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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 117525/2009
SANTOS, JOSE
vs.
TARGET CONSTRUCTION, LLC
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

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

FILED
FEB 06 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
FEB 05 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: January 24, 2014

_____, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

JOSE SANTOS,

Plaintiff,

-against- Index No. 117525/2009

TARGET CONSTRUCTION, LLC, EXTELL 601 WEST 137TH STREET, LLC, ROCKLEDGE SCAFFOLD CORP., SOLUTIONS CONSTRUCTION, INC., AND BULADO GENERAL CONTRACTORS GROUP,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging causes of action for negligence and violations of the Labor Law, defendants Rockledge Scaffold Corp. (Rockledge) (motion sequence number 005), Extell 601 West 137th Street LLC (Extell) (motion sequence number 006), and Bulado General Contractors Corp. s/h/a Bulado General Contrators Group (Bulado) (motion sequence number 007) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims asserted against them. Defendant Target Construction, LLC (Target) cross moves for summary judgment dismissing all claims and cross claims asserted against it.[1]

BACKGROUND

Plaintiff Jose Santos, a porter/handyman, seeks to recover damages for injuries that he sustained on July 16, 2008, when the ladder on which was working allegedly collapsed and fell in front of the residential apartment building known as 601 West 137th Street in Manhattan (the premises).

The premises is one of five residential apartment buildings located next to each other in upper Manhattan. Extell is the owner of all five buildings. Extell employed non-party

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[1]Motion sequence numbers 005, 006, and 007 are consolidated for disposition.

Wellington Gomez to be the resident manager of the five buildings. Extell also contracted with non-party Dream Building Services to provide superintendents and porters to these buildings. Dream Building Services employed plaintiff to work as a porter/handyman, and to handle minor repairs in the apartment buildings. Dream Building Services also employed non-party Jose Alexis Gonzalez as a superintendent for the premises. According to plaintiff's deposition testimony, plaintiff generally was supervised and directed by Gonzalez, who was supervised and directed by Gomez (Plaintiff's Examination Before Trial [EBT] at 26-27).

Plaintiff testified that, on the day of his accident, he received instructions from Gonzalez to check and repair a row of five non-working lights that were located on the underside of a sidewalk shed in front of the premises (*id.* at 35-36; 58-60). The sidewalk shed had been constructed by Rockledge to protect pedestrians while repairs were being made to the outside of the premises. Plaintiff testified that, at least once or twice before, he had been instructed to change single burnt-out light bulbs underneath the sidewalk shed in his capacity as porter /handyman (*id.* at 158). However, on the day of his accident, plaintiff testified that he was directed not simply to replace the non-working light bulbs, but to check the electrical line or circuit, in order to determine why the row of five light bulbs had burnt out simultaneously (*id.* at 59-61). To that end, Gonzalez had instructed plaintiff to retrieve an electric tester belonging to the company, in order to check whether the electric line was working (*id.* at 61-63).

Plaintiff testified that the five non-working bulbs were located approximately 12 feet from the ground (*id.* at 60). In order to reach the light bulbs, plaintiff and Gonzalez had chosen and retrieved a 10-foot aluminum A-frame ladder from among the ladders stored in a locked basement at the premises (*id.* at 63-66). Gonzalez assisted plaintiff in taking the ladder out to the

sidewalk, where Gonzalez opened the ladder and put it into place (*id.* at 69-70). Because the premises were located on a hill, the sidewalk in front of the premises was on a slope; thus, the ladder was not placed on a flat even surface (*id.* at 69). Plaintiff testified that Gonzalez left shortly after setting up the ladder (*id.* at 70).

Before ascending the ladder, plaintiff checked to see if the ladder was sitting well (*id.*). Plaintiff then began ascending the ladder, carrying his screwdriver and the electric tester in the pockets of his overalls, and a pair of pliers in his belt (*id.* at 71-72). Plaintiff testified that, in order to test the electric line, he needed to remove one of the non-working bulbs and place the tester into the socket (*id.* at 72). Plaintiff testified that he had climbed about five steps up the ladder, and was reaching up to a bulb with his right hand, when the ladder collapsed and fell forward (*id.* at 73-79). Plaintiff then fell forward off of the ladder, landing on and breaking his left arm (*id.* at 82, 92). Apparently, no one witnessed the accident. Plaintiff testified that, after his fall, several people ran to assist him and an ambulance was called to take plaintiff to the hospital.

