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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

110485-09

JOHN T. GUNN and ANN GUNN, as Co-Guardians for CHRISTOPHER GUNN, an incapacitated Person,
Plaintiff(s),

- v -

ARE-EAST RIVER SCIENCE PARK, LLC, TURNER CONSTRUCTION COMPANY and SITE SAFETY, LLC,
Defendant(s).

INDEX NO. ~~100449/09~~

MOTION DATE 08-17-2011

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

SITE SAFETY LLC,
Third-Party Plaintiff(s),

- v -

FALCON STEEL COMPANY, INC. and HELMARK STEEL, INC.,
Third-Party Defendant(s).

ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY,
Second Third-Party Plaintiff(s),

- v -

HELMARK STEEL, INC.,
Second Third-Party Defendant(s).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 7 were read on this motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits _____cross motion _____	4, 5
Replying Affidavits _____	6, 7

Cross-Motion: Yes X No

Upon the foregoing papers, it is Ordered that third-party/second third-party defendant HELMARK STEEL INC.'s motion for summary judgment pursuant to CPLR §3212, for an Order dismissing the Third-Party Summons and Complaint by SITE SAFETY, LLC, and for dismissal of those causes of action in the Second-Third Party Summons and Complaint by ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY asserted against HELMARK STEEL INC., and to enforce it's cross-claims for contractual and common law indemnification against FALCON STEEL COMPANY, INC., is decided in accordance with the memorandum decision filed herewith.

Accordingly, it is ORDERED that Motion Sequence 003, third-party/second third-party defendant HELMARK STEEL INC.'s, motion for summary judgment pursuant to CPLR §3212, for an Order dismissing the Third-Party Summons and Complaint by SITE SAFETY, LLC, and for dismissal of those causes of action in the Second-Third Party Summons and Complaint by ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY asserted against HELMARK STEEL INC., and to enforce it's cross-claims for contractual and common law Indemnification against FALCON STEEL COMPANY, INC. is granted only as to the Third Cause of Action in the Second Third Party Action, which is severed and dismissed. The action shall continue as to the remaining causes of action.

This constitutes the decision and order of this court.

Dated: October 17, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

JOHN T. GUNN and ANN GUNN, as Co-Guardians for CHRISTOPHER GUNN, an incapacitated person,

Plaintiff(s),

- V -

ARE-EAST RIVER SCIENCE PARK, LLC, TURNER CONSTRUCTION COMPANY and SITE SAFETY, LLC,

Defendant(s).

INDEX NO.: 109449/09

SITE SAFETY LLC,

Third-Party Plaintiff(s),

- V -

FALCON STEEL COMPANY, INC. and HELMARK STEEL, INC.,

Third-Party Defendant(s).

ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY,

Second Third-Party Plaintiff(s),

- V -

HELMARK STEEL, INC.,

Second Third-Party Defendant(s).

Manuel J. Mendez, J.S.C. :

Christopher Gunn was a 28 year old journeyman iron worker, that worked as part of a raising gang working on the plaza level of a building being constructed on behalf of ARE-East River Science Park, LLC. The building was to become a laboratory and office complex located near Bellevue Hospital on East 28th and 29th Street, between First Avenue and the FDR Drive. On April 29, 2008, Mr. Gunn was as a "tag line man" in the raising gang working on the plaza level of the worksite, which was approximately 23 to 29 feet above the basement level. The raising gang was attempting to install the tower crane grillage, a structural steel assembly on which a tower crane would be erected. Most of the plaza level was covered with metal decking, however approximately 23 feet away from where the raising gang was working, there was an approximately 30 inch wide open gap near the periphery. The gap was not covered and there was no decking, planking or safety netting.

The raising gang was attempting to install intermediate beams, which were smaller cross-beams perpendicular to the parallel north-south header beams. They had been directed to connect a beam on the western side and then force it into place on the eastern side of the building. Two spud wrenches were placed in the western connection instead of bolts to hold the steal beam in place and Mr. Gunn was directed to use a chain hoisting apparatus, known as a "come along," to bring the beam into position at the

eastern end. He sat on the header beam near the eastern connection and attempted to force the beam into place using the "come along" to pull it into position. When the eastern end of the beam was within six inches of its final position, he was directed by his foreman to release the "come along." After he released the "come along," the beam started to swing and pick up speed, pulling the spud wrenches out of the western connection and causing them to fail as a securing device. A gusset plate attached to the beam caught his tool belt and pulled him from the header. Although he was wearing a safety belt and harness with a lanyard he had not "tied off," however, there were no lifelines, stanchions or other points in the area to affix the harness. He lost his grip on the beam as it was bucking up and down, and fell through the opening in the metal decking approximately 23 to 29 feet, striking his head and neck on the basement level. Amongst the alleged injuries are a severed spinal cord, paraplegia and traumatic brain damage.

