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

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 17

KELLY MARIN and PAMELA MORALES,

Plaintiffs,

- against -

THE DOE FUND, INC., *et al*,

Defendants.

INDEX NOs.: 106605/2009
590357/2010
590700/2011

MOTION SEQ. NO.: 003

DECISION and ORDER

Motion by plaintiffs for partial summary judgment on Labor Law 240(1) Cause of Action

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Cross-Motions: ☐ No ☑ Yes **Number of Cross-Motions:** 2

Cross-Motion by Defendants Doe Fund, Knickerbocker, Atlantic, & Boricua Village for Summary Judgment
Cross-Motion by Defendant Pro Safety for Summary Judgment and Indemnification from Defendant Atlantic

Upon the foregoing papers, it is hereby ordered that this Motion and the Cross-Motions are granted only to the extent set forth in the attached separate written Decision and Order.

Dated: October 15, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☐ **Final Disposition**		☑ **Non-Final Disposition**	
Motion is:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other
Cross-Motions are:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
	☐ DO NOT POST		☐ REFERENCE	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

KELLY MARIN and PAMELA MORALES,

Plaintiffs,

-against-

THE DOE FUND, INC., KNICKERBOCKER CONSTRUCTION II LLC, ATLANTIC CONSTRUCTION GROUP LLC, BORICUA VILLAGE ASSOCIATES A2, L.P. and Pro Safety SERVICES LLC,

Defendants.

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DECISION & ORDER

Motion Sequence No.: 003

Index No.: 106605/2009

THE DOE FUND, INC., KNICKERBOCKER CONSTRUCTION II LLC and ATLANTIC CONSTRUCTION GROUP LLC,

Third-Party Plaintiffs,

-against-

NEW YORK PRE-CAST LLC and NEW YORK STEEL FABRICATORS,

Third-Party Defendants.

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Index No.: 590357/2010

Pro Safety SERVICES LLC,

Second Third-Party Plaintiffs,

-against-

NEW YORK PRE-CAST LLC and NEW YORK STEEL FABRICATORS,

Second Third-Party Defendants.

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Index No.: 590700/2011

HON. SHLOMO S. HAGLER, J.:

These are two consolidated actions to recover damages sustained by a welder when he fell from a steel beam while working at a construction site located at 508 East 163rd Street, Bronx, New York on or about October 1, 2008 ("the accident date").

In motion sequence number 003, plaintiffs Kelly Marin ("plaintiff" or "Marin") and Pamela Morales (collectively, "plaintiffs") move, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the common-law negligence and Labor Law §§ 200 and 240(1) claims against defendants The Doe Fund, Inc. ("Doe"), Knickerbocker Construction II LLC ("Knickerbocker"), Atlantic Construction Group ("Atlantic"), Boricua Village Associates A2 L.P. ("Boricua") (collectively, "Doe defendants") and Pro Safety Services LLC ("Pro Safety").

Doe defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them. Defendant Pro Safety cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it, as well as granting summary judgment in its favor on its contractual indemnification cross-claim against defendant Atlantic.

BACKGROUND/STATEMENT OF FACTS

On the accident date, defendant Doe owned the land under the building where the accident took place, and Doe leased the land to defendant Boricua. The building, known as A2 ("the building" or "A2") was owned by Boricua and was part of a project known as Boricua Village ("the project"), which involved the construction of nine buildings, eight of which are residential and one of which is a college. Defendant Atlantic was the company created for the development of the project. Boricua hired defendant Knickerbocker to serve as general contractor for the project. Atlantic hired defendant Pro Safety to serve as a site safety consultant. Pro Safety's duties on the project entailed observing and reporting safety conditions at the site and making sure that the directives of the New York City Department of Buildings were followed. On the day of the accident,

plaintiff worked as a welder for third-party/second third-party defendants New York Pre-Cast and New York Steel Fabricators (collectively, "Pre-Cast"), subcontractors on the building.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that he was working for Pre-Cast on the accident date doing iron work (Plaintiff's EBT at pp. 25, 27-28, attached as Exhibit "F" to Plaintiffs' Notice of Motion). Plaintiff testified that his direct supervisor, a man named "Train," and his foreman, Angelo Cedeno ("Cedeno"), both Pre-Cast employees, gave him instructions as to where to report to work on the project, as well as supervised his work (*id.*, at pp. 26, 29-31).