At the time of his accident, at least two construction/renovation projects were ongoing at the premises. On March 7, 2007, Extell had entered into a contract with defendant Target to perform interior renovations in seven apartments of the premises (*see* Nemetsky Affidavit: Attachments). On May 1, 2008, Extell had entered into a contract with defendant Bulado to perform restoration work on the exterior facade of the building (*see* Bendix Affirm., Exh. K). Bulado subsequently subcontracted the performance of the facade work to defendant Solutions Construction, Inc. (Solutions), pursuant to an agreement dated May 30, 2008 (*id.*, Exh. L). This subcontract identified Solutions as the subcontractor, and Bulado as the general contractor *(id.)*.

Prior to executing the contract with Bulado for the facade restoration, Extell had entered into a contract with Rockledge for the construction of a sidewalk shed in front of the premises (*see* Schleifer Affirm., Exh. L). As part of that written contract, Rockledge was to install vandal proof lighting underneath the sidewalk shed (*id.*). However, the proposal also provided that "[Rockledge] will not be responsible for the maintenance of lighting," and the terms of and conditions of the agreement expressly provided that "[Rockledge] does not inspect or maintain any lighting; this is the sole responsibility of the customer" (*id.*). Rockledge completed construction of the sidewalk shed on August 8, 2007.

In addition to the sidewalk shed that Rockledge had constructed for Extell, Rockledge also had constructed another sidewalk shed on the Broadway side of the premises, pursuant to a separate contract that it had executed with Bulado on May 2, 2008 (*id.*, Exh. M). However, the sidewalk shed on the Broadway side of the premises had been removed on July 7, 2008, a week or so prior to plaintiff's accident.

Plaintiff commenced the instant action on December 15, 2009, and filed an amended complaint on March 10, 2010. The amended complaint asserts causes of action for common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) against Extell, Rockledge, Bulado, Solutions and Target. As bases for these causes of action, plaintiff claims, inter alia, that the A-frame ladder was unsuitable for use on a sloped and uneven surface, and that the ladder was improperly placed on an unlevel footing, causing it to collapse as he was ascending it.

Extell has asserted cross claims against Rockledge, Bulado, Solutions, and Target for contractual and common-law indemnification and/or for contribution, and for breach of contract in failing to procure insurance. Rockledge has asserted cross claims against Extell, Bulado,

Solutions, and Target for contractual and common-law indemnification and contribution. Bulado has asserted cross claims against Extell, Rockledge, Solutions, and Target for common-law indemnification and/or contribution, and against Rockledge and Solutions for contractual indemnfication and breach of contract in failing to procure insurance. Solutions has asserted cross claims against Extell, Rockledge, Bulado, and Target, for common-law indemnification and/or contribution. Target has asserted cross claims against Extell, Rockledge, Bulado, and Solutions for common-law indemnification and/or contribution.

Extell, Rockledge, Bulado, and Target each now move for summary judgment dismissing plaintiff's complaint, as well as any and all cross claims asserted against them.

DISCUSSION

It is well settled that "[t]he 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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this prima facie showing has been made, the burden 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]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's role is solely to determine whether any triable issues of fact exist, and not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166 [1st Dept 2003]). In making this determination, the "facts must be viewed in the light most favorable to the non-moving party" (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492[1st Dept 2012] [citations and internal quotation marks omitted]). If there is any doubt as to the existence of a triable fact, or such an issue is even arguable or

debatable, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *International Customs Assoc. v Bristol-Myers Squibb Co.*, 233 AD2d 161, 162 [1st Dept 1996]).

