SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

GERMAN PACHECO,

Plaintiff,

- against -

HALSTED COMMUNICATION, LTD., MOBILPRO INSTALLATION SERVICES, LLC, MICHAEL MARTHALER and DEBRA MARTHALER, and RELATED ACTIONS,

Defendants.

Index No.: 30885/09

Motion Date: 5/24/12

Motion No.: 39 & 40

Motion Seq.: 4 & 5

- x

MOBILPRO INSTALLATION SERVICES, LLC,

Third-Party Plaintiff,

- against -

SATELLITE GP COMMUNICATIONS, INC.,

Third-Party Defendant.

Third-Party Index No. 350139/10

- x

HALSTEAD COMMUNICATIONS, LTD.,

Second Third-Party Plaintiff,

- against -

SATELLITE GP COMMUNICATIONS, INC.,

Second Third-Party Defendant.

Second Third-Party Index No. 350348/10

- x

The following papers numbered 1 to 22 read on this motion by defendant/second third-party plaintiff Halsted Communications, Ltd. (Halsted) for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), 200, and common-law negligence against it and for summary judgment in its favor on its cross claims for contractual and common-law indemnification against

defendant/third-party plaintiff Mobilpro Installation Services, LLC (Mobilpro) and its third-party causes of action for contractual and common-law indemnification asserted against third-party defendant/second third-party defendant Satellite GP Communications, Inc. (Satellite); and on this motion by Mobilpro for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), 200, and common-law negligence insofar as asserted against it; and on this cross motion by plaintiff for partial summary judgment against defendants on the issue of liability under Labor Law § 240(1).

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1 - 8
Notice of Cross Motion - Affidavits - Exhibits	9 - 12
Answering Affidavits - Exhibits	13 - 18
Reply Affidavits	19 - 22

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Halsted had a contract with Direct TV to install and service satellite television equipment sold or rented by Direct TV. Halsted, in turn, subcontracted to Mobilpro a portion of the services covered by its contract with Direct TV. Mobilpro hired Satellite as a subcontractor to upgrade a satellite dish at the premises owned or occupied by defendants Michael Marthaler and Debra Marthaler (Marthaler defendants). Plaintiff was an owner of Satellite. On November 28, 2007, while upgrading the satellite system at the Marthaler defendants' residence, plaintiff was allegedly injured when he fell off a ladder as he descended the roof. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. Thereafter, on March 17, 2010, Mobilpro commenced a third-party action against Satellite, alleging breach of contract for failure to procure insurance and common-law indemnification and contribution. On July 19, 2010, Halsted instituted a second third-party action against Satellite, alleging breach of contract for failure to procure insurance and common-law indemnification and contribution.

The court will not entertain Mobilpro's untimely motion for summary judgment. In the absence of a court order or rule to the contrary, CPLR 3212(a) requires summary judgment motions to be made no later than 120 days after the filing of the note of

issue, except with leave of court on good cause shown (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]). By an order of this court dated October 14, 2011, all summary judgment motions were required to be "filed no later than December 22, 2011." Mobilpro's motion for summary judgment was filed on January 30, 2012, almost one month after the court-ordered deadline, and Mobilpro has not offered any excuse for the delay.

In addition, with respect to plaintiff's cross motion, a cross motion for summary judgment made after the expiration of the statutory period or court-ordered deadline may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made on grounds nearly identical to that of the cross motion (*see Grande v Peteroy*, 39 AD3d 590 [2007]). Here, plaintiff's cross motion for summary judgment was filed on March 15, 2012, almost three months after the court-ordered deadline of December 22, 2011. Although plaintiff's cross motion and Halsted's timely motion both seek summary judgment on the issue of Halsted's liability under Labor Law § 240(1), the remaining issues presented by their respective cross motion and motion are not nearly identical. Specifically, plaintiff's cross motion also seeks summary judgment against Mobilpro and the Marthaler defendants on the issue of their liability under Labor Law § 240(1), whereas Halsted's motion only seeks summary judgment on the issue of its own liability to plaintiff under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. Under these circumstances, those branches of plaintiff's cross motion for summary judgment against Mobilpro and the Marthaler defendants on the issue of liability under Labor Law § 240(1) are time-barred and will not be considered herein.

The court will now address that branch of Halsted's motion for summary judgment dismissing the Labor Law § 240(1) claim against it and the branch of plaintiff's cross motion for partial summary judgment against Halsted on said cause of action. To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985]), a claim under Labor Law § 240(1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (*see Plass v Solotoff*, 5 AD3d 365 [2004]). On his cross motion, plaintiff established, prima facie, that defendants violated Labor Law § 240(1) and that

this violation was a proximate cause of plaintiff's injuries (*see Norwood v Whiting-Turner Contr. Co.*, 40 AD3d 718 [2007]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762-763 [2006]). At his deposition, plaintiff testified that, as he was descending the ladder after working on the satellite dish on the roof, it slid to the left, causing plaintiff to fall to the ground below.