On the day of the accident, Train instructed plaintiff to use a wrench to tighten the bolts "[b]etween [a horizontal] beam and the column" with a coworker, "Jose" (*id.*, at pp. 34, 36-37). The plaintiff performed this work while standing on top of a steel beam, located 15 to 20 feet off the ground, upon which plaintiff would climb (*id.*, at pp. 48-49, 61-64). In order to tighten the bolts the plaintiff used an electric drill and/or a wrench to tighten the bolts (*id.*, at pp. 39-43). Plaintiff's accident occurred while he was tightening a bolt with a wrench, when "the wrench slipped from the bolt" and he fell backwards to the floor (*id.* at pp. 39, 62, 65-66).

Plaintiff testified that he was wearing a safety harness and a hard hat at the time of the accident (*id.*, at pp. 60, 64). However, there was neither netting beneath where he was working nor scaffolding in the area (*id.*, at p. 64). Although in the past, plaintiff would tie himself off to the beam he was working from with a safety line attached to his harness, plaintiff could not tie off on the day of the accident, "[b]ecause there wasn't a beam where I could do it" (*id.* at pp. 60-62).

Plaintiff explained that the reason that he could not tie off to the beam on which he was working was "[b]ecause the dimensions of the beam was larger than his line was" (*id.*, at p. 62).

Plaintiff also testified that on the accident date at the location where his accident occurred, there were no safety lines nor a place to which he could secure his lanyard, no safety netting or scaffolds in place (*id.*, at pp. 99-100). Plaintiff further testified he was never told by anyone to utilize a scaffold or a ladder to perform his work nor was he told not to climb onto the beam without a ladder, scaffold or safety lines (*id.*, at pp. 101-102). In addition, plaintiff asserted that he was never provided with any equipment or material necessary to erect a fall protection system on this project (*id.*, at p. 100).

Deposition Testimony of Trent Skinner, Project Manager for Pre-Cast

Trent Skinner ("Skinner") testified that he was employed as a project manager by Pre-Cast on the accident date (Skinner EBT, attached as Exhibit "B" to Doe Defendants' Counsel's Affirmation in Opposition to Plaintiff's Motion, at pp. 7-8, 9-10). New York Pre-Cast manufactured the concrete hollow core plank flooring and New York Steel Fabricators served as the steel erection company on the project (*id.*, at p. 9). Skinner testified that plaintiff was working at a height from a steel beam when the accident occurred and that the Pre-Cast foreman told plaintiff to install bolts on the day of the accident (*id.*, at pp. 20-22). Skinner explained that "[t]he foreman is responsible for telling [plaintiff] to do the work, and [plaintiff] was supposed to follow the instructions of the foreman" (*id.*, at p. 22). He also testified that "the foreman would tell the guys what to do and what has to be done that day" (*id.*, at p. 23). Plaintiff's direct supervisor would also notify plaintiff if he noticed him working in an unsafe manner (*id.*, at p. 88). Skinner noted that the workers were in

charge of making sure that they were properly tied off when working at heights and the workers' foremen would supervise or approve how the workers were tied off (*id.*, at pp. 102-103).

Skinner also testified that plaintiff could not have been tied off, or he would not have fallen from the steel beam that he was working on (*id.*, at p. 27). He stated that plaintiff was provided with a hard hat and a harness with a clip on it (*id.*). He explained that "since [sometimes] you can't clip to beams . . . [y]ou have to use a steel strap to put around the beam to tie off to" (*id.*). In that case,"if there was not a place for him to hook his harness to, he could put a choker, which is like a steel strap, around the beam and then tie off to it" (*id.*, at p. 29).