ARE-East River Science Park, LLC (hereinafter referred to as "ARE-East"), the owner of the property contracted with Turner Construction Company to serve as construction manager and contractor. Turner Construction Company (hereinafter referred to as "Turner") contracted with Site Safety, LLC, as a consultant to provide services concerning compliance with safety regulations and a site safety manager. ARE-East and Turner also contracted with Helmark Steel Inc., to fabricate and erect the structural steel and decking at the project. Mr. Gunn was employed by Falcon Steel Company, Inc., which subcontracted with Helmark Steel, Inc. to erect the steel and decking at the construction project.

Motion sequence 003, is the motion by third-party/second third-party defendant Helmark Steel Inc., (hereinafter referred to as "Helmark") for summary judgment pursuant to CPLR §3212. Helmark seeks an Order dismissing the Third-Party Summons and Complaint by Site Safety, LLC, and those causes of action in the Second-Third Party Summons and Complaint by ARE-East and Turner asserted against Helmark, also to enforce Helmark's cross-claims for contractual and common law indemnification against Falcon Steel Company (hereinafter referred to as "Falcon").

Falcon, opposes Helmark's motion claiming there remain issues of fact concerning negligence which includes preclusion as to common law and contractual indemnification. Falcon claims that the purchase order with Helmark is violative of General Obligations Law 5-322.1 and claims that Helmark has not met its burden of proof that the exclusion in the insurance policy issued to Falcon is a bar to cross-claims based on anti-subrogation principles.

ARE-East and Turner, oppose Helmark's motion claiming there remain issues of fact concerning negligence which prevent summary judgment as to their cross-claims for common law indemnification. ARE-East and Turner claim that common law indemnification requires proof of negligence beyond statutory liability and ARE-East and Turner were not negligent.

Motion sequence 004, is the motion by the plaintiffs for summary judgment on liability pursuant to Labor Law §240[1], §241[6] and §200, they seek to have this matter set down for a trial on damages. Plaintiffs claim that there are no issues of fact.

Site Safety LLC, partially opposes the plaintiffs' motion. Site Safety, LLC claims there is a March 5, 2010 stipulation (Partial Opp. Exh. A), signed on behalf of the plaintiffs discontinuing their causes of action with prejudice, against Site Safety, LLC, "ONLY."

ARE-East and Turner, oppose the motion claiming that issues of fact exist as to the plaintiff's compliance with OSHA Subpart R and pursuant to Labor Law §240[1] as to whether the plaintiff was the sole and proximate cause of his injuries and a "recalcitrant worker." ARE-East and Turner claim plaintiff is not entitled to summary judgment pursuant to Labor Law §241[6] and §200, because there remain issues of fact concerning comparative negligence and the industrial code violations cited do not apply to the facts of this case.

Falcon, opposes plaintiffs' motion claiming that issues of fact exist as to the Labor Law §240[1] and §241[6] causes of action. Falcon claims there remain issues of fact concerning comparative negligence and whether Christopher Gunn was the sole proximate cause of his injuries which would preclude summary judgment.

Motion sequence 005, is the motion by defendant and third-party defendant, Site Safety, LLC, for summary judgment dismissing plaintiff's causes of action pursuant to the March 5, 2010 stipulation. Site Safety, LLC seeks an Order dismissing ARE-East and Turner's cross-claims for tort contribution, common law and contractual indemnity and breach of contract. Site Safety, LLC claims that ARE-East is not an incidental beneficiary to the contract entered into with Turner. Site Safety, LLC, claims that pursuant to their contract with Turner, Site Safety, LLC, was only retained in an advisory capacity as a "consultant" and was not delegated or assumed Turner's safety duties and obligations as construction manager and contractor at the site. Site Safety states that it brought a third-party action against Helmark and Falcon, asserting causes of action for tort contribution and common law indemnity. Site Safety, LLC, seeks to have Helmark and Falcon's cross-claims dismissed or upon a dismissal of the causes of action and cross-claims brought by plaintiffs, ARE-East and Turner, to have the third-party action declared moot.

ARE-East and Turner, oppose the motion by Site Safety, LLC. ARE-East and Turner claim that Site Safety, LLC, cannot establish that they were negligent as a matter of law. They claim that Site Safety, LLC, is liable to them for common law indemnification because it cannot establish lack of its own negligence. They claim Site Safety, LLC, took on additional responsibilities which demonstrate that it had the authority to "direct, supervise and control" the plaintiff's work which resulted in his injuries. ARE-East and Turner claim that Site Saftey LLC is liable to them for contractual indemnification pursuant the "hold harmless" clause in its contract.

Motion sequence 006, is the motion by defendants and second third-party plaintiffs, ARE-East and Turner, for summary judgment dismissing plaintiff's causes of action asserted against them pursuant to Labor Law §241[6] and §200. ARE-East and Turner also seek summary judgment on their cross-claims and third-party claims against Site Safety, LLC and Helmark. ARE-East and Turner claim that they are

not liable pursuant to Labor Law §200 because they did not supervise or control Christopher Gunn's work and that he reported to his employer, Falcon, which provided daily job instructions. They claim that Site Safety, LLC, is liable under common law indemnification because it had authority to stop the entire job or to tell the foreman to take precautions and was responsible for the plaintiff's safety. Alternatively they argue that Site Safety, LLC is liable to them pursuant to the indemnification clause in their contract. They claim that Helmark was also responsible for site safety and is liable to them under the indemnification clause in their contract. ARE-East and Turner claim they are not liable pursuant to Labor Law §241[6] because those sections of the industrial code, and the OSHA section cited by the plaintiffs, are not applicable to the facts of this case.