In support of its motion, Halsted asserts that plaintiff's own negligent conduct in leaning the ladder against the gutters on the roof, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident. In light of plaintiff's deposition testimony indicating that, after having requested a longer ladder to reach the roof, plaintiff was instructed by Halsted to use the ladder which was available at the work site, Halsted failed to show that plaintiff's actions were the sole proximate cause of the accident (*see e.g. Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749 [2009]; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879 [2006]. In any event, where, as here, a Labor Law § 240(1) violation is a proximate cause of an accident, the injured plaintiff's conduct cannot be deemed solely to blame for his injuries (*see Blake*, 1 NY3d at 290-291), and any comparative negligence on plaintiff's behalf is not a defense to a Labor Law § 240(1) claim (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). Therefore, that branch of Halsted's motion for summary judgment dismissing plaintiff's cause of action under Labor Law § 240(1) against it is denied, and the branch of plaintiff's cross motion for partial summary judgment against Halsted on the issue of liability under Labor Law § 240(1) is granted.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). Plaintiff herein alleges violations of Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7, 23-1.16, and 23-1.21 and Occupational Safety and Health Administration § 450(a).

Halsted established, prima facie, that the Industrial Code provisions cited by plaintiff are either insufficiently specific to support liability under Labor Law § 241(6) or inapplicable to the facts of the instant case. Industrial Code section 12 NYCRR 23-1.5 merely sets forth general safety standards and, thus, does not provide a basis for liability under Labor Law § 241(6) (*see Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2005]; *Sparkes v Berger*, 11 AD3d 601 [2004]). Likewise, it has

been held that the alleged violation of OSHA standards does not provide a basis for liability under Labor Law § 241(6) (*see Lin*, 18 AD3d at 802). Industrial Code provision 12 NYCRR 23-1.7, which sets forth safety standards for overhead protection from falling objects or materials, hazardous openings, bridge or highway overpass construction, drowning hazards, slipping and tripping hazards, vertical passages, air contamination of the work site, and corrosive substances, is inapplicable to this case because plaintiff's accident did not involve any of these hazards. Additionally, 12 NYCRR 23-1.16, which sets forth safety standards for safety belts, harnesses, tail lines, and lifelines, does not apply here because plaintiff was not provided with any such devices (*see Smith v Cari, LLC*, 50 AD3d 879, 881 [2008]). Notably, plaintiff failed to oppose dismissal of the aforementioned Industrial Code provisions and, therefore, the court deems the Labor Law § 241(6) claim premised upon them abandoned.

In his opposition, plaintiff relies primarily on 12 NYCRR 23-1.21(b)(4)(v) to support his Labor Law § 241(6) claim. Industrial Code provision 12 NYCRR 23-1.21(b)(4)(v) provides that "the upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder." Contrary to plaintiff's contention, this regulation is inapplicable here because plaintiff testified at his deposition that the upper end of the ladder was leaning against the gutters, which are "soft" and "bend" due to the application of pressure, and, thus, the ladder was not leaning against a slippery surface. In view of the foregoing, the branch of Halsted's motion for summary judgment dismissing the Labor Law § 241(6) cause of action asserted against it is granted.

Turning to that branch of Halsted's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it, Halsted failed to establish its entitlement to judgment as a matter of law. When a claim arises out of alleged defects or dangers in the methods or materials of the work rather than the condition of the premises, where as here, recovery against the owner or general contractor cannot be had under the common law or Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2006]). In this case, Halsted failed to submit any evidence demonstrating that it did not have the authority to exercise supervision or control over the manner of the injured plaintiff's work on the satellite dish. Given that Halsted failed to meet

its prima facie burden, the court need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The branch of Halsted's motion for summary judgment on its cross claim for contractual indemnification against Mobilpro must be denied. The right to contractual indemnification depends upon the specific language of the contract (*see Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2005]). In addition, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor (General Obligations Law § 5-322.1; *see Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2009]). Paragraph 5a of the contract between Halsted and Mobilpro states, "Contractor agrees to indemnify and hold Halsted Communications harmless from all claims, losses, expenses, fees including attorney fees, costs, settlements and judgments arising out of the performance of the Services." This broad indemnification provision runs afoul of General Obligations Law § 5-322.1 because it shifts to Mobilpro responsibility for all claims regardless of Halsted's own negligence (*see DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656 [2008]; *Wolfe v Long Is. Power Auth.*, 34 AD3d 575 [2006]; *Gibson v Bally Total Fitness Corp.*, 1 AD3d 477 [2003]). Furthermore, as previously discussed, Halsted has failed to demonstrate its freedom from negligence with regard to the underlying accident.

Inasmuch as the second third-party complaint (Halsted's exhibit E) does not allege a third-party cause of action against Satellite for contractual indemnification, the branch of Halsted's motion for summary judgment seeking summary judgment on the third-party claim for contractual indemnification against Satellite is denied.

With respect to those branches of Halsted's motion seeking summary judgment in its favor on its cross claim against Mobilpro and its third-party cause of action against Satellite for common-law indemnification and contribution, Halsted did not address those issues in its moving papers and failed to submit any evidence to demonstrate its entitlement to judgment as a matter of law. In any event, as previously discussed, Halsted did not establish its freedom from negligence with regard to the happening of plaintiff's accident. As such, those branches of Halsted's motion for summary judgment on its cross claim against Mobilpro and its third-party claim against Satellite for common-law indemnification and contribution are denied.

Accordingly, the branch of Halsted's motion for summary judgment dismissing plaintiff's claim under Labor Law § 241(6) against it is granted. In all other respects, Halsted's summary judgment motion is denied. Mobilpro's motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), 200, and common-law negligence insofar as asserted against it is denied in its entirety. The cross motion by plaintiff for partial summary judgment against Halsted on the issue of liability under Labor Law § 240(1) is granted. In all other respects, plaintiff's cross motion is denied.

Dated: Long Island City, NY
September 17, 2012

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ROBERT J. McDONALD
J.S.C.