Skinner maintained that the workers were made aware that there were chokers available on the site, and that they knew that when "there's no room for them to hook, they would have to use the steel chokers" (*id.*, at pp. 30-31). When pressed, Skinner could not state exactly where or when the workers were told about the chokers. Moreover, Skinner did not have any knowledge as to whether or not there was anywhere for plaintiff to tie off to at the time of the accident, or whether plaintiff was specifically told to use a steel choker to tie off to in the event he could not tie off to the beam (*id.*, at pp. 30-32, 105). In fact, at one point in his deposition, Skinner testified that the chokers were kept in the gang boxes (*id.*, at p. 31) and, at another point, Skinner testified that chokers were stored in the basement of the building (*id.*, at pp. 94, 105). Skinner could not state how many chokers were available at the site (*id.*, at p. 94). Skinner also testified that Pro Safety did not provide Pre-Cast with any safety equipment, and Pro Safety did not instruct the Pre-Cast workers as to what work needed to be done, or how to perform that work (*id.*, at pp. 65, 74).

Deposition Testimony of Marc Altheim, an Owner of Knickerbocker, Boricua and Atlantic

Marc Altheim ("Altheim") testified that he is a co-owner of Atlantic, a real estate development company, as well as an owner of Boricua and Knickerbocker (Altheim EBT at pp. 8-10, attached as Exhibit G to Plaintiffs' Notice of Motion). Altheim also testified that, other than being the lessor of the land, Doe did not have any day-to-day activities at the project (*id.*, at p. 8). Altheim also testified that defendant Atlantic had no connection with the construction of A2 (*id.*, at pp. 8, 10). In addition, defendant Knickerbocker did not provide any of the equipment on site, and no one from Knickerbocker had any specific knowledge about the procedures for working at heights or general safety issues (*id.*, at pp. 29-30). Altheim testified that the particular subcontractor doing the work would be responsible for its own safety procedures when working at heights (*id.*).

Altheim further testified that Knickerbocker did not have any employees who did day-to-day construction type work (*id.*, at p. 34). Knickerbocker did have a superintendent on the project who oversaw the work, and "who walked around and was generally in charge of things . . . on the A2 building" (*id.*, at pp. 17, 18-19). Altheim noted that Pro Safety was hired to provide safety services on the project and their duties included ensuring that the job was safe "from the standpoint of the New York City Department of Buildings" (*id.*, at 34).

Affidavit of John McCarthy, President of Pro Safety

In his affidavit, John McCarthy ("McCarthy"), president of Pro Safety, stated that, on May 24, 2006, Pro Safety and defendant Atlantic entered into an agreement known as the "Consultant Agreement" (McCarthy Affidavit in Support of Pro Safety's Cross-Motion, dated July 25, 2012 ["McCarthy Aff."], at ¶ 2; Consultant Agreement, attached as Exhibit "A" to Pro Safety's Memo

of Law). McCarthy stated that Pro Safety did not have the authority to supervise, direct or control the work of any of the employees on the job site, including plaintiff (McCarthy Aff. at ¶ 6). In addition, Pro Safety did not supply any of the safety equipment used at the job site (*id.*,).

Affidavit of Philip Nelson, Pro Safety Safety Consultant

Philip Nelson ("Nelson"), employed as a safety consultant with defendant Pro Safety at the project on the accident date, stated in his affidavit that his duties and responsibilities as safety consultant on the project were limited to observing the workers and notifying either Atlantic or Knickerbocker if a safety violation was noticed (Nelson Affidavit in Support of Pro Safety's Cross-Motion, dated July 25, 2012 [Nelson Aff."], at ¶¶ 2, 6). As an employee of Pro Safety, Nelson did not have the authority to control, direct or supervise any of the work of the employees at the job site, including plaintiff (*id.*, at ¶ 7). In addition, Pro Safety did not supply any safety equipment on the project (*id.*, at ¶ 8).

