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SHORT FORM ORDER

INDEX No. 08-40313
CAL. No. 10-02340OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-1-11
ADJ. DATE 5-24-11
Mot. Seq. # 002 - MotD

LENNON JAMES,

Plaintiff,

- against -

EVERGREEN HOMES CONSTRUCTION CORP., EVERGREEN ESTATES LAND DEVELOPMENT CORP., and EVERGREEN HOMES, INC.,

Defendants.

LAURENCE A. SILVERMAN, ESQ.
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EVERGREEN HOMES CONSTRUCTION CORP., EVERGREEN ESTATES LAND DEVELOPMENT CORP., and EVERGREEN HOMES, INC.,

Third-Party Plaintiffs,

- against -

METRO-URBAN CONTRACTING, INC.,

Defendant.

BRUCE N. LEDERMAN, ESQ.
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139-18 86th Road
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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 19; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

12-4-11

ORDERED that the motion by defendants Evergreen Homes Construction Corp., Evergreen Estates Land Development Corp., and Evergreen Homes, Inc. for summary judgment dismissing the complaint and for summary judgment on their third-party cause of action for contractual indemnification is granted to the extent that (1) it seeks dismissal of so much of the plaintiff's complaint as alleges causes of action for common law negligence and violation of Labor Law §§ 240 (1) and 200, (2) it seeks dismissal of so much of the plaintiff's complaint as alleges a cause of action for violation of Labor Law § 241 (6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.30, 23-2.4, 23-3.3 and 23-4.1, and (3) seeks summary judgment on the third-party cause of action for contractual indemnification in favor of third-party plaintiff Evergreen Homes Construction Corp, and is otherwise denied.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained while working on the construction of a new home for the defendant builders at premises located in Greenlawn, New York. Defendant Evergreen Homes Construction Corp., who owned the premises and managed the construction, hired the plaintiff's employer, third-party defendant Metro-Urban Contracting, Inc., to perform the framing work at the premises. The plaintiff was purportedly injured when he was utilizing an air-compressed nail gun to secure a piece of plywood, and a nail ricocheted back towards him, and struck him in the right eye. In his complaint, the plaintiff alleges that the defendants are liable for his injuries based on common law negligence as well as their violation of Labor Law §§ 240 (1), 241 (6) and 200. The defendants brought a third-party action against third-party defendant Metro-Urban for contractual indemnification, common law indemnification, and failure to procure and maintain insurance.

The defendants now move for summary judgment dismissing the complaint. Specifically, the defendants argue (1) the Labor Law § 240 (1) cause of action should be dismissed because such provision is inapplicable to the facts of this case, (2) the Labor Law § 200 and common law negligence causes of action should be dismissed because they did not direct, control or supervise the plaintiff's work, and neither created nor had notice of the allegedly dangerous condition which caused the plaintiff's injury, and (3) the Labor Law § 241 (6) cause of action should be dismissed because the Industrial Code provisions relied on are either inapplicable to this case or cannot be established. The defendants also move for summary judgment in their favor on their third-party cause of action against Metro-Urban for contractual indemnification.

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 demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of their motion for summary judgment, the defendants submit, *inter alia*, the plaintiff's deposition testimony, the deposition testimony of Anthony Bonavita on behalf of the defendants, the deposition testimony of Lawrence Rapp on behalf of the third-party defendant Metro-Urban, and an agreement between Metro-Urban and Evergreen Homes Construction Corp., dated September 22, 1999.

As is relevant to this motion, the plaintiff testified that, at the time of the incident, he was standing on a ladder and putting up plywood with a nail gun. He was standing on the third step from the top of the eight foot ladder, and was holding the nail gun approximately even with his eyes. A nail ricocheted and struck him in the right eye. He dropped the nail gun and almost fell off the ladder. On the date of the incident, the plaintiff had been employed by Metro-Urban for approximately 14 weeks. The owner of Metro-Urban, Lawrence Rapp, acted as his supervisor on this project. Rapp was at the job site on a daily basis to supervise and to perform work. On the date of the accident, another Metro-Urban employee was acting as his supervisor because Rapp was out. Although plaintiff observed the defendants inspect his work, he never received any instructions from the defendants on how to do, or correct, his work.

