissing the plaintiff's amended complaint as against them, or, in the alternative, for summary judgment on their third-party claims against third-party defendant Logozzo Brothers Construction Corp. (Logozzo) (motion sequence number 5).

Plaintiff's amended complaint, dated May 31, 2018 (NYSCEF Doc No. 108), asserts causes of action premised on violations of Labor Law §§ 240 (1), 241 (6), and 200, as well as for common-law negligence. His lawsuit stems from a construction-site accident which took place on February 29, 2016. Plaintiff claims he was injured while assisting with the lifting of a bundle of rebars at a building under construction (the accident). Forsyth, as the owner of the project site, had hired Foundations to act as the construction manager for the project, which involved the erection of a new building.[2] Foundations, in turn, had hired

[2] One of the two Foundations entities – Foundations Group I, Inc. (previously known as Foundations Group, Inc.) – had entered into a contract with Forsyth, dated July 22, 2014 (NYSCEF Doc No. 160), whereas the other Foundations entity – Foundations Interior Design Corp. – had obtained the NYC DOB permits for the

Logozzo as the concrete subcontractor, pursuant to a subcontract dated December 3, 2015 (NYSCEF Doc No. 162). Logozzo then retained defendant Stone Age Equipment Inc. (hereafter "Stone Age") as the company to deliver the rebar bundles to the project site. Plaintiff was employed by third-party defendant Logozzo as an iron worker at the time of the accident.

On the date of the accident, four floors had been completed, and the fifth floor was in the early stages of construction. Earlier that morning, a flatbed truck (owned and operated by since-dismissed defendant Men of Steel), loaded with bundles of rebar, had arrived at the project site. A boom truck (owned and operated by defendant Stone Age) was tasked with raising the rebar bundles from the flatbed truck and placing them in a designated spot behind the perimeter barrier on the fifth floor.

Plaintiff was assigned by his employer Logozzo to go to the fifth floor and to hand-signal to the Stone Age boom-truck driver to ensure that the rebar bundles, once raised to the height of the fifth floor, were placed in the designated spot. Plaintiff, however, lacked any experience with hand signaling, and no signal person or other experienced individual was available on the ground or on the fifth floor to assist him.[3]

After the first bundle of rebar had been raised and safely placed onto (and within the perimeter barrier of) the fifth floor by Stone Age, the second bundle of rebar was raised. As

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project (*see* Kenneth Eybs' EBT tr at page 63, line 7 to page 64, line 23 at NYSCEF Doc No. 116). For purposes of these motions, the court will consider them to be united in interest and/or alter egos of each other, as they have not sought to differentiate themselves.

[3] It was Logozzo's obligation to provide flag persons for delivery and removal of materials at the project site (*see* Logozzo's EBT tr at page 50, lines 7-10).

the second bundle of rebar was raised, plaintiff was facing the boom truck and standing inside the fifth-floor perimeter barrier. While standing there, plaintiff extended his right arm out over the fifth-floor perimeter barrier, stretching toward the boom truck driver on the ground below to signal to him. Gesturing with his outstretched right hand, plaintiff indicated to the boom-truck driver that the second load should not be lowered because it was too close to him. However, plaintiff's hand signals were either ignored or were not seen or understood by the boom-truck driver, because the arm of the boom truck, with the second bundle of rebar, was lowered onto plaintiff's right arm, crushing it against the perimeter barrier. Only when the barrier gave way, and pieces of wood fell to the ground below, did the boom-truck driver notice, and only then did he stop the descent of the load and lift the boom off of plaintiff's right arm.

Plaintiff, in his 30s at the time, was hospitalized at Bellevue Hospital where he underwent surgery on the day of the accident. He sustained a serious crush injury, including damage to the tendons and nerves in his right arm. He has not worked since the day of the accident, and he received Workers' Compensation benefits from Logozzo's insurance carrier for several years.