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

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to maintain a safe worksite (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Labor Law § 200 requires, inter alia, that all work places

> "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"

(*id.*). Claims involving Labor Law § 200 generally fall into two broad categories: those where workers are injured as a result of the methods or manner in which the work is performed, and those where workers are injured as a result of a defect or dangerous condition existing on the premises *(see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

When, as here, an accident is the result of a contractor's or worker's means or methods, it must be shown that a defendant exercised actual supervision and control over the activity, rather than possessing merely general supervisory authority (*Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]); *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]). In contrast, when the accident is the result of a dangerous or defective condition at the worksite, it must be shown that the owner or contractor either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). However, supervision and control need not be proven

where the injury arose from a dangerous condition at the worksite *(see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

Rockledge, Bulado, and Target argue that their motions for summary judgment dismissing these cause of actions should be granted because they were neither owners nor general contractors, and had no connection with, and never exercised any supervision or control over, the work in which plaintiff was engaged, or the equipment that plaintiff was using, at the time of his injury. Extell argues that its motion for summary judgment dismissing these causes of action should be granted because, although it is the owner of the premises, (1) Extell had no direct supervisory control over the means and methods of the activity being undertaken by plaintiff at the time of his injury; and (2) there is no evidence that Extell owned the ladder which caused plaintiff's injury, or that the ladder was defective.

In support of its motion, Rockledge has submitted a copy of its contract with Extell, as evidence that Rockledge's contractual obligations with Extell extended only to constructing/removing the sidewalk shed in front of the premises. Rockledge also submits the affidavit of its president, Jeremiah Harrington, to establish that Rockledge had completed construction of the sidewalk shed on August 8, 2007, and had last performed any work on that sidewalk shed on February 22, 2008. Harrington further avers that Rockledge did not employ, control, or supervise plaintiff, or any other contractor or subcontractor, at the premises.

Bulado has submitted a copy of its contract with Extell, as well as a copy of its subcontract with Solutions, to establish that it was engaged solely in performing facade restoration work at the premises. Bulado also submits the affidavit of its vice president Jose Antonio Lado, to establish that Dream Building Services was not a subcontractor of Bulado; that

Bulado did not supervise or control, and was not authorized to supervise or control, the employees of Dream Building Services; and, that Bulado did not operate, maintain, or control the sidewalk shed in front of the premises, or the lighting underneath the sidewalk shed.

Target has submitted a copy of its contract with Extell to establish that Target was retained solely to perform interior renovation work on seven apartments at the premises. Target also has proffered an affidavit from its president, Heshy Nemetsky, to establish that Target did not employ plaintiff, and did not direct, supervise, or control plaintiff's work at the premises, or the work of any other contractor at the site.

In addition to these contracts and affidavits, defendants each have attached a copy of plaintiff's deposition testimony, in which plaintiff states that he was supervised directly by Gonzalez, who received his directions and instructions from Extell's manager, Gomez. Defendants further note plaintiff's deposition testimony, that he had no recollection of ever speaking to anyone from Rockledge, Bulado, or Target (see Plaintiff's EBT at 152-153, 155, and 165-166).

In support of its motion, Extell proffers the affidavit of its manager, Gomez, who avers that although Dream Building Services was hired to provide superintendents and porters to Extell's five residential apartment buildings, "the superintendents and porters were not at any time employees of Extell and received no direction from [Extell] regarding how to perform their work" (Gomez Aff. ¶¶ 5-6). Gomez further avers that plaintiff would receive instructions from Gonzalez, a fellow Dream Building Services employee, and that "[n]o one from Extell would give instructions to Mr. Gonzalez on the means and methods that he or the handymen under him were to employ in undertaking their maintenance tasks" (*id.* ¶ 7). Gomez also avers that no one

from Extell directed plaintiff to perform the activity in which he was engaged at the time of his injury, and that Extell did not control, supervise or in any way direct plaintiff's work, or the work of any employee of Dream Building Services at the subject premises (id. ¶¶ 10-11).