DISCUSSION

" 'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case' " (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for

summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiffs' Labor Law § 240(1) Claim Against Doe Defendants and Pro Safety

Plaintiffs move for summary judgment as to liability on their Labor Law § 240(1) claim as against Doe defendants and Pro Safety. Doe defendants and Pro Safety cross-move for summary judgment dismissing the Labor Law § 240(1) claim against them. Labor Law § 240(1), also known as the Scaffold Law, provides in relevant part that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

" 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person' " (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (*Binetti v MK W. St. Co.*, 239 AD2d 214, 214-215 [1st Dept 1997]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500-501]).

To prevail on a Labor Law § 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v*

Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Labor Law § 240(1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

However, "[a]lthough the statute was intended to protect a worker against gravity-related risks arising from the work being performed, not every gravity-related hazard falls within the scope of the statute [citation omitted]" (*Melo v Consolidated Edison Co. of N.Y.*, 246 AD2d 459, 460 [1st Dept 1998], *affd* 92 NY2d 909 [1998]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). "Rather, the statute addresses only exceptionally dangerous conditions posed by elevation differentials, when the work site itself is elevated or is positioned below the area where materials or load are hoisted or secured [internal quotation marks and citations omitted]" (*id.*; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d at 263).

Initially, it should be noted that, as owners of the land and building where the accident occurred, defendants Doe and Boricua may be liable to plaintiffs under Labor Law §§ 240(1) and 241(6). In addition, as general contractor of the project, defendant Knickerbocker may be liable to plaintiffs under Labor Law §§ 240(1) and 241(6). However, it must be determined whether

defendants Atlantic and Pro Safety may be vicariously liable for plaintiff's injuries as statutory agents of the owners. " 'When the work giving rise to [the duty to conform to the requirements of § 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor' " (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 293]). The parties' actual course of practice is controlling for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240(1) (*Ortega v Catamount Constr. Corp.*, 264 AD2d 323, 324 [1st Dept 1999]).

As no evidence has been put forth in this case to establish that Atlantic, the development company created for the project, directed or supervised any of the work on the project, plaintiffs are not entitled to summary judgment in their favor on the Labor Law §§ 240(1) and 241(6) claims against Atlantic. To that effect, plaintiff and Skinner testified that plaintiff's supervisor and foreman, both Pre-Cast employees, gave him his work instructions and supervised his work at the site. In addition, Altheim testified that the subcontractors were in charge of their own safety procedures regarding working at heights. Accordingly, defendant Atlantic is entitled to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims against it.

As to Pro Safety, the cases involving liability of a site safety manager for injuries arising out of construction work at construction sites also turn on whether the site safety manager can be deemed an "agent" of the owner or general contractor (*Greaves v Obayashi Corp.*, 61 AD3d 570, 571 [1st Dept 2009]; *Doherty v City of New York*, 16 AD3d 124, 125 [1st Dept 2005] [safety consultant was not liable in personal injury action brought by worker, given that it was not the supplier of the safety

equipment, did not direct, supervise or control worker or his coworker in the performance of their duties]). A review of the evidence in this case reveals that Pro Safety was merely a site safety consultant, with only general responsibility to oversee site safety and no authority to direct and control the work of the employees at the site, and no duty to remedy unsafe conditions. Skinner testified that Pro Safety did not provide Pre-Cast with any safety equipment. In addition, Skinner testified that Pro Safety did not instruct the Pre-Cast workers as to what work was to be done, or how to perform that work. McCarthy and Nelson of Pro Safety stated in their affidavits that no one from Pro Safety had any authority to supervise, direct or control the work of any of the employees on the job site, including plaintiff.

As Pro Safety lacked the requisite indicia of agency to be considered a proper Labor Law defendant, plaintiffs are not entitled to summary judgment in their favor on their Labor Law §§ 240(1) and 241(6) claims against Pro Safety, and Pro Safety is entitled to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims against it (*see Walls v Turner Constr. Co.*, 4 NY3d at 864; *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *Lazarou v Turner Constr. Co.*, 18 AD3d 398, 399 [1st Dept 2005]).