After discovery in the main action was completed and a note of issue was filed on July 7, 2022, Justice Lawrence Knipel of this court, by order, dated August 16, 2022, set the post-Note of Issue deadline for Logozzo's pretrial deposition in the third-party action (NYSCEF Doc Nos. 76 and 99). On September 2, 2022, before Logozzo's deposition was held, plaintiff served the instant motion for partial summary judgment on the issue of liability in the main action (NYSCEF Doc No. 101). In accordance with the aforementioned order,

Logozzo's pretrial deposition was held on September 22, 2022 (NYSCEF Doc No. 159), with Forsyth and Foundations' counsel each receiving the transcript on or about October 6, 2022. On December 8, 2022, or approximately two months after their counsel's receipt of Logozzo's deposition transcript, Forsyth and Foundations (hereafter, F&F) jointly served the instant cross motion for summary judgment, which, as noted, requests (among other relief) an extension of time within which to cross-move for summary judgment as against plaintiff and, separately, against Logozzo (NYSCEF Doc No. 137).

Two procedural matters warrant discussion at the outset. *First*, at oral argument held on August 7, 2023, the Court (after noting that Stone Age Equipment, Inc. ("Stone Age") had filed no papers in connection with the pending motions) denied its counsel's oral application for an adjournment of the argument and for an extension of time to file its opposition to plaintiff's motion.[4] The Court's discretionary ruling in that regard, as predicated on Stone Age's inordinate delay of 13 months and its counsel's undocumented allegation of law-office failure, was based on ample precedent (*see e.g. Palmer v Cadman Plaza N., Inc.*, 215 AD3d 759, 761 [2d Dept 2023]; *Kim & Bae, P.C. v Lee*, 173 AD3d 990, 992 [2d Dept 2019]). It follows that the plaintiff's motion for partial summary judgment on the issue of liability as against Stone Age should be considered on its merits and without any opposition from Stone Age.[5]

[4] *See* Transcript of Oral Argument, dated August 7, 2023, at page 4, lines 17-21 ("THE COURT: . . . I'm going to have to deny [Stone Age's] application because the plaintiff's motion was adjourned seven times and it was filed within 60 days of the note of issue and the note of issue was filed last July. It's been 13 months. I think that's long enough to oppose a motion.").

[5] The Court notes that the parties stipulated to amend the caption to reflect that the correct defendant is Stone Age Equipment Inc. [Doc 154]. The original defendant in the complaint, and in its Answer, and at the

Second, the Court, in its discretion, will grant the branch of F&F's cross motion for leave to make this late motion under the "good cause" analysis of CPLR 3212 (a) governing untimely motions for summary judgment. The substantive branch of F&F's cross motion, for dismissal of plaintiff's claims as against them, addresses nearly the identical issues as plaintiff's timely motion (*see e.g., Lennard v Khan*, 69 AD3d 812, 814 [2d Dept 2010]; *Grandev v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). Further, the remaining substantive branch of F&F's cross motion, for summary judgment on their third-party claims as against Logozzo (though obviously unrelated to plaintiff's timely served motion) meets the "good cause" requirement as Logozzo's witness was deposed post-Note of Issue, and in fact, after plaintiff's motion was filed (*see e.g., Khan v Macchia*, 165 AD3d 637, 638 [2d Dept 2018]; *Germain v Tanner Prince Realty, LLC*, 2019 NY Slip Op 33268[U], *18 [Sup Ct, Kings County 2019]).

Liability

The court next turns to consideration of the merits of plaintiff's motion for summary judgment under Labor Law §§ 240 (1), 241 (6), and 200, as well as common-law negligence, and of F&F's cross motion for summary judgment against the plaintiff, and on their third-party claims against Logozzo for contractual indemnification, common-law contribution/indemnification, and breach of contract to obtain insurance.

Starting with plaintiff's Labor Law § 240 (1) cause of action against the defendants, the Court notes that section 240 (1) "requires certain contractors and property owners to

deposition for this defendant, Doc 167, the business is titled in the caption as "SNG Brick and Stone Inc. d/b/a Stoneage Equipment."

provide adequate safety devices when workers engage in particular tasks involving elevation-related risks" (*Healy v EST Downtown, LLC*, 38 NY3d 998, 999 [2022]), such as risks associated with workers falling from a height and/or with objects falling on workers (*see e.g. Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]). As the Court of Appeals cautioned, "[l]iability may . . . be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential*" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation marks omitted; emphasis added], *rearg denied* 25 NY3d 1195 [2015]). "Consequently, the protections of Labor Law § 240 (1) do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*id*. [internal quotations marks omitted; emphasis in the original]). "Rather, liability remains contingent upon the existence of a hazard contemplated in section 240 (1) *and* the failure to provide, or the inadequacy of, a safety device of the kind enumerated therein" (*id*. [internal quotation marks and brackets omitted; emphasis added]). Stated otherwise, section 240 (1) is not applicable unless the plaintiff's injuries result from both an elevation-related risk *and* a statutorily enumerated safety device which was either absent or inadequate.