In further support of its motion, Extell notes that there is no evidence that establishes that Extell owned the ladder, or from which a jury could conclude that the A-frame ladder was defective. Extell contends that, based on plaintiff's own description of the accident, it is clear that the ladder never actually collapsed, but had tipped forward when plaintiff leaned forward. Extell also cites to plaintiff's deposition testimony, that the ladder had "stayed in the shape of an A" when it collapsed or fell forward, to conclude that the ladder must have been locked in an open position and undamaged when plaintiff saw it after the accident.

Plaintiff argues that all of the defendants' motions for summary judgment should be denied, as premature, as there is outstanding discovery, including the depositions of the defendants, and that issues of fact exist as to which entity actually was responsible for maintaining and repairing the lighting underneath the sidewalk shed. Plaintiff argues that, while Rockledge appears to have disclaimed any obligation to maintain or repair the lighting in its agreement with Extell, depositions of all the parties are needed to determine whether Extell may have entered into further agreements with any of these entities with respect to the maintenance and repair of such lighting.

With respect to each particular defendant, plaintiff argues that Rockledge's motion for summary judgment should be denied, as numerous issues remain concerning the wiring of the scaffold that can only be resolved through the deposition of witnesses. Plaintiff argues that Rockledge's contract with Extell, which purportedly relieved Rockledge of responsibility for

maintaining the lighting, is not dispositive given that plaintiff is alleging a malfunction in the lighting.

Plaintiff argues that Bulado's motion should be denied pending completion of discovery, because Bulado admittedly was a general contractor on the premises performing facade restoration work. Plaintiff argues that "[i]t strains credulity to believe that Bulado, as General Contractor, did not have authority to control work being performed on the sidewalk shed which was erected to protect pedestrians from work above the sidewalk" (Katz Affirm. in Further Opposition ¶ 5). Plaintiff additionally argues that "[i]t is unclear from the papers the nature of Bulado's work at the time of the accident and the extent of their authority to remedy a malfunction of a sidewalk shed" (*id.*).

Plaintiff argues that Target's motion for summary judgment should be denied as the complaint alleges that Target also was a general contractor at the premises.

Plaintiff argues that Extell's motion for summary should be denied, as premature, since plaintiff has not had an opportunity to inspect the ladder involved in the accident, without which it cannot be determined who owned the ladder and whether the ladder was defective or inappropriate for the activity in which plaintiff was engaged. Plaintiff argues that issues of fact also exist as to whether both Gonzalez and Gomez had authority to supervise his work. In support of this contention, plaintiff submits his affidavit averring that there were two supervisors present at his worksite on a daily basis: Gonzalez and Gomez; that both of these individuals had authority over him; that both of these individuals would give him assignments; and, that both of these individuals had authority to supervise his work and to stop work if they felt it was necessary (Santos Aff. ¶ 3). Plaintiff also notes that, during his deposition, he testified that

Gomez had supervised Gonzalez, and that Gomez would issues orders to Gonzalez, who would them transmit them to plaintiff. In any event, plaintiff argues that summary judgment would be premature, as plaintiff has not been provided with a copy of the work order that he was given for the task that resulted in his injury, and he also has been unable to depose either Gonzalez and Gomez to determine whether there had been any discussions between them with respect to task that plaintiff was performing that day.

To obtain summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim, the burden is on defendants "to demonstrate, beyond a material issue of fact, that [they] bore no responsibility for plaintiff's accident" (*Sosa,* 101 AD3d at 493). Specifically, defendants must "show that [they] did not exercise any authority over the means and methods of plaintiff's work, or that, to the extent the accident arose out of a dangerous condition on the premises, [they were] not liable for the condition" (*id.*, citing *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 148).

Under this standard Extell's motion for summary judgment dismissing the negligence and Labor Law § 200 must be denied. The parties have presented conflicting affidavits as to whether Extell, through its manager Gomez, had the authority to exercise any supervision and control over plaintiff's work. In his affidavit, Gomez does not aver that Extell had no authority to supervise or control the work of the superintendents and porters provided by Dream Building Services. The court also notes that Extell has not produced a copy of its contract with Dream Building Services.