Labor Law § 240(1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (*Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999] [defendant liable under Labor Law § 240(1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder]). Here, plaintiffs put forth a prima facie showing that plaintiff was injured as a result of Doe defendants' failure to provide plaintiff with any safety devices to protect him against the risk of falling from the beam that he was working on at the time of the accident (*see Kaminski v Carlyle One*, 51 AD3d 473,

474 [1st Dept 2008] [the defendants' failure to provide the plaintiff with any safety devices to protect him against the risk of falling created by his need to lean over the side of the bridge to nail side panes resulted in Labor Law § 240(1) liability]).

"[I]n light of the failure to provide plaintiff with any safety device to protect him against the risk of falling, 'the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries' " (*Gontarzewski v City of New York*, 257 AD2d 394, 395 [1st Dept 1999], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]). Moreover, Doe defendants did not offer sufficient evidence to refute plaintiff's showing or to raise a bona fide issue of fact as to how the accident occurred (*see Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]). It should also be noted that, contrary to Doe defendants' contention, "[t]here is no bar to granting partial summary judgment as to liability, on plaintiff's statement alone, since no bona fide issue as to his credibility exists" (*Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]; *see also Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004] [the fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment on his behalf]).

Doe defendants also argue that they are not liable for plaintiff's injuries under Labor Law § 240(1) alleging plaintiff was the sole proximate cause of his injuries. To this effect, Doe defendants argue that plaintiff was negligent in not tying his harness off, and, if he was unable to tie off to the beam he was working on, he should have taken it upon himself to erect his own fall arrest system by placing a steel choker around the beam and tying off to it. Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240(1) (*see Robinson*

v East Med. Ctr., LP, 6 NY3d 550, 554 [2006] [plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004] [where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240(1) for injuries caused solely by his violation of those instructions]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290).

However, in such a case as here, comparative fault is not a defense to a Labor Law § 240(1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Jamison v GSL Enters.*, 274 AD2d 356, 361 [1st Dept 2000]). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is ***a*** cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]).

Further, it has not been demonstrated that this is a case of a recalcitrant worker, where a plaintiff purposely declined to use safety devices provided (*see Stolt v General Foods Corp.*, 81

NY2d 918, 920 [1993]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012]; *Lanier v Metropolitan Tr. Auth.*, 37 AD3d 425, 426 [2d Dept 2007] [no Labor Law liability where plaintiff was provided with safety devices, was present for several safety meetings where he was instructed to use said safety devices, and yet, he intentionally chose not to use those devices in direct violation of the instructions]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403, 404 [1st Dept 2005]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1st Dept 2003]; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228, 228-229 [1st Dept 2002]). In *Stolt*, the Court of Appeals held that the recalcitrant worker defense:

> "requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer. It has no application where, as here, no adequate safety devices were provided. We note that an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device' "

(*Stolt*, 81 NY2d at 920 [citations omitted]).

Importantly, "the requirement of a worker's 'normal and logical response' to get a safety device rather than having one furnished or erected for him is limited to those situations when workers know the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for them to do so" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 238 [1st Dept 2009]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008] [generic statements of availability of safety devices were insufficient to create an issue of fact as to whether the plaintiff was the sole proximate cause of his injury]; *Robinson v East Med. Ctr., LP*, 6 NY3d at 554-555).

Such a scenario does not exist here. While Skinner testified that there were steel chokers somewhere on site that could be wrapped around the beam for tying off, his testimony did not establish that plaintiff was specifically told to utilize them, that plaintiff was aware of their location, or that he had a habit of using them. Although Skinner testified that the workers were made aware that there were chokers available on the site, and that they knew that when "there's no room for them to hook, they would have to use the steel chokers" (Skinner EBT at p. 22 , attached as Exhibit "B" to Doe Defendants' Counsel's Affirmation in Opposition to Plaintiff's Motion), Skinner acknowledged that he did not have any knowledge as to whether plaintiff was specifically told to use a steel choker. At one point in his deposition, Skinner testified that the chokers were kept on the gang boxes box, and at another point, Skinner testified that chokers would be stored in the basement of the building. Moreover, when pressed, Skinner could not state exactly where or when the workers were told about the existence of the steel chokers and could not state how many chokers were available at the site.. As such, Doe defendants have failed to establish that plaintiff was a recalcitrant worker.