Here, plaintiff's Labor Law § 240 (1) claim fails to meet either of the aforementioned prongs. As was recently explained in *Brooks v 662 Pac. St., LLC*, 2023 NY Slip Op 30766(U), "[a]n accident proximately caused by the mechanical operation of a crane, hoist, excavator or like device generally does not implicate the application of the force of gravity requirement of Labor Law § 240 (1)" (*id.*, *6-7) (citing, among others, *Gasques v State*, 15

NY3d 869, 870 [2010]; *Mohamed v City of Watervliet*, 106 AD3d 1244, 1246 [3d Dept 2013]; *Jaeger v Costanzi Crane Inc.*, 280 AD2d 743, 744 [3d Dept 2001]; *Elezaj v P.J. Carlin Const. Co.*, 225 AD2d 441, 442 [1st Dept 1996], *rearg denied, lv appeal granted* 228 AD2d 1008 [1st Dept 1996], *affd on other grounds* 89 NY2d 992 [1997]); *see also Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781, 783 (1993); *Smith v Hovnanian Co. Inc.*, 218 AD2d 68, 70-71 (3d Dept 1995).

Specifically, plaintiff has failed to "adduce proof sufficient to create a question of fact regarding whether his [accident] resulted from the lack of a safety device," or to identify any safety device that could have prevented the accident (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]). Even after drawing all reasonable inferences in plaintiff's favor, the Court finds that he was injured by the allegedly negligent operation of the boom truck by its operator (Stone Age), rather than by the effects of gravity or by the absence (or inadequacy) of a statutorily enumerated safety device. To be clear, if the boom truck operator could not see or understand plaintiff's hand signals, he should not have moved the boom. It is noted that the driver of the boom truck has not been deposed. A principal of Stone Age testified that he had two drivers at the time, Michael Pakus and Eric Noyola [Doc 167 Pages 33-34].

Accordingly, the branch of plaintiff's motion for partial summary judgment on the issue of liability as against the defendants on his Labor Law § 240 (1) cause of action is denied. The court further notes that, in its cross motion, F&F makes a prima facie showing of entitlement to summary judgment and dismissal of the plaintiff's Labor Law § 240 (1) claim based on the same analysis, that Labor Law § 240 (1) is inapplicable to this accident.

As such, the plaintiff's claim, premised upon Labor Law § 240 (1), is dismissed as against defendants F&F. Stone Age is not a proper Labor Law 240(1) defendant, as it was a subcontractor, not the property owner, its statutory agent, or the general contractor, and as such, this cause of action is dismissed as against it as well (*DeGidio v City of NY*, 176 AD3d 452 [1st Dept 2019]).

The Court next turns to plaintiff's Labor Law § 241 (6) cause of action. Labor Law § 241 (6) requires building owners and contractors to "provide reasonable and adequate protection and safety" for workers involved in building construction, excavation or demolition and to comply with safety rules and regulations promulgated by the State Commissioner of Labor (*Ross v Curtis Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 502, 601 N.Y.S.2d 49, 618 N.E.2d 82). To assert a sustainable cause of action under section 241 (6), a plaintiff "must allege a violation of a concrete specification of the [Commissioner's regulations in the] Industrial Code" (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp*., 271 A.D.2d 231, 232, 705 N.Y.S.2d 577). To prevail under this statute, a claimant must demonstrate the existence of an injury sustained in an area where "construction, excavation or demolition work is being performed" (Labor Law § 241 [6]; see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 693 NE2d 1068, 670 NYS2d 816 [1998]), "the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury" (*Lawyer v Hoffman*, 275 AD2d 541, 542, 711 NYS2d 618 [2000]; see St. Louis v Town of N. Elba, 70 AD3d 1250, 1250, 894 NYS2d 587 [2010], affd 16 NY3d 411, 947 NE2d 1169, 923 NYS2d 391 [2011]) and that the violation was the proximate cause of the injury (see *Auchampaugh v Syracuse Univ*., 57 AD3d 1291, 1293,