Site Safety, LLC, opposes the motion claiming that pursuant to the contract with Turner liability only applies to full indemnity, when Site Safety, LLC, is completely negligent. Site Safety, LLC, claims that Turner is subject to liability for its own negligence under the contract and there is no contractual indemnification. Site Safety, LLC, states that ARE-East is not a party to the contract with Turner and has no contractual rights. Site Safety, LLC, claims that no evidence exists and there is only speculation that it negligently failed to properly execute its inspection responsibilities pursuant to the contract with Turner, therefore the motion should be denied.

Helmark opposes the motion claiming that Labor Law §200 applies to ARE-East and Turner because they exercised supervision and control over the work performed on the premises, and had knowledge of the dangerous condition. Helmark claims that a proximate cause for plaintiff's accident, was allowing Falcon employees to install steel grillage on the same level and in close proximity to areas where decking was not yet complete on the date of the accident. Helmark claims that ARE-East and Turner had a contractual obligation to control the work to avoid dangers, they directed and supervised Falcon and had actual knowledge of the dangerous condition. It claims ARE-East and Turner cannot obtain summary judgment for common law indemnification because there remain issues of fact concerning whether they are at fault for Christopher Gunn's injuries.

Falcon opposes the motion claiming ARE-East and Turner had actual knowledge of the dangerous condition and there remain issues of fact concerning whether they controlled the means and methods of the work being performed by Falcon at the time of the accident. Falcon claims that ARE-East and Turner have not demonstrated entitlement to contractual indemnification.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Contractual Indemnification

Contractual indemnification involves the parties agreeing to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff's injuries through its negligence. An indemnification clause in a contract can be enforced if it is established that the party seeking enforcement was not negligent and was only statutorily liable, or did not supervise or control the work being performed (Amato v. Rock-McGraw, Inc., 297 A.D. 2d 217, 746 N.Y.S. 2d 150 [N.Y.A.D. 1st Dept., 2002], Uluturk v. City of New York, 298 A.D. 2d 233, 748 N.Y.S. 2d 371 [N.Y.A.D. 1st Dept., 2002] and Colozzo v. National Center Foundation, 30 A.D. 3d 251, 817 N.Y.S. 2d 256 [2006]).

An indemnification agreement is void as against public policy pursuant to GOL §5-322.1, if it contains language that completely indemnifies an owner or general contractor for harm caused based on their negligence. The purpose of GOL §5-322.1 is to prevent subcontractors from assuming liability for the negligence of the owner or contractor pursuant to the contract (Brown v. Two Exch. Plaza Partners, 76 N.Y. 2d 172, 556 N.E. 2d 430, 556 N.Y.S. 2d 991 [1990]). An indemnification agreement that modifies the liability for negligence and contains the words "to the fullest extent permitted by law" or language that limits indemnification to subcontractor liability for its own negligence has been found not to violate GOL §5-322.1 (Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y. 2d 786, 680 N.E. 2d 1200, 658 N.Y.S. 2d 903 [1997]). A general contractor that has been found partially liable can enforce an indemnification agreement against a subcontractor for the portion of liability that pertains to the subcontractor (Brooks v. Judlau Contr., Inc., 11 N.Y. 3d 204, 898 N.E. 2d 549, 869 N.Y.S. 2d 366 [2008]). Contractual indemnification does not supersede the common law right to indemnification. The ability of a contractor to limit its contractual obligation does not necessarily affect its duty to indemnify under the common law (Felker v. Corning Incorporated, 90 N.Y. 2d 219, 682 N.E. 2d 950, 60 N.Y.S. 2d 249 [1997]).

Common Law Indemnification

Common law indemnification requires the party seeking indemnity to establish that it was not negligent beyond any statutory liability and that the proposed indemnitor's negligence contributed to the causation of the accident (Correia v. Professional Data Management, Inc., 259 A.D. 2d 60, 693 N.Y.S. 2d 596 [N.Y.A.D. 1st Dept 1999]). Common law indemnification allows a party held strictly liable pursuant to Labor Law §240[1] to be indemnified by the party or parties actually responsible for supervising, directing and controlling plaintiff's work. The party seeking common law indemnification cannot recover if it is negligent beyond strict statutory liability (Gulotta v. Bechtel Corporation, 245 A.D. 2d 75, 664 N.Y.S. 2d 801 [N.Y.A.D. 1st Dept. 1997] and Walker v. Trustees of the University of Pennsylvania, 275 A.D. 2d 266, 712 N.Y.S. 2d 117 [N.Y.A.D. 1st Dept. 2000]).