Plaintiffs are, therefore, entitled to summary judgment in their favor on his Labor Law § 240(1) claim against Doe defendants, and Doe defendants are not entitled to summary judgment dismissing said claim.

Plaintiff's Labor Law § 241(6) Claim

Initially, it should be noted that, while Doe defendants and Pro Safety move for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim against them, plaintiffs do not move for summary judgment in their favor as to liability on the Labor Law § 241(6) claim.

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated an applicable, specific implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7(b)(1), 23-1.15 and 23-1.16, plaintiff does not address those Industrial Code violations in his motion papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, Doe defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241(6) claim predicated on those provisions.

Industrial Code section 23-1.7(b)(1), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by safety railing, is sufficiently

concrete in its specifications to support plaintiff's Labor Law § 241(6) claim (*Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). Here, Doe defendants are entitled to summary judgment dismissing that part of the Labor Law § 241(6) claim predicated on a violation of Industrial Code section 23-1.7(b)(1), because this provision does not apply to the facts of this case, since plaintiff was not injured by a fall through a hazardous opening, but rather, by a fall from the steel beam.

Industrial Code section 23-1.15, which deals with the use of safety railings, and section 23-1.16, which deals with the use of safety belts, harnesses, tail lines and life lines, are sufficiently specific to support a Labor Law § 241(6) claim (*see Shaheen v Hueber-Breuer Constr. Co.*, 4 AD3d 761, 761 [4th Dept 2004]; *Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 902 [3d Dept 1999]). However, these sections are inapplicable to the facts of this case, because these safety devices were not in use at the time of the alleged accident. These rules merely set forth the specifications for these safety devices and do not require their use. The Courts have uniformly held that where the rule merely sets forth standards for a device and the device is not required, these sections are inapplicable (*Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]).

Thus, plaintiffs are not entitled to summary judgment as to liability on that part of their Labor Law § 241(6) claim predicated on alleged violations of Industrial Code sections 23-1.15 and 23-1.16. In addition, Doe defendants are entitled to dismissal of that part of plaintiffs' Labor Law § 241(6) claim predicated on these alleged violations.

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

Plaintiffs move for summary judgment as to liability on the common-law negligence and Labor Law § 200 claims against Doe defendants and Pro Safety. Doe defendants and Pro Safety cross- move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 317). Labor Law § 200(1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]), and (2) when the accident results from " 'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work' " (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]).

The factual scenario in the instant case clearly shows that the accident occurred, not because of any inherently dangerous condition of the property itself, but rather, because of the means and

methods used by the subcontractor to do its work. In other words, the accident was caused due to the fact that the plaintiff was working at a height without proper fall protection in place.

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Regardless of which analysis is applied in this case, plaintiffs are not entitled to summary judgment on their common-law negligence and Labor Law § 200 claims, because they have not met their burden of establishing entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d at 563-564). To that effect, the plaintiffs do not cite any evidence in support of these claims, only asserting generally that Doe defendants did not take any steps to safeguard the work site. Moreover, plaintiff states that Doe defendants' witness, Altheim, "admits that no one from Doe defendants' companies was responsible for overseeing safety on the project nor did they ever direct the contractor as to safety issues on the job" (Hymowitz Affirmation in Support of Plaintiff's Summary Judgment Motion, at 17).

Thus, the burden to create a triable issue of fact never arises since the plaintiff fails to meet his burden of establishing entitlement to summary judgment and the Court need not even consider opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Thus, plaintiffs

are not entitled to summary judgment in their favor on the common-law negligence and Labor Law § 200 claims against Doe defendants and Pro Safety.