According to the plaintiff, he first began doing framing work in 1988, and was an expert at it. The type of nail gun involved in this incident was the nail gun that was utilized for the bulk of rough framing. He received instructions on how to operate the nail gun when he first began doing framing work. The basic operation of the gun is that when you pull the trigger, and the nozzle of the gun is pressed up against something, a nail comes out. The plaintiff testified that there were times where the wood was very hard because it was notched, and that in such situations there was a tendency for the nail to fly back at you. He had observed nails ricochet and strike other workers in the hands and the feet. The plaintiff testified that the nail guns used on the subject project were owned by his employer. Neither he, nor anyone that he knew of, had problems with these nail guns prior to his accident. He did not notice anything out of the ordinary about the operation of this equipment prior to this incident, and did not notice anything out of the ordinary about the plywood that he was securing. According to the plaintiff, he was never advised to use eye protection while using the nail gun. The plaintiff testified that he never used safety goggles or glasses on this project, that no one ever told him to wear safety goggles or glasses on this project, and that his employer never provided him with safety goggles or glasses for use on this project. He also never observed anyone else from Metro-Urban wearing safety glasses or goggles on this project. The plaintiff testified that he did not attend any safety meetings at this project and did not recall ever discussing safety.

Anthony Bonavita testified that he was a partner of the defendant companies, which were builders in the business of new residential home construction. According to Bonavita, whichever corporate entity owned a specific premises was also the entity responsible for overseeing the work at the premises and hiring the subcontractors. Defendant Evergreen Homes Construction Corp. owned the premises at issue and was responsible for hiring all of the subcontractors on the project. Bonavita acted as one of the project managers and would visit the job site to check on the progress of the construction. Bonavita testified that he did not instruct workers as to the work they would perform on a particular day, and did not have the authority to stop work if he saw a subcontractor's employee doing something that was improper. He would, however, approach a worker's employer if he believed the worker was engaged in a practice that was unsafe. According to Bonavita, he had a safety meeting with each of the subcontractors at the start of each job. The subcontractors were required to supply their employees with all of the safety equipment needed to perform the job at issue, and he did not provide any safety devices. Bonavita testified that the defendants had

subcontracted framing work out to Metro-Urban on several prior occasions. Although a purchase order was signed for each individual job, a blanket contract was in existence between the parties. This blanket contract, which was signed in 1999, contained the ongoing obligations of the subcontractor when doing work for Evergreen Homes Construction Corp.

Lawrence Rapp, the principal of Metro-Urban, testified that he first worked with the defendants in 1995, approximately 15 years prior. Since that time his residential framing company had performed work on approximately one hundred homes for the defendants. Rapp testified that he was present on the subject job site daily. He provided all of the tools and equipment required by his employees, including the subject nail gun. He never had any problems with this nail gun, or any of the nail guns, prior to the incident. He was not present at the time of the accident, and had left one of his employees in charge as supervisor. Rapp testified that Evergreen Construction was the general contractor on the job site, owned the property, and directed the work that was to be done. Evergreen did not provide any equipment, did not provide any safety devices to Metro-Urban's employees, and did not direct the means and methods of how Metro-Urban performed its work on the job site.

Rapp testified that safety procedures were implemented as Metro-Urban deemed necessary. He and his employees spoke about common sense safety, but he did not hold an organized safety meeting. According to Rapp, if one of his employees confronted a particular situation, he would explain at that time what the employee should do to be careful. Rapp testified that four pairs of goggles, which belonged to Metro-Urban, were present at the site. He admitted that most of the time, Metro-Urban employees did not wear goggles. The exceptions were when they were chipping concrete and when there was saw dust and it was windy. On these occasions, employees would know to wear eye protection by his example of wearing eye protection. Prior to the accident, Rapp did not require that his employees wear eye protection and did not have a conversation with his employees about eye protection. Rapp testified that he was not familiar with any OSHA rules regarding use of nail guns or use of eye protection. At no time did he suggest, or require, that any of his employees utilize eye protection while using the nail gun. In hindsight, he would recommend that they use safety goggles while operating the nail gun.

The evidence submitted established the defendants' *prima facie* entitlement to summary judgment dismissing so much of the complaint as alleges a cause of action for violation of Labor Law § 240 (1). Labor Law § 240 (1) imposes liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards, where such failure is a proximate cause of the accident (***Henry v Eleventh Ave., L.P.***, __AD3d__, 928 NYS2d 72 [2d Dept 2011]; *see*, ***Balzer v City of New York***, 61 AD3d 796, 797, 877 NYS2d 435 [2d Dept 2009]). Labor Law § 240 (1) was specifically "designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]; *see*, ***Henry v Eleventh Ave., L.P.***, *supra*; ***Balladares v Southgate Owners Corp.***, 40 AD3d 667, 835 NYS2d 693 [2d Dept 2007]; *see also*, ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]). Labor Law § 240 (1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991]). To impose liability pursuant to Labor Law § 240 (1), there must be a violation of the statute and that violation must be a