870 NYS2d 564 [2008]; *Shields v General Elec. Co*., 3 AD3d 715, 718, 771 NYS2d 249 [2004]).

Upon review of the plaintiff's motion papers and F&F's cross motion papers, the court finds that F&F have demonstrated that Industrial Code (12 NYCRR) §§ 23-1.2 (a) and (e), 23-1.5 (a)-(c), 23-1.7 (a) (1)-(2), (e) (1)-(2), 23-1.15 (b)-(d), 23-6.1 (b), (c) (1)-(2), (e) (1)-(3), 23-8.1 (b) (1), (6)-(7), 23-8.2 (a) (1)-(2), (b) (1)-(2), (c) (1)-(2), and (4), (d) (1)-(3), (e), (f) (1)-(3), and (g) (1)-(2), as pled in plaintiff's Supplemental Verified Bill of Particulars dated October 23, 2020 (NYSCEF Doc No. 125), either fail to state specific and enforceable standards, or are inapplicable to the facts of this case (*see generally Rivas-Pichardo v 292 Fifth Ave. Holdings, LLC*, 198 AD3d 826 [2d Dept 2021]). Of note, in his motion papers, the plaintiff makes no affirmative arguments in support of his claims regarding the aforementioned Industrial Code sections. As F&F has made a prima showing in its cross motion that these sections either fail to state specific and enforceable standards, or are inapplicable to the facts of this case, the plaintiff's Labor Law § 241 (6) cause of action, as predicated on alleged violations of these sections, are dismissed as against defendants F&F.

The only Industrial Code sections that the plaintiff addresses in his motion for summary judgment, (all of which are also cited in his Supplemental Verified Bill of Particulars) are Industrial Code §§ 23-1.15 (a) ("Safety Railing"); 23-6.1 (e) (2) and (h) ("General Requirements for Material Hoisting"); 23-8.1 (f) (2) (i)-(ii) and (f) (6) ("General Provisions for Mobile Cranes" – "Hoisting the Load"); and 23-8.2 (c) (3) ("Specific Provisions for Mobile Cranes" – "Hoisting the Load"). The court will discuss these individually.

The first of the Industrial Code provisions on which plaintiff relies in support of his Labor Law § 241 (6) cause of action – § 23-1.15 (a) ("Safety Railing") – requires that "a safety railing . . . consist [of] . . . [a] . . . horizontal wooden handrail, not less than 36 inches nor more than 42 inches above the walking level. . . ." Relying on this provision, plaintiff contends that the fifth-floor perimeter barrier must have been higher than 42 inches because (1) Plaintiff is 5 feet, 5 inches tall and he testified that the barrier came up to his armpit and (2) because the long arm of the boom crushed his right forearm/hand, which, in turn, crushed his right armpit against, and into, the top of the fifth-floor perimeter barrier. The safety standard set forth in Industrial Code § 23-1.15 (a), is specific enough to support a Labor Law § 241 (6) cause of action. F&F asserts that this section is inapplicable, as plaintiff's claim that the barrier was too high is "directly contradicted by the Daily Report which shows a photograph of the barrier" [Doc 169 ¶59, citing to Doc 174, pages 6-12].

From the photos attached to the Daily Report [Doc 174], it would appear that a question of fact exists regarding the height of the barrier. However, it is not clear whether, as regards a perimeter barrier, it would only be a barrier that was too low which would be a safety violation, not one which was too high. There does not appear to be a separate Industrial Code section that provides specifications for perimeter barriers, and this section is addressed to "handrails," such as those on stairs, which do need to be at the specified height so someone can grab it with their hands. Here, the upper left photo on Page 8 of Doc 174 shows that the top of the barrier was at the worker's armpit, which would be higher than 42 inches. Nonetheless, it was not too high to block a worker's hand signals. Furthermore, the orange mesh which covers the barrier is not opaque, and can be seen through. The court

finds that the plaintiff has not made a prima facie case that the height of the perimeter barrier, if being higher than 42 inches is in fact a violation of this regulation, that such violation was the proximate cause of plaintiff's injury (see *Auchampaugh v Syracuse Univ.*, 57 AD3d 1291, 1293, 870 NYS2d 564 [2008]; *Shields v General Elec. Co.*, 3 AD3d 715, 718, 771 NYS2d 249 [2004]).