Worker's Compensation Law §11

An indemnification agreement entered into prior to the date of plaintiff's accident, prevents preclusion of claims against a plaintiff's employer under Worker's Compensation Law §11 (Gary v. Flair Beverage Corp., 60 A.D. 3d 413, 875 N.Y.S. 2d 4

[N.Y.A.D. 1st Dept., 2009] and Portelli v. Trump Empire State Partners, 12 A.D. 3d 280, 786 N.Y.S. 2d 5 [N.Y.A.D. 1st Dept., 2004]). Worker's Compensation Law §11 permits a claim for contractual indemnification to a third party by the employer based on liability for injuries sustained by an employee acting within the scope of employment, but the party seeking to be indemnified must prove through competent medical evidence that the person sustained a "grave injury." (McKinney's Cons. Laws of NY, Book 64, Worker's Compensation Law §11 and Portelli v. Trump Empire State Partners, 12 A.D. 3d 280, supra).

Labor Law §240[1]

The purpose of Labor Law §240[1], also known as the "scaffold law" is to protect construction workers by imposing strict liability on "owners, contractors and their agents," for violations which proximately cause injuries. Labor Law §240[1] is a strict and absolute liability statute, the comparative negligence of the worker is generally not a defense. Strict liability applies regardless of whether there was actual exercise of supervision and control over the work performed (Sanatass v. Consolidated Investing Company, 10 N.Y. 3d 333, 887 N.E. 2d 1125 [2008] and Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004]). Plaintiff's comparative negligence is not a defense to Labor Law §240 [1] liability, unless it can be established that the plaintiff's conduct was the sole and proximate cause of the accident (Gallagher v. New York Post, 14 N.Y. 3d 83, 923 N.E. 2d 1120, 896 N.Y.S. 2d 732 [2010]).

Labor Law §240[1], is to be construed liberally to accomplish its purpose, however, it is limited to "special hazards" involving elevation differentials (Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 [1993]). Recovery does not extend to harm resulting from routine workplace risks (Runner v. New York Stock Exchange, 12 N.Y. 3d 599, 922 N.E. 2d 865, 895 N.Y.S. 2d 279 [2009]).

The plaintiff has the burden of showing that protection was needed from the effects of gravity, that a risk of elevation based injury exists, and that the owner or contractor did not provide adequate safety devices (Broggy v. Rockefeller Group, Inc., 8 N.Y. 3d 675, 870 N.E. 2d 1144, 839 N.Y.S. 2d 714 [2007]). A plaintiff's knowledge that appropriate safety devices were available but not in the vicinity, is not enough for the defendants to meet their burden in a motion for summary judgment. Evidence that plaintiff did not know he was expected to use the safety device for the assigned task, or the lack of direction on how to perform the task utilizing the safety device including a "standing order" conveyed to the workers directing its use, is a basis to grant the plaintiff summary judgment (Gallagher v. New York Post, 14 N.Y. 3d 83, supra and Tounkara v. Fernicola, 80 A.D. 3d 470, 914 N.Y.S. 2d 161 [N.Y.A.D. 1st Dept., 2011]). A plaintiff is not the sole proximate cause of his injuries where the evidence shows he did not on his own initiative engage in a foolhardy risk but rather relied on the directions of his foreman or supervisor (Harris v. City of New York, 83 A.D. 3d 104, 923, N.Y.S. 2d 2 (N.Y.A.D. 1st Dept., 2011]).

To defeat plaintiff's motion for summary judgment pursuant to Labor Law §240[1] the defendants must raise an issue of fact concerning, whether the plaintiff, "had

adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (Auriemmma v. Biltmore Theatre, LLC, 82 A.D. 3d 1, 917 N.Y.S. 2d 130 [N.Y.A.D. 1st Dept., 2011] citing to Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y. 3d 35, supra and Gallagher v. New York Post, 14 N.Y. 3d 83, supra). Compliance with Occupational Safety and Health Administration (hereinafter referred to as OSHA) Guidelines, where there is no requirement to "tie off" and the failure to do so results in the plaintiff's injury, does not defeat a prima facie showing of liability pursuant to Labor Law §240 [1] (John J. Murray v. Arts Center and Theater of Schenectady, Inc., 77 A.D. 3d 1155, 910 N.Y.S. 2d 187 [N.Y.A.D. 3rd Dept., 2010]).

Labor Law §241[6]

Labor Law §241[6] establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [N.Y.A.D. 1st Dept., 2003] citing to Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command," and not a reiteration of common law negligence (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, 841, N.Y.S. 2d 249 [N.Y.A.D. 1st Dept. 2007] citing to Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra). Causes of action pursuant to Labor Law §241(6), are subject to valid defenses of contributory negligence and comparative negligence (Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, supra).

Subcontractors may be liable under Labor Law §241[6] if they are statutory agents with delegated supervision and control over either the work area involved or the work which resulted in plaintiff's injury. Evidence that a subcontractor delegated the requisite supervision and control to another second subcontractor can be sufficient to find that the first subcontractor possessed authority and was liable as the statutory agent of the general contractor (Nascimento v. Bridgehampton Construction Corp., 86 A.D. 3d 189, 924 N.Y.S. 2d 353 [N.Y.A.D. 1st Dept., 2011]). Liability would apply to the first subcontractor as an agent of the general contractor regardless of whether it actually coordinated or supervised the work performed (Weber v. Baccarat, Inc., 70 A.D. 3d 487, 896 N.Y.S. 2d 12 [N.Y.A.D. 1st Dept., 2010]). A subcontractor that qualifies as a statutory agent cannot escape liability by delegating work to another entity (Nascimento v. Bridgehampton Construction Corp., 86 A.D. 3d 189, supra).