proximate cause of the plaintiff's injuries (*see*, ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Canosa v Holy Name of Mary R.C. Church***, __AD3d__, 920 NYS2d 390 [2d Dept 2011]; ***Bin Gu v Palm Beach Tan, Inc.***, 81 AD3d 867, 917 NYS2d 661 [2d Dept 2011]; ***Wnetrzak v V.C. Vitanza Sons, Inc.***, 79 AD3d 939, 913 NYS2d 736 [2d Dept 2010]; ***Andro v City of New York***, 62 AD3d 919, 880 NYS2d 111 [2d Dept 2009]; ***Gittleson v Cool Wind Ventilation Corp.***, 46 AD3d 855, 848 NYS2d 709 [2d Dept 2007]). Here, the plaintiff's injuries did not result from an elevation-related hazard within the meaning of Labor Law § 240 (1) (*see*, ***Kanarvogel v Tops Appliance City, Inc.***, 271 AD2d 409, 705 NYS2d 644 [2d Dept 2000]; ***Sorisi v Nineteen New York Props.***, 264 AD2d 835, 695 NYS2d 410 [2d Dept 1999]). In his opposition papers, the plaintiff concedes this fact. Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law § 240 (1) is granted.

With respect to the plaintiff's cause of action to recover damages pursuant to Labor Law § 241 (6), such provision requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see*, ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

Here, the plaintiff alleges that the defendants violated the regulations found at 12 NYCRR §§ 23-1.7, 23-1.30, 23-1.8 (a), 23-2.4, 23-3.3 and 23-4.1. The evidence submitted established the defendants' *prima facie* entitlement to summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241 (6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.30, 23-2.4, 23-3.3 and 23-4.1 on the grounds that such provisions are inapplicable to the facts of this case. 12 NYCRR § 23-1.7 provides for "protection from general hazards," which include "overhead hazards," "falling hazards," "drowning hazards," "slipping hazards," "tripping hazards," "air contaminated or oxygen deficient work areas," and "corrosive substances." The evidence before this court, including the plaintiff's deposition testimony, does not indicate that the plaintiff's injuries arose from any of the hazards specified by this provision (*see*, ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]; ***Hernandez v Columbus Ctr., LLC***, 50 AD3d 597, 857 NYS2d 84 [1st Dept 2008]; ***Guercio v Metlife Inc.***, 15 AD3d 153, 789 NYS2d 120 [2d Dept 2005]; *see also*, ***Timmons v Barrett Paving Materials, Inc.***, 83 AD3d 1473, 920 NYS2d 545 [4th Dept 2011]; ***Forschner v Jucca Co.***, *supra*). Similarly, 12 NYCRR § 23-1.30, which pertains to illumination of work areas, is not applicable to the facts of this case as the plaintiff's testimony does not indicate that his accident was caused by insufficient light or that the amount of lighting fell below

the specific statutory standard (*see*, ***Tucker v Tishman Constr. Corp. of N. Y.***, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [2d Dept 1997]; ***Bennion v Goodyear Tire & Rubber Co.***, 229 AD2d 1003, 645 NYS2d 195 [4th Dept 1996]; *compare*, ***Lucas v KD Dev. Constr. Corp.***, 300 AD2d 634, 752 NYS2d 718 [2d Dept 2002]; ***Sorisi v Nineteen New York Props.***, *supra*). The provisions of 12 NYCRR § 23-2.4 (a) and (b) relate to temporary and permanent flooring in skeleton steel construction. Subdivision (c) of section 23-2.4 relates to buildings with single wood flooring, double wood flooring, or bar joint construction. These provisions have no applicability to the site where the plaintiff was injured (*see*, ***Giordano v Forest City Ratner Cos.***, 43 AD3d 1106, 842 NYS2d 552 [2d Dept 2007]). Likewise, 12 NYCRR § 23-3.3, which relates to the safety measures required during "demolition by hand," and 12 NYCRR § 23-4.1, which relates to the safety measures required during certain "excavations," are inapplicable to the facts of this case where, at the time of the plaintiff's injury, neither demolition nor excavation was taking place at the subject job site (*see*, ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Balladares v Southgate Owners Corp.***, *supra*; ***Ruland v Long Island Power Auth.***, 5 AD3d 580, 774 NYS2d 84 [2d Dept 2004]; *cf.*, ***Martins v Board of Educ. of City of New York***, 82 AD3d 1062, 919 NYS2d 196 [2d Dept 2011]; ***La Veglia v St. Francis Hosp.***, *supra*; ***Campoverde v Bruckner Plaza Assoc., L.P.***, 50 AD3d 836, 855 NYS2d 268 [2d Dept 2008]).