Although Gomez broadly avers that Extell did not control, supervise, or in any way direct plaintiff's work, or the work of any employee of Dream Building Services at the subject

premises, plaintiff testified that Gomez did direct and supervise Gonzalez, who then directed and supervised plaintiff. In light of these conflicting accounts, and since plaintiff has yet to depose either Gomez or Gonzalez, summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims would be premature.

In any event, summary judgment on these causes of action also would not be warranted at this time, as Extell has failed to meet its burden of establishing that it did not own the ladder involved in plaintiff's accident, and that the ladder was not defective. Plaintiff's testimony, that the ladder was stored in a locked basement at the premises to which both Gomez and Gonzalez had keys, arguably raises a triable issue of fact as to whether the ladder belonged to Extell. Plaintiff testified and averred numerous times that the ladder collapsed as he was ascending it. The fact that plaintiff also testified that the ladder had remained in an open position after it fell does not, by itself, establish that there was no defect in the ladder. As the ladder apparently has never been made available to plaintiff for examination, and Extell does not indicate that it actually investigated or examined the ladder following the accident, summary judgment would be premature.

In contrast, the motions by defendants Rockledge, Bulado, and Target, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 claims, are granted. Rockledge, Bulado, and Target each have produced evidence sufficient to establish that they had no connection to the work that plaintiff was performing, or to the ladder that plaintiff was using, at the time of his injury. These defendants also have proffered evidence sufficient to establish that there was no contractual relationship between any of these entities and plaintiff or his employer; that these entities had neither any obligation or authority to supervise or control the

work that plaintiff was performing at the time of his injury; and, that these entities did not exercise any actual supervision or control over plaintiff's work.

In opposition, plaintiff has proffered no evidence that might establish an issue of fact in this regard. Plaintiff's contention, that these entities might have entered into some other agreements, by which they assumed responsibility for maintaining the lighting underneath the sidewalk shed, is based wholly on speculation and thus is insufficient to create an issue of fact in this regard (*see Morgan v New York Tel.*, 220 AD2d 728, 729 [2nd Dept 1995]). In any event, the documentary evidence proffered by defendants sufficiently establishes that Extell, alone, assumed responsibility for inspecting and maintaining the lighting underneath the sidewalk shed, pursuant to its contract with Rockledge.

Plaintiff's Labor Law §§ 240 (1) and 241 (6) Claims

Labor Law §§ 240(1) and 241(6) each impose absolute liability on construction site owners, general contractors, and their agents for any breach of their statutory duty which has proximately caused injury.

Specifically, Labor Law § 240 (1) provides, in relevant part:

> "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"

(*id.*). The statute was enacted 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*'" (*Runner v*

New York Stock Exch., Inc., 13 NY3d 599, 604 [2009], quoting *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]).

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

> "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, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places"

(*id.*). Labor Law § 241 (6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" *(Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [2003]), and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross*, 81 NY2d at 501).

Rockledge, Bulado, and Target argue that their motions for summary judgment to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims should be granted because they were neither owners or general contractors within the meaning of these statutes, and because the activity in which plaintiff was engaged at the time of his injury involved only routine maintenance, which is not covered under these statutes.

Extell argues that its motion for summary judgment to dismiss these claims should be granted since, at the time of his injury, plaintiff was not engaged in repair, but merely was attempting to replace some burnt-out light bulbs. Extell argues that such activity constitutes

routine maintenance, which is not an enumerated activity covered by these statutes. Extell further argues that, even assuming that plaintiff had been instructed to inspect the circuit and/or wiring to determine the cause of the outage, "[p]resumably, if he had found that the circuit was bad, he would not have done any repair work. Why? He was not an electrician" (Finder Reply Affirm. ¶ 7-8). In any event, Extell argues that dismissal of these causes of action is warranted because the ladder was not defective.