As to the cross-motion, as Doe defendants and Pro Safety sufficiently established that they did not control the manner in which plaintiff performed his work, and as plaintiff failed to put forth evidence to raise an issue of fact as to this matter, Doe defendants and Pro Safety are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them (*see Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139, 144-145 [1st Dept 2012]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, [1st Dept 2007]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] [protruding bolt that plaintiff tripped over was not a defect inherent in the property, but instead, its presence was the result of the manner in which the plaintiff's employer performed its work]).

As set forth previously, plaintiff and Skinner both testified that plaintiff's supervisor and foreman from Pre-Cast directed and supervised his work on the project, and that the subcontractors on the project were in charge of their own safety procedures when working at heights. Moreover, a review of the record reveals that, at most, Doe defendants and Pro Safety exercised only general supervisory control at the site. "General supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d at 311; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007] ["Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory

control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877); *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

As a result, Doe defendants and Pro Safety are entitled to dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims against them.

Whether Plaintiffs' Motion for Summary Judgment Is Premature

Doe defendants argue that plaintiffs' motion for summary judgment is premature, because, without having the opportunity to conduct the depositions of Pro Safety and certain nonparty witnesses, Doe defendants may be unable to state facts essential to oppose plaintiffs' motion for summary judgment on the issue of liability.

Summary judgment is considered premature where the moving party has not been deposed and has not yet responded to outstanding discovery requests, which could reveal evidentiary proof in admissible form crucial to the issue of liability for the accident at issue (*see* CPLR 3212[f]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]; *Arez v Twin Parks Northeast Houses*, 294 AD2d 266, 266-267 [1st Dept 2002]). If a key fact at issue is in the exclusive knowledge of the moving party, summary judgment will ordinarily be denied (*Aubrey Equities v SMZH 73rd Assoc.*, 212 AD2d 397, 398 [1st Dept 1995]; *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:19 at 326).

Here, as the plaintiff and his supervisor have both been deposed, and as there are no key facts at issue in the exclusive knowledge of plaintiff, plaintiffs' motion for summary judgment is not premature.

Whether the Unexecuted Transcripts Relied upon by Plaintiffs Are Admissible as Evidence

Doe defendants also argue that plaintiffs are not entitled to summary judgment on the ground that the deposition transcripts of plaintiff and Altheim were not signed by the deponents, and it has not been shown that the transcripts were submitted to respective witnesses for review and signature pursuant to CPLR 3116 (a).

Contrary to Doe defendants' contention, the unsigned, but yet certified, deposition of plaintiff, which was submitted by plaintiffs in support of their motion, is admissible under CPLR 3116(a), because "the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent" (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012], citing *Ashif v Won Ok Lee*, 57 AD3d 700, 700 [2d Dept 2008]). In addition, the deposition transcript is admissible as plaintiff's own admission since the transcripts had been certified as accurate by the court reporter (*Singh v Actors Equity Holding Corp.*, 89 AD3d 488, 488 [1st Dept 2011], citing *Morchick v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999]).

Further, although the deposition transcript of Altheim was unsigned, it was certified, and Doe defendants did not challenge its accuracy. As such, it qualifies as admissible evidence in support of plaintiffs' summary judgment motion (*Rodriguez,* 91 AD3d at 936).

Pro Safety's Cross-claim for Contractual Indemnification Against Atlantic

Pro Safety argues that, even in the event that plaintiffs' complaint against it is dismissed, it is still entitled to be reimbursed for its legal fees and costs incurred to date from defendant Atlantic, pursuant to the indemnification provision contained in the Consultant Agreement between Pro Safety and Atlantic.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that " '[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Initially, it should be noted that, although Pro Safety cross-claimed against Doe, Knickerbocker and Atlantic for contractual indemnification, it only entered into a contract with Atlantic for defense and indemnification. Thus, Doe and Knickerbocker are entitled to summary judgment dismissing Pro Safety's cross-claim for contractual indemnification against them.