Plaintiffs in their Verified Bill of Particulars dated September 30, 2008 [Mot. Seq. 004, Exh. 2], claim that the following Industrial Code Sections (12 N.Y.C.R.R.) were violated, 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-1.11, 23-1.12, 23-1.15, 23-1.16, 23-1.17, 23-1.24, 23-2.1, 23-2.2, 23-2.3, 23-4, 23-5, 23-6, 23-7, and 23-8. The plaintiffs' motion papers only specifically address industrial code sections, 23-1.7[b], 23-1.16, 23-2.3[a], 23-2.3[c], 23-8.1[f][2][i], 23-8.1[f][2][ii], 23-8.1[f][5], 23-8.2 [c][3].

Section 23-1.7 [b] [1][i] applies to "Hazardous Openings," and requires that, "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." A "hazardous opening" has been defined as "large enough for a person to fit into" (Messina v. City of New York, 300 A.D. 2d 121, 752 N.Y.S. 2d 608 [N.Y.A.D. 1st Dept., 2002] and Salazar v. Novalex Contracting Corp., 72 A.D. 3d 418, 897 N.Y.S. 2d 423 [N.Y.A.D. 1st Dept., 2010]). A hazardous opening requires there be a fall into an opening on the work surface and not from an edge (Smith v. McClier Corp., 38 A.D. 3d 322, 831 N.Y.S. 2d 413 [N.Y.A.D. 1st Dept. 2007]). Defendants claim that a cover was not needed because free access was required at the location and Christopher Gunn was not working in an area close to the opening. Section 23-1.7 [b] [1][ii] applies to areas where free access is needed and that requires a barrier or safety railing to guard the opening. The defendants have failed to provide sufficient evidence that free access was required in the area, there was deposition testimony that the opening existed because that part of the decking had not been completed and that it would have been covered if a request was made. Section 23-1.7 [b] [1][iii] applies to situations where employees work close to the edge of such an opening and does not apply to the facts of this case. The plaintiffs do establish a claim pursuant to Section 23-1.7 [b] [1][i], Christopher Gunn's entire body fell through the hole in the decking and landed more than twenty feet below. Defendants have raised an issue of fact concerning whether the plaintiff should be considered to have fallen into the opening. Plaintiff fell into the hole after being shaken off the beam that pulled him approximately 23 feet from the area he was working.

Section 23-1.16 pertains to, "Safety Belts, Harnesses, Tail Lines and Lifelines." Plaintiffs claim that Section 23-1.16[b] applies because it requires attachment to a "securely anchored lifeline" and the defendants never provided him with a lifeline in the area he was working. Plaintiffs met their burden of proof by establishing that he was provided with, and wore, a safety harness with a lanyard and he was not provided with a lifeline or a means to attach his lanyard to the lifeline. Defendants raise an issue of fact based on the failure to provide the lifeline. Defendants claim that Christopher Gunn was not instructed to attach his lifeline because such instruction was not necessary under OSHA subpart R.

Plaintiffs have not sufficiently met their burden of proof concerning Section 23-2.3[a][1]. Section 23-2.3[a][1] pertains to, "Structural Steel Assembly," it requires that, "During the final placing of structural steel members, loads shall not be released from hoisting ropes until such members are securely fastened in place. Structural steel members shall not be forced into place by hoisting machines while any person is so located that he may be injured thereby." The plaintiffs met their initial burden of proof claiming that although ropes were not involved in the "come along," the deposition testimony of Larry Rissmiller [Mot. Seq. 004, Exh. 16, pp 80-84] establishes the beam was being forced into place and the "come along" was improperly released. Plaintiffs provide the expert affidavit of Ross McLaren, a rigging engineer with 30 years experience [Mot. Seq. 004, Exh. 22], he claims that it was improper to force the beam into place especially when Mr. Gunn was seated in a vunerable position on top of the header beam. Plaintiffs also provide the Affidavit of Michael F. Russo, a professional

engineer [Mot. Seq. 004, Exh. 23], he states that after the "come along" was removed, the other workers continued to use pry-bars to finish moving the beam into place. Mr. Russo states, the force of gravity on the load caused the beam to swing in a pendulum-like manner as it approached its connection point. The defendants raised an issue of fact based on their claims that this section does not apply because there were no ropes and the cross-beam was not being placed in its final position. The defendants have also raised an issue of fact based on the deposition testimony of Larry Rissmiller [Mot. Seq. 004, Exh. 16, pp 80-84] in which he states the beam was being forced into place and the "come along" was released because he believed it was in place.

Section 23-2.3[c] is subtitled "tag lines," It applies to the use of "tag lines" when structural steel is being hoisted and directs that they be used to avoid uncontrolled movement. There is deposition testimony that Christopher Gunn used a "tag line" as required pursuant to section 23-2.3[c], and released it when directed to by Mr. Rissmiller, because the beam appeared to be in place and could not be connected if the line remained in place [Mot. Seq. 004, Exh. 16, pp 83-84]. There remains an issue of fact concerning whether section 23-2.3[c] applies, based on the deposition testimony that the "tag line" was used until it was determined that the beam was in place.

