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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59

Justice

Index Number : 102667/2011
MCCREA, WILLIAM
vs.
ARNLIE REALTY
SEQUENCE NUMBER : 003
DISMISS

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 attached Memorandum Decision and Order.

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

Dated: AUG 06 2015

DEBRA A. JAMES, 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: PART 59

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WILLIAM MCCREA and CLAUDIA MCCREA, Index No.: 102667/2011

Plaintiffs,

-against-

ARNLIE REALTY COMPANY LLC and ARNAR PURCHASING GROUP INC.,

Defendants.

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ARNLIE REALTY COMPANY, LLC, Third-Party Index No.: 590124/13

Third-Party Plaintiff,

-against-

BRINK ELEVATOR CORP. and UNION ELEVATOR CORP.,

Third-Party Defendants.

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Debra A. James, J.:

Motion sequence numbers 002 and 003 have been consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an elevator mechanic while repairing a passenger elevator (the Elevator) of an apartment building (the Building) located at 500 West 110th Street, New York, New York, on March 25, 2008.

In motion sequence number 002, defendant/third-party

plaintiff Arnlie Realty Company LLC (Arnlie) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, as well as granting summary judgment in its favor on its third-party cause of action against third-party defendant Brink Elevator Corp. (Brink).

In motion sequence number 003, third-party defendant Brink moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, as well as any cross claims or counterclaims asserted against it.

Plaintiffs William McCrea (plaintiff) and Claudia McCrea cross-move for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against Arnlie.

BACKGROUND

On March 25, 2008, the day of the accident, Arnlie owned the Building where the accident occurred.

According to plaintiff's deposition testimony, on that day, with instructions from his supervisor that the safety component of the Elevator was dragging, plaintiff, an elevator repair mechanic employed by Brink, was dispatched to the basement of the Building to investigate a grinding noise coming from the Elevator and repair it. Brink had conducted a monthly regular maintenance inspection of the Elevator on March 1, 2008, at which time no

problems were indicated. The Building superintendent reported that he began hearing strange "grinding" noises from the Elevator the week preceding the accident and summoned Brink to make the repair. After granting plaintiff access to the Building the superintendent left the Building to run an errand, and did not return until immediately after the accident.

When plaintiff arrived with his helper, the Elevator was operational and still in use. Plaintiff had his standard toolbox with him but did not bring any parts.

Plaintiff went to the motor room and inspected the controller, which appeared fine. Plaintiff and his helper rode the Elevator in both directions, noticed the "scraping" noise and both he and his helper agreed that the "scraping" noise was the dragging of the elevator's safety.

Plaintiff manually raised the Elevator car up to the basement level in order to inspect the Elevator's safety underneath it. As the Elevator has a safety feature that prevents it from operating with any passenger access door open, it was necessary for plaintiff to override this safety feature by either boosting the car up with the relays, which were located in the motor room, or inserting a "jumper" in the door that tricks the system into sensing the door is closed, though plaintiff

could not recall what method he used.

When the Elevator car reached the height necessary for plaintiff to inspect the safety, plaintiff "pushed in two [black] relays", which were located in the motor room. His assistant was positioned by the Elevator car. Plaintiff asserted that once the relay buttons are pushed in, there is no way that the "[E]levator could move if someone on an upper floor pushed a call button. He also testified that in order to inspect the safety, it was necessary to enter the Elevator's pit, which was located approximately three to four feet below the ground floor. At that point, the Elevator was stopped approximately half way up between the floors, which enabled plaintiff to examine the safety, from a standing position.

Based on his experience as an elevator mechanic, plaintiff opined that in order to be safe, an elevator typically has a safety device called a "stop switch" located inside the elevator pit on the wall to the left for the purpose of locking the elevator into place. He described the stop switch as "[a] little red tag-go (sic) switch, like a like switch, but red", but did not see one and opined that the switch had not been installed because the Elevator had been "grand fathered" under a prior Building Code that did not require a stop switch.

While plaintiff was standing underneath the Elevator investigating the problem, plaintiff heard a noise and the Elevator unexpectedly descended at a faster than normal rate, pinning plaintiff between the Elevator and the basement floor, causing him injury.

At his deposition, the Building superintendent testified that there was a kill switch [a gray handle which one would pull down] on the wall of his office that could be used to shut down the elevator. He described his office as one unit with his space and the motor room space separated by a partition. He stated that he never touched the kill switch on the day of the accident. He testified that he had observed elevator maintenance technicians pull the switch in the past when servicing the Elevator. He stated that plaintiff did not ask him or anyone else to manipulate the kill switch either before or after the accident.