As such, the branch of plaintiff's motion which seeks summary judgment based upon this section of the Industrial Code is denied. The branch of defendants' motion which seeks to dismiss plaintiff's claim under this section, Industrial Code 23-1.15 (a), is granted.

The second group of Industrial Code provisions on which plaintiff relies – §§ 23-6.1 (e) (2) and (h) ("General Requirements for Material Hoisting") – are inapplicable to the facts of this case. F&F makes a prima facie showing that subpart 6.1 (and the underlying provisions) do not govern mobile cranes, such as the boom truck at issue. 12 NYCRR § 23-6.1 [a] states it "shall apply to all material hoisting equipment except (hoisting equipment covered under other, separate regulations, such as) cranes. . ."]; *see also Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2d Dept 2006]). Stone Age was using a boom truck, which is hydraulic crane mounted on a flatbed truck. It is considered to be a crane for purposes of the Industrial Code (*Van Nostrand v Race & Rally Constr. Co., Inc.*, 34 Misc 3d 1213[A], 2012 NY Slip Op 50066[U] [Sup Ct, Suffolk County 2012]; *Claude v Triborough Bridge & Tunnel Auth.*, 2023 NY Slip Op 30057[U] [Sup Ct, NY County 2023]). As these sections are thus inapplicable to the facts of this case, the branch of plaintiff's motion which seeks summary judgment based upon these sections of the Industrial Code is

denied. The branch of defendants' motion which seeks to dismiss plaintiff's claim under these sections is granted.

The third group of Industrial Code provisions cited by plaintiff are §§ 23-8.1 (f) (2) (i)-(ii) and (f) (6) ("General Provisions for Mobile Cranes" – "Hoisting the load"). Industrial Code §§ 23-8.1 (f) (2) (i)-(ii) requires that two conditions be met during a hoisting operation; namely, that: "(i) There shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions" (hereafter, the "no acceleration/deceleration provision"); and "(ii) The load shall not contact any obstruction" (hereafter, the "no load-against-obstruction provision"). Separately and additionally, Industrial Code § 23-8.1 (f) (6) prohibits mobile cranes from hoisting or carrying any load "over and above any person" (hereafter, the "no overhead-load provision"). Of the three foregoing provisions, the motion and cross motion reveal that both the "no load-against-obstruction provision" and the "no overhead-load provision" provisions of Industrial Code § 23-8.1 (f) (2) (ii) and (f) (6) are relevant to the facts of this case.

The court finds that the other Subsection, 23-8.1 (f) (2) (i), cited by plaintiff is not relevant. No proof has been offered that that would demonstrate that the accident was in any way caused by a "sudden acceleration or deceleration of the moving load," thereby making the "no acceleration/deceleration provision" of Industrial Code § 23-8.1 (f) (2) (i) inapplicable to the facts of this case.

However, without the testimony of the boom truck operator, no proof has been offered that would demonstrate that the driver did not hoist the load over and above the

plaintiff, as it has not been clearly explained how the arm of the boom pinned plaintiff to the perimeter barrier (*Locicero v Princeton Restoration, Inc.*, 25 AD3d 664 [2d Dept 2006]).