Section 23-8.2 [c][3] is applied in conjunction with Section 23-2.3[c]. Section 23-8.2 [c][3], applies to loads lifted by mobile cranes, it states that they, "...shall be raised vertically to avoid swinging during hoisting..," also it provides that a tag line shall be used when rotation or swinging may create a hazard. Plaintiffs have not sufficiently met their burden of proof concerning Section 23-8.2 [c][3] because a "tag line" was used during the hoisting, there remains an issue of fact concerning whether it was prematurely released.

Plaintiffs claim Sections 23-8.1[f][2][i] and [f][2][ii] and 23-8.1[f][5] apply to the facts of this case. Sections 23-8.1[f][2][i] and [f][2][ii], forbid a sudden acceleration or deceleration of the load and contact with any obstruction. The plaintiffs have not met their burden of proof as to Sections 23-8.1[f][2][i], [f][2][ii] and 23-8.1[f][5]. There is insufficient evidence that there was an intentional sudden acceleration or deceleration moving the load, or that contact with an obstruction caused the beam to swing resulting in the accident. Plaintiffs have not sufficiently established that Christopher Gunn had been standing or placed on the load or hook of the mobile crane.

Labor Law § 200

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site. An implicit precondition to the common law duty is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury, mere directions as to the time and quality of the work is not enough to impose liability (Esposito v. New York City Industrial Development Agency, 305 A.D. 2d 108, 760 N.Y.S. 18 [N.Y.A.D. 1st Dept., 2003] aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003]). Labor Law §200 requires that the plaintiff establish that the defendant had either actual or constructive notice of the

unsafe condition that caused the accident. The notice must be specific as to the defect or hazardous condition and its location, so that corrective action could have been taken (Mitchell v. New York Univ., 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [N.Y.A.D. 1st Dept. 2004] and Vasquez v. Urbahn Associates, Inc., 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept., 2010]).

Pursuant to Labor Law § 200, a general duty to comply with safety regulations, including weekly safety meetings with subcontractors and regular walk throughs as well as the ability to stop work for safety reasons is insufficient to impose liability. It must be shown that the defendant controlled the manner in which work is performed (Geonie v. OD & P NY Limited, 50 A.D. 3d 444, 855 N.Y.S. 2d 495 [N.Y.A.D. 1st Dept. 2008] and Burkoski v. Structure Tone, Inc., 40 A.D. 3d 378, 836 N.Y.S. 2d 130 [N.Y.A.D. 1st Dept. 2007]). Responsibility for coordinating and scheduling trades at the worksite does not invest a construction manager with the level of direction and control needed to find them liable for the injury producing work (Colozzo v. National Center Foundation, Inc., 30 A.D. 3d 251, 817 N.Y.S. 2d 256 [N.Y.A.D. 1st Dept., 2006]. Labor Law §200 liability cannot be asserted against a defendant based on alleged violations of OSHA which govern employee and employer relations (Delaney v. City of New York, 78 A.D. 3d 540, 911 N.Y.S. 2d 57 [N.Y.A.D. 1st Dept., 2010]).

Motion Sequence 003, by third-party/second third-party defendant Helmark Steel Inc., for summary judgment pursuant to CPLR §3212, for an Order dismissing Site Safety, LLC's Third-Party Summons and Complaint and those causes of action in the Second-Third Party Summons and Complaint by Are-East River and Turner asserted against Helmark [Mot. 003, Exh. 6], also to enforce Helmark's cross-claims for contractual and common law indemnification against Falcon, is granted only as to the third cause of action in the Second Third-Party Action. The third cause of action in the Second Third Party Action's Complaint is severed and dismissed. The remainder of the motion is denied.

Helmark has not sufficiently made out a prima facie case and there remain issues of fact concerning whether Helmark is liable to Site-Safety, LLC, ARE-East and Turner based on contractual and common law theories of indemnification. Helmark entered into an agreement with Turner Construction Inc. [Mot. Seq. 003, Exh. 11], that includes at paragraph XXIII, an indemnification paragraph with the proper exclusionary language. The contract at Article XXII, states that Helmark agrees to be bound by the "Safety, Health and Environmental Policy." The "Health and Safety Plan" [Mot. Seq. 003, Exh. 10] includes in section B-9, additional fall protection requirements, and at section B-13 includes a policy statement with requirements concerning steel erection. Helmark may be liable for contractual indemnification even though it was not present at the job site. There remain issues of fact concerning whether Helmark was an agent to ARE-East and Turner under Labor Law §241[6], with delegated supervision and control over either the work area involved or the work performed by Falcon which resulted in plaintiff's injury. There remain issues of fact concerning vicarious liability and negligence under common law indemnification.