In opposition to this branch of the motion, the plaintiff failed to raise a triable issue of fact regarding the applicability of the aforementioned sections of the Industrial Code (*see*, ***Campoverde v Bruckner Plaza Assoc., L.P.***, *supra*). Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241 (6) based on a violation of Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.30, 23-2.4, 23-3.3 and 23-4.1 is granted.

However, the evidence submitted failed to establish the defendants prima facie entitlement to summary judgment dismissing so much of the complaint as alleges a cause of action for violation of Labor Law 241 (6) as based on a violation of Industrial Code (12 NYCRR) § 23-1.8 (a). That provision of the Industrial Code states that suitable, approved eye protection "shall be provided for and shall be used by all persons" while engaged in "any operation which may endanger the eyes" (*see*, ***Beshay v Eberhart L.P. # 1***, 69 AD3d 779, 893 NYS2d 242 [2d Dept 2010]; ***Fresco v 157 E. 72nd St. Condo.***, 2 AD3d 326, 769 NYS2d 536 [1st Dept 2003]). It cannot be said, as a matter of law, that such regulation is inapplicable to the facts of this case (*see*, ***Dennis v City of New York***, 304 AD2d 611, 758 NYS2d 661 [2d Dept 2003]; *compare*, ***Zamajtys v Cholewa***, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]). Rather, there exists a triable issue of fact as to whether, at the time of his accident, the plaintiff was engaged in work that "may endanger the eyes" so as to require the use of eye protection pursuant to Industrial Code (12NYCRR) 23-1.8 (a) (*cf.*, ***Guryev v Tomchinsky***, __AD3d__, 928 NYS2d 574 [2d Dept 2011]). Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing so much of the complaint as alleges a claim for damages pursuant to Labor Law § 241 (6) based on a violation of Industrial Code (12NYCRR) 23-1.8 (a) is denied.

With respect to the Labor Law § 200 and common-law negligence causes of action, Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 352; ***Gasques v State of New York***, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; ***Dooley v Peerless Importers***, 42 AD3d

199, 837 NYS2d 720 [2d Dept 2007]). To be held liable under Labor Law § 200 and for common-law negligence when, as here, a claim arises out of the use of allegedly dangerous or defective equipment at the job site, the party to be charged must have possessed the authority to supervise or control the means and methods of the work (*see*, ***Reyes v Arco Wentworth Mgt. Corp.***, *supra*; ***Mancuso v MTA N.Y. City Tr.***, 80 AD3d 577, 914 NYS2d 283 [2d Dept 2011]; ***La Veglia v St. Francis Hosp.***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see*, ***La Veglia v St. Francis Hosp.***, *supra*; ***Orellana v Dutcher Ave. Bldrs.***, *supra*; ***Perri v Gilbert Johnson Enters.***, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see*, ***Austin v Consolidated Edison***, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; ***Capolino v Judlau Contr.***, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; ***McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.***, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; ***Garlow v Chappaqua Cent. School Dist.***, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; ***Perri v Gilbert Johnson Enters.***, *supra*; *compare*, ***Mancuso v MTA N.Y. City Tr.***, *supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work is performed (*see*, ***La Veglia v St. Francis Hosp.***, *supra*; *cf.*, ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Hughes v Tishman Constr. Corp.***, 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007]).

Here, the evidence submitted establishes that the defendants did not direct, supervise or control the means or methods by which the plaintiff performed his work (*see*, ***Canosa v Holy Name of Mary R.C. Church***, *supra*; ***Wnetrzak v V.C. Vitanza Sons, Inc.***, *supra*; ***La Veglia v St. Francis Hosp.***, *supra*; ***Rivera v 15 Broad St.***, 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; ***Ramos v Patchogue-Medford School Dist.***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*; ***Dooley v Peerless Importers***, *supra*; ***Blessinger v Estee Lauder Cos.***, 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]). Thus, the defendants established a *prima facie* entitlement to summary judgment dismissing so much of the complaint as seeks to recover damages for a violation of Labor Law § 200 and common law negligence (*see*, ***Dennis v City of New York***, *supra*; ***Kanarvogel v Tops Appliance City, Inc.***, *supra*).