In addition, the "no load-against-obstruction provision" of Industrial Code § 23-8.1 (f) (2) (ii) is both specific and applicable to the facts in this case. According to plaintiff's theory of his accident, the long arm of the boom truck crushed his right arm against and into the fifth-floor perimeter railing until the railing broke, and in doing so, the long arm of the crane contacted an "obstruction" (*i.e.*, the plaintiff's arm, and by extension, the fifth-floor perimeter barrier) in violation of the "no load-against-obstruction provision" of Industrial Code § 23-8.1 (f) (2) (ii). F&F contends that this section is not applicable, and argues that it was the arm of the boom truck that came in contact with the plaintiff, not the load. While there is some appellate authority that supports F&F's position (*see Thompson v Ludovico*, 246 AD2d 642, 644 [2d Dept 1998], where "(t)he plaintiff was . . . injured when, while he was working on a truck crane at a construction site, the boom of the crane slipped and crushed his arm," Industrial Code § 23-8.1 (f) (2) (ii) was found not applicable to the facts of that case. Nonetheless, this court finds that a broader view of the word "obstruction" should be used, as the First Department did in *Long v Tishman/Harris*, 50 AD3d 356, 357 [1st Dept 2008], where the court defined the word "obstruction" in the section as "something that hinders passage." The interpretation of the word "obstruction" as applied to the facts of this case (and, in particular, whether an obstruction constituted a proximate cause of plaintiff's accident) presents a triable issue of fact warranting a trial.

As such, the branch of plaintiff's motion which seeks summary judgment on his cause of action under Labor Law § 241 (6) based upon these sections of the Industrial Code

is denied. The branch of defendants' motion which seeks to dismiss plaintiff's claims under these sections is granted with regard to Industrial Code § 23-8.1 (f) (2) (i), and denied with regard to Industrial Code §§ 23-8.1 (f) (2) (ii) and (f) (6). Whether these regulations were violated must be determined by the jury.

The fourth and final provision on which plaintiff relies – Industrial Code § 23-8.2 (c) (3) ("Special Provisions for Mobile Cranes" – "Hoisting the load") – requires that "[l]oads lifted by mobile cranes. . . be raised vertically so as to avoid swinging during hoisting" (hereafter, the "vertical raise provision"); and that "[a] tag or restraint line. . . be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard" (hereafter, the "tagline provision"). Addressing the "vertical raise provision" first, the Court notes that it is "designed to protect workers from hazards created by the horizontal movement of a load being hoisted by a crane" to "avoid *swinging* during hoisting" (*Van Nostrand v Race & Rally Const. Co., Inc.*, 114 AD3d 664, 667 [2d Dept 2014]). Regarding the "tagline provision," the Court observes that it is also designed to protect workers against the danger of swinging loads by requiring the use of a tagline. Upon review of the record, the court finds that this provision is inapplicable to plaintiff's accident. It is true, as plaintiff points out, that he testified that "prior to the [long arm of the boom truck] making contact with [his right] arm, . . . the load of material [was] being moved horizontally into the building," and that "[a]t the same time, . . . the load [was] being lowered down."[6] Nonetheless, a mere horizontal movement is not sufficient, in and of itself, to trigger the

[6] *See* Plaintiff's EBT tr at page 229, line 11 to page 230, line 5.

applicability of the "vertical raise provision" because, according to the record, at no time, did the load at issue swing. The "tagline provision" is also inapplicable because the record is devoid of any proof (by way of an expert affidavit or otherwise) that the absence of a tagline was a proximate cause of the accident (*see Wein v East Side 11th & 28th, LLC,* 186 AD3d 1579, 1581 [2d Dept 2020]).

As such, the branch of plaintiff's motion which seeks summary judgment on his cause of action under Labor Law § 241 (6) based upon Industrial Code section 23-8.2 (c) (3) is denied. The branch of defendants' motion which seeks to dismiss plaintiff's claim under this section is granted.

In conclusion, the court finds that there are triable issues of fact as to the merits of plaintiff's Labor Law § 241 (6) cause of action solely as predicated on the alleged violations of Industrial Code §§ 23-8.1 (f) (2) (ii) and (f) (6), the "no load-against-obstruction provision" and the "no overhead-load provision". Thus, these claims are not dismissed. However, plaintiff has not made a prima facie case for summary judgment on these claims as against F&F, and thus this branch of his motion for summary judgment is denied. Stone Age is not a proper Labor Law 241(6) defendant, as it was a subcontractor and not the owner, its statutory agent or the general contractor, and as such, plaintiff's cause of action under Labor Law 241(6) is dismissed as against Stone Age in its entirety.