By affidavit, the professional engineer retained by Arnlie stated that based upon his examination of the accident site on June 13, 2014, he determined that "plaintiff's own negligence caused this accident by failing to properly control and lockout/tagout the elevator before entering the pit to perform repairs by simply removing power to the elevator control and

drive system via the opening of the main switch line". He further opined that "[p]laintiff's accident was caused by him failing to follow and/or violating multiple basic safety requirements as outlined in the Elevator Industry Field Employees Safety Handbook". He stated that plaintiff attended at least one safety course given by his union that "would include safety training in accordance with the Elevator Industry Field Employee safety Manual and in conformance to the OSHA standards...and lockout/tagout training." He described the lockout/tagout process as "removal of power to the elevator system in order to prevent the unintended movement of the elevator". He cited plaintiff's testimony that plaintiff "was aware that the subject elevator did not have a stop switch in the pit", but that he nevertheless "proceeded to enter the elevator pit without taking control of the elevator and locking out the elevator." The expert further asserted that the "subject elevator did have a main line switch located just outside the elevator machine room and had the capability to be locked out and tagged".

The Service Agreement

At the time of the accident, there was a monthly service agreement, dated October 1, 1993, in effect between Herk Maintenance Company (Herk) (later known as Brink) and Arnlie for

the Elevator (the Service Agreement). The Service Agreement states, as follows:

> It is agreed the Company does not assume possession, management or control of any part of the equipment, but such remains the Purchaser's exclusively as the owner (or lessee) thereof, and the purchaser [Arnlie], as a condition, shall indemnify and save the Company [Herk], its agents, servants or employees harmless for any claims for injury to persons except during periods of work when and if the Company's employees actually take charge of equipment, or if a defect is a direct result of a negligent repair made by the Company.
>
> ***
>
> The Purchaser shall shut down the equipment immediately upon manifestation of any irregularity in operation or appearance in the equipment, notify the Company at once, and keep the equipment shut down until completion of the repairs, and further, shall keep the equipment under continuous surveillance by competent personnel to detect such irregularities between periods of the Company's examination.

The Service Agreement, in addition, provides that, "The Company [Herk] will provide Workmen's Compensation and Liability insurance to protect against bodily injury or death which may occur while its employees are actually engaged in working".

DISCUSSION

Labor Law § 240 (1) Claim Against Arnlie

Labor Law § 240 (1) (also known as the Scaffold Law) 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

(Ryan v Morse Diesel, 98 AD2d 615 [1st Dept 1983]).

"'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]).

> Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein

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]).

To prevail on a section 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]).

To fall within the special protections afforded by Labor Law § 240 (1), a worker must have been engaged in one of the statute's enumerated activities at the time of the accident (*see* Prats v Port Auth. of N.Y. & N.J., 100 NY2d 878, 880-881 [2003]).

Initially, the crux of this case involves the issue of whether the work that plaintiff was performing at the time of the accident was a repair, which is covered by Labor Law § 240 (1), or routine maintenance, which is not. In opposition to plaintiffs' cross motion, and in support of their own motion to dismiss the Labor Law § 240 (1) claim, Arnlie argues that plaintiffs are not entitled to judgment in their favor, because plaintiff was not performing repair work on the elevator at the time of the accident, but rather was performing routine maintenance.

Labor Law § 240 (1) expressly applies not only to constructing, but also to "repairing." "Although repairing is among the enumerated activities, [courts] have distinguished this from 'routine maintenance,'" which falls outside the purview of the statute (Esposito v New York City Indus. Dev. Agency, 1 NY3d

526, 528 [2003] [citation omitted]; see also Abbatiello v Lancaster Studio Assoc., 3 NY3d 46, 53 [2004]; Prats v Port Auth of N.Y. & N.J., 100 NY2d at 882). The focus of the 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]).

As set forth in a recent First Department case, Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc. (118 AD3d 524, 526-527 [1st Dept 2014]):

> In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as 'whether the work in question was occasioned by an isolated event as opposed to a recurring condition' (Dos Santos v Consolidated Edison of N.Y., Inc., 104 AD3d 606, 607 [1st Dept 2013]; whether the object being replaced was 'a worn-out component' in something that was otherwise 'operable' (Gonzalez v Woodbourne Arboretum, Inc., 100 AD3d 694, 697 [2d Dept 2012]; and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement (Picaro v New York Convention Ctr. Dev. Corp., 97 AD3d 511, 512 [1st Dept 2012]).