The "Consultant Agreement" between Pro Safety (referred to therein as PSS) and Atlantic states, in pertinent part, as follows:

> "8. HOLD HARMLESS/INDEMNIFICATION. Unless and until PSS is adjudicated solely negligent, Atlantic Development agrees to hold PSS (and its employees and/or agents) harmless from and against, as well as defend and indemnify PSS for, any and all claims, disputes, suits, losses, liabilities, and/or costs (including, but not limited to, attorneys' fees) that result in any alleged and/or actual damages to any person or property that occur at Atlantic Development worksites. It is expressly understood that the obligations hereunder shall survive the term of this agreement"

(Consultant Agreement, attached as Exhibit A to Defendant Pro Safety's Cross-Motion).

Doe defendants argue that the indemnification section of the "Consultant Agreement" Pro Safety seeks to enforce is void under General Obligation Law § 5-322.1, as it calls for Pro Safety to be indemnified for its own negligence and does not contain a "savings clause" (*see Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2d Dept 2006] [an indemnification that purports to indemnify a party for its own negligence is not void under General Obligations Law § 5-322.1 if it authorizes indemnification "to the fullest extent permitted by law"]).

Under General Obligations Law § 5-322.1, a contract or agreement, relative to the construction or repair of a building, purporting to "indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons" caused by the negligence of the promisee, his agents or employees, "whether such negligence be in whole or in part, is against public policy and is void and unenforceable" *(see Carriere v Whiting Turner Contr.*, 299 AD2d 509, 511 [2d Dept 2002]; *Castrogiovanni v Corporate Prop. Invs.*, 276 AD2d 660, 661 [2d Dept 2000] [General Obligations Law prohibits enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent]).

However, where there is no negligence on the part of the proposed indemnitee, as in the instant case, that statute does not apply (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 177 [1990]). In addition, as argued by plaintiffs, General Obligations Law § 5-322.1 "only prohibits

enforcement of a contractual indemnification clause if the party seeking indemnification was negligent, or had the authority to supervise, direct or control the work that caused the injury" (*Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 437 [2d Dept 2004).

As set forth previously, the evidence in this case does not establish that Pro Safety was either negligent or that it had any supervisory control over the injury-producing work. Thus, Pro Safety is entitled to contractual indemnification for reimbursement of its attorneys' fees incurred to date from defendant Atlantic.

It should also be noted that, as the complaint and any cross-claims against Pro Safety have been dismissed, Doe defendants are also entitled to dismissal of Pro Safety's cross-claim against them for contribution, because this cross-claim is now moot.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the portion of plaintiffs Kelly Marin and Pamela Morales' motion pursuant to CPLR 3212 (motion sequence number 003) for summary judgment in their favor as to liability on the Labor Law § 240(1) claim as against defendants The Doe Fund, Inc., Knickerbocker Construction II LLC, and Boricua Village Associates A2 L.P., is granted, and the motion is otherwise denied; and it is further

ORDERED that the portion of the cross-motion of defendants The Doe Fund, Inc., Knickerbocker Construction II LLC, Boricua Village Associates A2 L.P., and Atlantic Construction Group LLC, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all claims and cross-claims against them is granted **only to the extent** of dismissing plaintiffs' causes of action

for common law negligence and Labor Law §§ 200 and 241(6), and these claims are severed and dismissed as to these defendants, with the exception of plaintiffs' Labor Law § 240(1) claim against these defendants, and with the exception of defendant Pro Safety Services LLC's cross-claim against Atlantic for contractual indemnification; and it is further

ORDERED that the portion of Pro Safety's cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it is granted, and the complaint and cross-claims are dismissed with costs and disbursements to Pro Safety as taxed by the Clerk upon the submission of the appropriate bill of costs; and it is further

ORDERED that the portion of Pro Safety's cross-motion, pursuant to CPLR 3212, for contractual indemnification of its attorneys' fees as against Atlantic is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: October 15, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.