There also remain issues of fact concerning whether the indemnification provision in the purchase order between Helmark and Falcon are valid. Although none of the parties have objected to the claim that plaintiff suffered a "grave injury" under Worker's Compensation Law §11, Falcon claims the indemnification agreement in the purchase order is void pursuant to General Obligations Law § 5-322.1. The purchase order [Mot. Seq. 003, Exh. 12] contains language that completely indemnifies Helmark for harm based on their negligence. Pursuant to General Obligations Law § 5-322.1, the purchase order does not have the proper exclusionary language. Helmark claims that at paragraph 14 of the purchase order it states that it is governed by the law of the State of Delaware and the provisions of General Obligations Law § 5-322.1, do not apply in that state. Helmark has not sufficiently established its prima facie claim that Delaware Law does not apply General Obligations Law § 5-322.1. In the case cited by Helmark, Menkes v. St. Joseph Church, 2011 WL 1235225 [Del. Super., 2011], the court stated that, "Under Delaware Law, a general contractor cannot assign liability for its own wrong doing to a third party," although it is not citing to General Obligations Law § 5-322.1, the application of Delaware Law has the same result. The Delaware Court went on to find that the clause could possibly remain enforceable, if after the offensive language was stricken the remaining obligation would be valid under Delaware law. Applying Delaware Law there remains an issue of fact as to whether the provision can still be enforceable. Falcon did not sufficiently raise an issue of fact on its claim that anti-subrogation statutes bar Helmark's cross-claims.

Motion sequence 004, the plaintiffs motion for summary judgment on liability pursuant to Labor Law §240[1] and §241[6], seeks to have this matter set down for a trial on damages. Plaintiffs' motion pursuant to Labor Law §240[1], is granted only as to defendants ARE-East and Turner. Plaintiff causes of action against Site-Safety, LLC, are severed and dismissed pursuant to stipulation dated March 5, 2010. The remainder of the plaintiffs' motion for summary judgment pursuant to Labor Law §241[6], is denied.

Plaintiffs have met their prima facie case that they are entitled to summary judgment on liability pursuant to Labor Law §240[1]. There are no issues of fact with respect to the need for protection from the effects of gravity and the existence of an elevated risk. The defendants have failed to sufficiently raise an issue of fact or establish that Christopher Gunn was the sole and proximate cause of his injuries. The defendants claim that under OSHA Subpart R, the plaintiff's ability to tie himself to a lifeline was optional and he chose not to. The deposition testimony of Larry Rissmiller, the raising gang foreman, and plaintiff's supervisor on the date of the accident [Mot. Seq. 004, Exh. 16], states that there was no lifeline that was close enough to tie unto and Mr. Gunn was not directed to "tie off" [Mot.. Seq. 004, Exh. 16, pp 61-62]. Plaintiff was directed to the header beam and to use the "come along" by Mr. Rissmiller. Edward Hendrickson, the iron worker foreman and general foreman employed by Falcon on the date of the accident testified at his deposition that additional safety devices and tie offs were not provided because of compliance with OSHA subpart R regulations [Mot Seq. 004, Exh. 17, pp 22-24]. The plaintiff did not intentionally fail to "tie off," he was not directed to do so, and did not have anything to "tie off" to. Site Safety, LLC has

a stipulation with the plaintiffs releasing it from liability as to plaintiff's causes of action. Pursuant to Labor Law §240[1], the remaining defendants, ARE-East and Turner, are strictly liable to the plaintiffs.

Plaintiffs have not sufficiently established a basis for summary judgment under their Labor Law §241 [6] causes of action. The plaintiffs' causes of action pertaining to Industrial Code Sections (12 N.Y.C.R.R.) 23-1.5, 23-1.8, 23-1.10, 23-1.11, 23-1.12, 23-1.15, 23-1.17, 23-1.24, 23-2.1, 23-2.2, 23-4, 23-5, 23-6, 23-7 and Sections 23-8.1[f][2][i] and [f][2][ii] and 23-8.1[f][5], are severed and dismissed. The plaintiffs' claims as to industrial code sections, 23-1.7[b], 23-1.16, 23-2.3[a], 23-2.3[c] and 23-8.2 [c][3] remain. The remainder of plaintiffs' motion for summary judgment pursuant to their Labor Law §241 [6] causes of action is denied, there remain issues fact concerning the violations of the remaining industrial code sections, and as to defenses of contributory and comparative negligence.

Motion sequence 005, is the motion by defendant and third-party defendant, Site Safety, LLC, for summary judgment dismissing plaintiff's causes of action pursuant to the March 5, 2010 stipulation and for an Order dismissing ARE-East and Turner's cross-claims for tort contribution, common law and contractual indemnity and breach of contract. Site Safety, LLC, also seeks to have Helmark and Falcon's cross-claims dismissed or upon a dismissal of the causes of action and cross-claims brought by plaintiffs, ARE-East and Turner, to have the Third-Party action declared moot. Site Safety, LLC's motion is granted as to the plaintiffs' causes of action based on the March 5, 2010 stipulation and those causes of action asserted against it for contractual indemnification on behalf of ARE-East River Science Park, LLC. The action shall continue as to the remaining causes of action.