In opposition, the plaintiff failed to raise a triable issue of fact as to the defendants' liability under Labor Law § 200 or common law negligence (*see*, ***Wnetrzak v V.C. Vitanza Sons, Inc.***, *supra*; ***Gittleson v Cool Wind Ventilation Corp.***, *supra*; *see also*, ***Maloney v J.W. Pfeil & Co., Inc.***, *supra*). Accordingly, those branches of the defendants' motion which seeks summary judgment dismissing so much of the complaint as seeks to recover damages pursuant to Labor Law § 200 and common law negligence are granted.

Lastly, turning to the defendants' third-party cause of action for contractual indemnification against Metro-Urban, contractual indemnification is permitted where it is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (Workers' Compensation Law § 11; ***Spiegler v Gerken Bldg. Corp.***, *supra*; *see*, ***Tullino v Pyramid Cos.***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Mantovani v Whiting-Turner Contr. Co.***, 55 AD3d

799, 869 NYS2d 544 [2d Dept 2008]; ***Castilla v K.A.B. Realty, Inc.***, *supra*). The right to contractual indemnification depends upon the specific language of the contract between the parties (*see*, ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]) and "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). In this action, the defendants rely on a contract entered between Evergreen Homes Construction Corp. and Metro-Urban Contracting, Inc., dated September 22, 1999. This agreement purports to apply "to any work performed by [Metro-Urban] for and on behalf of Evergreen Homes Construction Corp., AFM Realty Corp. as well as any and all other affiliated entities and business ventures of the aforementioned." With respect to indemnity the agreement provides, in pertinent part, "to the fullest extent permissible by law the subcontractor agrees to indemnify and hold the General Contractor, including the General Contractor's agents, and employees harmless from and against any and all losses, claims, damages, penalties, or expenses, including reasonable attorney's fees arising from bodily injury or death to any person and/or property damage including loss of use arising out of or in any way relating to the work performed or omission caused by the subcontractor, agents, or employees of the subcontractor as well as subcontractors hired by the subcontractor under this contract."

At the outset, the defendants failed to demonstrate a *prima facie* showing of entitlement to summary judgment insofar as the cause of action in the third-party complaint seeks contractual indemnification of Evergreen Estates Land Development Corp. and Evergreen Homes Inc. In this regard, a review of the contract submitted reveals that Metro-Urban did not contract with Evergreen Estates Land Development Corp. and Evergreen Homes Inc., but with Evergreen Homes Construction Corp. Moreover, the evidence submitted fails to establish that Metro-Urban expressly agreed to contribution to, or indemnification of, these parties under the terms of its contract with Evergreen Homes Construction Corp. (*compare*, ***Mantovani v Whiting-Turner Contr. Co.***, *supra*). Accordingly, the branch of the motion by the defendants for summary judgment in their favor insofar as they assert a cause of action in their third-party complaint against Metro-Urban for contractual indemnification of Evergreen Estates Land Development Corp. and Evergreen Homes Inc., is denied.

In contrast, the defendants established a *prima facie* entitlement to summary judgment in their favor insofar as they assert a cause of action in their third-party complaint for contractual indemnification of Evergreen Homes Construction Corp. by Metro-Urban. Metro-Urban expressly agreed to indemnify Evergreen Homes Construction Corp. "to the fullest extent permissible by law" from and against any claims or expenses, including reasonable attorney's fees, arising from bodily injury to any person arising out of, or in any way relating to, the work performed by Metro-Urban. As the instant matter involves a claim arising from bodily injury to the plaintiff which arises out of the work performed by Metro-Urban, Evergreen Homes Construction Corp. is entitled to indemnification from Metro-Urban under the express terms of the contract (*see*, ***Rodrigues v N & S Bldg. Contrs., Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***LaRosa v Internap Network Servs. Corp.***, *supra*). This provision does not violate General Obligations Law § 5-322.1, as it provides for indemnification "to the fullest extent permissible by law" (*see*, ***Ulrich v Motor Parkway Props., LLC***, *supra*). In addition, Evergreen Homes Construction Corp. established that the plaintiff's injuries did not result from its negligence, and that its liability, if any, is purely vicarious under Labor Law § 241 (6) (*see*, ***Fresco v 157 E. 72nd St. Condo.***, *supra*; ***Kanarvogel v Tops Appliance City, Inc.***, *supra*).

Metro-Urban has not submitted opposition to this motion and, therefore, has failed to raise a triable issue of fact. Accordingly, the branch of the motion by the defendants/third-party plaintiffs for summary judgment in their favor insofar as they assert a cause of action in their third-party complaint against Metro-Urban for contractual indemnification of Evergreen Homes Construction Corp. is granted.

Dated: NOV. 3, 2011

W. Gerard Asher
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**