Plaintiff's remaining causes of action, under Labor Law § 200 and common-law negligence, are addressed to the means and methods of Stone Age's and Logozzo's work. Plaintiff testified at length at his deposition that he received all his instructions from, and

was exclusively supervised by, his employer's foreman.[7] The record establishes that F&F exercised no actual control over the operation of the boom truck, nor how the loads were raised. The injury to plaintiff in this case arose from the means and methods of the work by Stone Age and Logozzo. Thus, no liability may be attributed to F&F under Labor Law § 200 or under the common law (*see Elezaj*, 225 AD2d at 443; *see also Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]).

Contrary to plaintiff's contentions, Forsyth's and Foundations' (F&F's) respective authority to stop the work and their respective general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under Labor Law § 200 or common-law negligence (*see Messina v City of NY*, 147 AD3d 748, 749 [2d Dept 2017]). Neither Forsyth nor Foundations carried any "responsibility for the manner in which the [plaintiff's] work [was to be] performed" (*Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]). Therefore, dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action is warranted as against F&F.

With regard to the branch of plaintiff's motion for summary judgment as against defendant Stone Age on his Labor Law § 200 and common-law negligence causes of action, the court finds that plaintiff has made a prima facie case for summary judgment. Defendant Stone Age has failed to oppose the motion, despite being granted seven adjournments. Thus, this branch of the motion is granted. It is determined that Stone Age was negligent, and that

[7] *See* Plaintiff's EBT tr at page 47, lines 12-18; page 48, lines 21-24; page 49, lines 4-8; page 62, line 19 to page 63, line 9; page 64, lines 3-7; page 198, lines 9-12; and page 204, lines 2-8.

its negligence was a proximate cause of the plaintiff's accident. Whether plaintiff was comparatively at fault will still require a trial, however.

Third-party claims

The court next turns to a determination of the merits of the branch of F&F's motion for summary judgment on their third-party claims against third-party defendant Logozzo. As previously noted, F&F's third-party claims as against Logozzo sound in: (1) contractual indemnification, (2) common-law contribution/indemnification, and (3) breach of contract to obtain insurance.

The broadly worded contractual indemnification provision here states, in § 4.6.1, that "[t]o the fullest extent permitted by law, the Subcontractor [Logozzo] shall indemnify, defend and hold harmless the Owner [Forsyth], Contractor [Foundations,] . . . and agents and employees of any of them 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 Subcontractor's [Logozzo's] Work under this Subcontract, provided that where any such claim, damage, loss or expense is attributable to bodily injury . . . , such indemnity shall be only to the extent not caused by the negligent acts or omissions of any such party indemnified hereunder." Similar provisions conditioning indemnification for claims "arising out of" or otherwise connected with the performance of the contracted-for work have been found to require no proof of the indemnitor's negligence or fault (*see Beharovic v 18 E. 41st St. Partners, Inc.*, 123 AD3d 953, 956 [2d Dept 2014]; *Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1020 [2d Dept 2011]). Contrary to Logozzo's contentions, the contractual indemnification provision does not violate General Obligations Law § 5-322.1, because the

provision expressly excuses Logozzo from indemnifying Forsyth or Foundations (or both) for its (or their) own negligence (*see Beharovic*, 123 AD3d at 956). It is noted that there is no dispute that Logozzo hired Stone Age to provide the boom truck [Doc 159 Page 65].

F&F's third-party claims for common-law contribution and indemnification require a different analysis, however. Workers' Compensation Law § 11 bars third-party claims for common-law contribution and indemnification against a plaintiff's employer unless the employee has sustained a "grave injury." Plaintiff's bills of particulars, as amplified by his pretrial testimony, establish that he did not sustain a "grave injury"[8] from the accident, and that he received Workers' Compensation benefits from Logozzo's insurance carrier for several years after the accident, but the payments had stopped by the time of his deposition. Accordingly, F&F's third-party claims for common-law contribution and indemnification are subject to dismissal, as they are barred by the statute (*see McIntosh v Ronit Realty, LLC*, 181 AD3d 580, 581 [2d Dept 2020]; *Pineda v 79 Barrow St. Owners Corp.*, 297 AD2d 634, 636-637 [2d Dept 2002]).