Site Safety, LLC has not sufficiently made out a prima facie case and there remain issues of fact concerning whether Site Safety is liable to ARE-East and Turner based on common law theories of indemnification and to Turner based on contractual indemnification. ARE-East and Turner have raised an issue of fact concerning Site Safety, LLC's additional responsibilities and whether it had the authority to "direct, supervise and control" the plaintiff's work which resulted in his injuries. Malik Harrison, Site Safety, LLC's safety manager at the site on the date of the accident stated at his deposition that he had more duties than at a typical site, including orienting workers, insurance walkthroughs and making sure the men wore their personal protective equipment [Mot. Seq. 006, Exh. N, pp 11-13]. Site Safety, LLC, did not annex a copy of the deposition transcript of Malik Harrison to its motion papers and relies instead on his affidavit. The affidavit is insufficient to establish that Mr. Harrison's additional duties did not include direction and supervision of safety procedures on the date of the accident. Site Safety, LLC, claims that pursuant to their contract with Turner, Site Safety, LLC, was only retained in an advisory capacity as a "consultant" and was not delegated or assumed Turner's safety duties and obligations as construction manager and contractor at the site [Mot. Seq. 005, Exh.P]. Site Safety, LLC, has not sufficiently met its initial burden of proof entitling it to summary judgment on its claims against Helmark and Falcon for tort contribution and common law indemnity. There remain

issues of fact concerning negligence under common law indemnification and the extent of tort contribution.

Motion sequence 006, by defendants and second third-party plaintiffs, ARE-East and Turner, for summary judgment dismissing plaintiff's causes of action pursuant to Labor Law §241[6] and §200 asserted against them and on their cross-claims and third-party claims against Site Safety, LLC and Helmark, is denied.

ARE-East and Turner have not sufficiently made their prima facie case that they are not liable pursuant to Labor Law §200 because they did not supervise or control Christopher Gunn's work or that they did not have either actual or constructive notice of the unsafe condition that caused the accident. There remain issues of fact under plaintiffs' Labor Law §241[6] causes of action regarding violations of industrial code sections 23-1.7[b], 23-1.16, 23-2.3[a], 23-2.3[c] and 23-8.2 [c][3] and whether they violated the nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers. Kevin Balvin, the structural superintendent for Turner on the date of the accident, stated at his deposition that he was present at the site on the date of the accident, that he performed at least four walkthroughs of the site regularly and that he was aware of an opening of approximately two to three feet in length in the deck which was done by Falcon to provide access to the deck (Mot. Seq. 006, Exh. I, pp. 23, 30-33, 43). There remain issues of fact whether ARE-East and Turner had actual knowledge of the dangerous condition or supervised, directed and controlled the means and methods of the work being performed by Falcon at the time of the accident. There also remain issues of fact on ARE-East and Turner's cross-claims and third-party claims against Site Safety, LLC and Helmark, based on contribution, indemnification and liability.

Accordingly, it is ORDERED that Motion Sequence 003, third-party/second third-party defendant HELMARK STEEL INC.'s, motion for summary judgment pursuant to CPLR §3212, for an Order dismissing the Third-Party Summons and Complaint by SITE SAFETY, LLC, and for dismissal of those causes of action in the Second-Third Party Summons and Complaint by ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY asserted against HELMARK STEEL INC., and to enforce it's cross-claims for contractual and common law indemnification against FALCON STEEL COMPANY, INC. is granted only as to the Third Cause of Action in the Second Third Party Action, which is severed and dismissed. The action shall continue as to the remaining causes of action, and it is further,

ORDERED that Motion Sequence 004, plaintiffs' motion for summary judgment on liability pursuant to Labor Law §240[1] and §241[6], seeking to have this matter set down for a trial on damages, is granted only as to plaintiff's causes of action pursuant to Labor Law §240[1] as to defendants ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY. Plaintiffs' causes of action against SITE-

SAFETY, LLC are severed and dismissed pursuant to stipulation dated March 5, 2010. The action shall continue as to the plaintiffs remaining causes of action, and it is further,

ORDERED that Motion Sequence 005, defendant and third-party defendant, SITE SAFETY, LLC's, motion for summary judgment dismissing plaintiff's causes of action pursuant to the March 5, 2010 stipulation; dismissing ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY's cross-claims, and having HELMARK STEEL INC.'s and FALCON STEEL COMPANY, INC. 's cross-claims dismissed or upon a dismissal of the causes of action and cross-claims brought by plaintiffs, ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY, to have the third-party action declared moot, is granted only as to the plaintiffs' causes of action based on the March 5, 2010 stipulation and those causes of action asserted against it for contractual indemnification on behalf of ARE-EAST RIVER SCIENCE PARK, LLC. The action shall continue as to the remaining causes of action, and it is further,

ORDERED that Motion sequence 006, defendants and second third-party plaintiffs, ARE-EAST RIVER SCIENCE PARK, LLC and TURNER CONSTRUCTION COMPANY's, motion for summary judgment dismissing plaintiff's causes of action pursuant to Labor Law §241[6] and §200 asserted against them and on their cross-claims and third-party claims against SITE SAFETY, LLC and HELMARK STEEL INC., is denied.

The Clerk is to enter judgment accordingly.

Dated: October 17, 2011

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.