Plaintiff argues that defendants' motions to dismiss his Labor Law §§ 240 and 241 claims should be denied, as the accident occurred underneath a sidewalk shed that had been constructed to protect pedestrians, and thus occurred within the context of an ongoing construction project at the premises. Plaintiff further argues that there exists, at a minimum, an issue of fact whether plaintiff's activity that day involved repair rather than maintenance. Plaintiff also argues that because his claims are based, in part, on allegations that the ladder was not appropriate for the activity, and was improperly placed on an unlevel footing, he was not required to establish that the ladder was defective in order to maintain these causes of action.

The motions by Rockledge, Bulado, and Target, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, are granted. The nondelegable liability imposed by these statutes attach only to a contractor that has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury *(see Kwoksze Wong v. New York Times Co.*, 297 A.D2d 544 [1st Dept 2002]). "As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured

worker" (*Barrios v City of New York*, 75 A.D.3d 517, 518 [2nd Dept 2010] citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–318 [1981]; *Aversano v JWH Contr., LLC*, 37 AD3d 745 [2nd Dept 2007]).

Here, Rockledge and Target have made their prima facie showing of entitlement to summary judgment by establishing, through submission of their contracts with Extell and the affidavits of their principals, that they had not been delegated the authority and duties of a general contractor, and that they did not have supervisory control and authority over the work being done by plaintiff; therefore, that they were not owners, contractors, or agents covered under the provisions of Labor Law §§ 240(1) and 241(6). Bulado also has established its entitlement to summary judgment dismissing these causes of action through submission of evidence establishing that, although it was a general contractor with respect to the facade restoration work, Dream Building Services was not a subcontractor of Bulado; Dream Building Services's work for Extell was governed by a distinct contract and was wholly separate from the work of Bulado; and, that Bulado had no authority or control over the work being done by Dream Building Services or its employees. Where, as here, defendants have established that they were neither owners or general contractors of the work in the performance of which plaintiff was injured, nor the agents of the owner who had entered into the contract with plaintiff's employer, dismissal of the Labor Law §§ 240 (1) and 241(6) causes of action is warranted *(Chang Zhang Zou v 122 Dev., LLC*, 103 AD3d 519 [1st Dept 2013]).

On the other hand, Extell's motion for summary judgment dismiss these causes of action must be denied, at least at this juncture, as there exists triable issues of fact whether plaintiff was engaged in a covered activity at the time of his injury. To fall within the special protections

afforded by Labor Law § 240 (1), a worker, at the time of the accident, must have been engaged in one of the statute's enumerated activities *(see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880–881 [2003]; *Jock v Fien*, 80 NY2d 965, 968 [1992]). The focus of inquiry is on the "type of work the plaintiff was performing at the time of injury" (*Panek v County of Albany,* 99 NY2d 452, 457 [2003], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). "'[D]elineating between routine maintenance and repairs is frequently a close, fact-driven issue'" *(Kostyo v Schmitt & Behling, LLC*, 82 AD3d 1575, 1576 [4th Dept 2011], quoting *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987 [3rd Dept 2009]). The question of whether a particular activity falls within the statute "must be determined on a case-by-case basis, depending on the context of the work" (*Prats*, 100 NY2d at 883).

"'[T]o constitute a "repair' under Labor Law § 240(1), there must be proof that the . . . object being worked upon was inoperative or not functioning properly" (*Kostyo* at 1576, quoting *Goad v Southern Elec. Intl.*, 263 AD2d 654, 655 [3rd Dept 1999]), while work that involves merely "replacing components that require replacement in the course of normal wear and tear" constitutes "routine maintenance," not "repair" *(Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). The courts have held that, "[w]here a person is investigating a malfunction . . ., efforts in furtherance of that investigation are protected activities" *(Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010], quoting *Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 973 [4th Dept 2001]).

Here, plaintiff testified that he was directed, not merely to change the burnt-out light bulbs, but to investigate the line and circuit to determine the cause of the outage. Plaintiff testified that having an entire string of lights burn out was unusual, and notes that he has yet to be

provided with any inspection records reflecting the cause of the light outage at the sidewalk shed. In these circumstances, plaintiff's testimony is sufficient to raise an arguable issue of fact whether plaintiff was investigating a malfunction in the lighting at the time of his injury.