F&F's remaining third-party claim, for breach of contract to obtain insurance, is devoid of merit. Although Logozzo's insurer accepted F&F's tender, it appears that the insurer did so with a reservation of rights. F&F's contention that such reservation of rights

[8] "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." (Workers' Compensation Law § 11[1]).

amounted to Logozzo's breach of its insurance-purchase obligation, is misguided. As long as Logozzo purchased the requisite insurance coverage, and there is no claim that the policy was not compliant with the requirements in the contract, Logozzo's insurance-purchase contractual obligation vis-à-vis F&F was met (*see e.g., Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]). From the text of the letter at Document 166, it appears that coverage was denied to Foundations Group I, but granted to Foundations Group, Inc. and Foundations Interior Design Corp. as "AXIS is not in possession of a written contract obligating additional insured status for that entity." As the NYS Department of State Division of Corporations website makes clear, Foundations Group, Inc. filed an amendment changing its name to Foundations Group I, Inc. in 2012, and that they are one and the same entity. The letter states that "As set forth below, AXIS hereby agrees to provide a defense to Forsyth, Foundations, and Foundations Group in the consolidated lawsuit subject to this reservation of rights. You will receive information regarding appointed defense counsel shortly. AXIS must respectfully deny coverage for Foundations Group I because AXIS is not in possession of any contract obligating Logozzo to name Foundations Group I as an additional insured." Further, the firm Gallo Vitucci Klar LLP has appeared on behalf of all remaining defendants except Stone Age, by notice of appearance dated 6/29/23, which was about six months after this motion was filed, and in fact, after the reply papers were filed. In addition, this court, on the record (see transcript of oral argument) removed Foundations Group, Inc. from the caption, as its name was amended to Foundations Group I, Inc. and they did not both need to be in the caption. This is reflected in the order on motion seq. #6, issued on August 7, 2023. Thus, it would seem that this branch of the motion is academic,

as Logozzo's insurer has assumed the defense of F&F. The branch of F&F's motion addressed to its third-party claims was not raised at oral argument at all, it is noted.

Conclusions of Law

Based on the foregoing and after oral argument on the record, it is

ORDERED that the portion of F&F's cross motion (motion sequence number 5) for leave to make a late summary judgment motion is granted, notwithstanding the untimeliness of their cross motion; and it is further

ORDERED that the branch of the plaintiff's motion (motion sequence number 4), for summary judgment on his claim under Labor Law § 240 (1), asserted against all defendants, is denied in its entirety, and the branch of F&F's cross motion (motion sequence number 5), for summary judgment dismissing that claim is granted, and plaintiff's cause of action under Labor Law § 240 (1) is dismissed as against all defendants, including Stone Age; and it is further

ORDERED that the branch of the plaintiff's motion (motion sequence number 4), for summary judgment on his cause of action under Labor Law § 241 (6), asserted against all defendants, is denied. This cause of action is dismissed solely as asserted against defendant Stone Age; and it is further

ORDERED that the branch of F&F's cross motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is granted, with the exception of plaintiff's Labor Law § 241 (6) claims predicated on alleged violations of Industrial Code §§ 23-8.1 (f) (2) (ii) and (f) (6); and it is further

ORDERED that the branch of F&F's cross motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence causes of action is granted, and these claims are dismissed; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on his Labor Law § 200 and common law negligence causes of action as asserted against defendant Stone Age is granted without opposition, and the plaintiff's comparative fault, if any, shall be determined at the trial; and it is further

ORDERED that the branch of F&F's cross motion seeking contractual indemnification on their third-party claim as against Logozzo, in accordance with § 4.6.1 of the subcontract, is granted; and it is further

ORDERED that Logozzo is directed, to the extent that it has not already, to immediately assume F&F's defense, that is, for all three defendants as Foundations Group, Inc. merely changed its name to Foundations Group I, Inc., and is the same entity, and to reimburse their legal fees and disbursements incurred thus far, to the extent not already paid; and it is further

ORDERED that any dispute as to the amount of the attorneys' fees and disbursements which F&F have incurred and are entitled to be reimbursed for, for the period from the date the action was commenced to the date Logozzo assumes its defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded; and it is further

ORDERED that the remainder of F&F's cross motion as regards its third-party claims is denied; and it is further

ORDERED that F&F's counsel shall electronically serve a copy of this decision/order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of service thereof.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.