Although, as Extell notes, plaintiff may not have been a licensed electrician, plaintiff testified that his duties as a handyman included doing minor repairs. Although Extell "presumes" that plaintiff would not have repaired a malfunction in the lighting if one had been found, it is not inconceivable that a building handyman would be tasked with performing minor repairs involving an electrical outage, even though not an electrician.

Finally, this court finds that plaintiff's allegations that the ladder was not placed on a level footing, and was inappropriate for the activity in which he was engaged, are sufficient to establish a violation of these statutes. Accordingly, Extell's summary judgment on these causes of action is, at best, premature.

Defendants' Cross Claims

The motions by Rockledge, Bulado, and Target, to dismiss all of the cross claims asserted against them, are granted.

To establish a claim for common-law indemnification and/or contribution, the party seeking indemnity must prove, inter alia, that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). As all of the common-law negligence and Labor Law § 200 claims have been dismissed against these defendants, dismissal of these causes of action is appropriate (*Wong v New York Times Co*, 297 AD2d at 549).

A party's right to contractual indemnification depends upon the specific language of the

contract (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255 [2nd Dept 2010]). As there appears to be no indemnification provision in Extell's contract with Bulado, any cross claim against Bulado for contractual indemnification must be dismissed . The indemnification provision in the contract between Rockledge and Extell provides that Rockledge will indemnify Extell, and its agents and employees, against "all claims, damages, losses, suits, judgments, actions and expenses (including attorney's fees and costs) caused *directly and solely* by Rockledge Scaffold Corporation, its employees or other persons *under the direct and immediate control* of Rockledge Scaffold Corporation" (Schleifer Affirm., Exh. L [emphasis added]) . The indemnification provision in the contract between Target and Extell provides that Target will provide indemnification to Extell and its employees against claims, damage, losses and expenses, including attorney's fees, "arising out of or resulting from performance of [Target's] Work . . . cause[d] in whole or in part by negligent acts or omissions of the contractor, . . . [or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (Smith Affirm.: Nemetsky Aff. and Exhibits). As the evidence establishes that plaintiff's injury was not caused directly and solely by Rockledge, or anyone under its direct and immediate control; and did not result from any negligent acts or omissions of Target, or anyone for whose acts they were liable; dismissal of all cross claims for contractual indemnification against these defendants also is warranted.

To the extent that any cross claims have been asserted against any defendants for breach of contract in failing to procure insurance, all of these cross claims are dismissed, as none of the parties have set forth any of the contractual provisions on which these claims are asserted.

Extell's motion, for summary judgment dismissing all cross claims for indemnification and contribution asserted against it, is granted to the extent of dismissing any and all cross claims

asserted by Rockledge, Bulado and Target. As these parties have now been relieved from any liability in this action, any claims for common-law indemnification and contribution have been rendered academic. Any claim for contractual indemnification asserted against Extell by these parties also must be dismissed, as there appears to be no contractual provision obligating Extell to indemnify any of these parties.

Accordingly, it is

ORDERED that the motions by defendants Rockledge Scaffold Corp. (motion sequence number 005) and Bulado General Contractors Corp. s/h/a Bulado General Contrators Group (Bulado) (motion sequence number 007), and the cross motion by defendant Target Construction, LLC (Target), for summary judgment dismissing all claims and cross claims asserted against them, are granted; and it is further

ORDERED that the motion by Extell 601 West 137th Street LLC (motion sequence number 006), for summary judgment dismissing all claims and cross claims asserted against it, is granted to the extent of dismissing all cross claims asserted against it by defendants Rockledge Scaffold Corp., Bulado General Contractors Corp. s/h/a Bulado General Contrators Group, and Target Construction, LLC, and the motion is otherwise denied; and it is further

ORDERED that the action is severed and shall continue as to the remaining defendants; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, on February 27, 2014 ~~January [illegible], 2014~~, at 9:30 am.

Dated: January 24, 2014

FILED

FEB 06 2014

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.