A review of the uncontradicted testimonial evidence in this case indicates that the work in question was caused by an isolated event, and not a recurring condition (see Dos Santos v Consolidated Edison of N.Y., Inc., 104 AD3d at 607-608 [where the plaintiff was called upon to address a flooding condition that

was causing vaporous conditions, held that the plaintiff's work was "far from routine," and thus, was repair work for the purposes of the statute]). Plaintiff testified that the day of the accident was the first time that he had ever encountered a dragging safety on any of the elevators at the Building. The Building superintendent testified that the week before plaintiff's accident was the first time that he had ever heard the Elevator making such "grinding" noise.

In addition, plaintiff was not called to the premises to replace a worn out or loose component part, but rather, he was called to the premises to fix a safety that was not properly aligned, and which was dragging on the Elevator's rail (see Piccione v 1165 Park Ave., 258 AD2d 357, 358 [1st Dept 1999] [replacing the ballast and sockets of a fluorescent light fixture and disconnecting, stripping, and reconnecting the wires constitutes "repairing" within the meaning of the statute]; Benfanti v Tri-Main Dev., 231 AD2d 855, 855 [4th Dept 1996] [removal of a part of a drain pipe for the purpose of unclogging and repairing it constituted repair work]; cf. Esposito v New York Indus. Dev. Agency, 1 NY3d at 528 [work constituted routine maintenance, rather than repair work, where the work "involved replacing components that require replacement in the course of

normal wear and tear"]). Plaintiff also testified that he did not take any parts with him to the work site.

It should also be noted that 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, 1728-1729 [4th Dept 2010], quoting Short v Durez Div.-Hooker Chems. & Plastic Corp., 280 AD2d 972, 973 [4th Dept 2001]; Caraciolo v 800 Second Ave. Condominium, 294 AD2d 200, 202 [1st Dept 2002] [where the plaintiff's work involved climbing a water tank in response to an alarm indicating something wrong with a repair, held that "[i]nspection of an integral part of the building in furtherance of repairing an apparent malfunction [was] . . . within the scope of . . . [Labor Law § 240 [1]]"]). Here, at the time of the accident, plaintiff was standing beneath the elevator and inspecting the safety in order to correct the problem at hand.

Finally, there is no indication in the record that this is a situation where the device or component that was being fixed or replaced was intended to have a limited life span or required periodic adjustment or replacement (*see* Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc. (118 AD3d at 525, 527 [replacement of glass panels of a skylight in a church steeple

constituted repair work for the purposes of Labor Law § 240 (1), because the panels were not expected to be regularly replaced due to normal wear and tear]). As such, the work that plaintiff was performing at the time of the accident constituted repair work for the purposes of the statute.

In opposition, citing the case of Carr v Perl Assoc. (201 AD2d 296, 297 [1st Dept 1994]), Arnlie argues that, because the elevator was still operable, plaintiff was not engaged in repair work. In Carr, the plaintiff, also an elevator maintenance mechanic, became injured when she "slipped and fell beneath the elevator into an open shaft" (*id.*). In making its determination that Labor Law § 240 (1) applied, the Carr Court reasoned that "as the elevator was inoperable, plaintiff was engaged in 'repair' work within the meaning of the statute" (*id.*). Defendant's argument fails, however, because the Carr court did not specifically state that an elevator must be inoperable in order for the work to be considered repair work. Moreover, it makes no sense to suggest that if a defective elevator is still operational, the fix must be considered "routine maintenance," rather than "repair."

In addition, as plaintiffs argue, Labor Law § 240 (1) applies to the facts of this case on a falling objects theory,

because the Elevator was not properly secured against falling at the time of the accident. Liability under a falling object theory is not limited to objects in the process of being hoisted or secured at the time of the accident. Labor Law § 240 (1) also applies to objects which "required securing for the purposes of the undertaking" (Outar v City of New York, 5 NY3d 731, 732 [2005] [Labor Law § 240 (1) applicable where plaintiff was struck by an unsecured dolly, which was being stored on top of a bench wall, and not in the process of being hoisted or secured, at the time that it fell on the plaintiff]; see also Quattrocchi v F.J. Sciame Constr. Corp., 11 NY3d 757, 759 [2008] [Labor Law § 240 (1) applicable where "[the plaintiff] was struck by falling planks that had been placed over open doors as a makeshift shelf"]; Vargas v City of New York, 59 AD3d 261, 261 [1st Dept 2009]; Boyle v 42nd St. Dev. Project, Inc. (38 AD3d 404, 405 [1st Dept 2007] [Labor Law § 240 (1) liability where threaded rods, which were not in the process of being hoisted or secured at the time of the accident, fell from a height and injured the plaintiff]).

In addition, plaintiff has sufficiently shown that "the object fell '*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute'" (Moncayo v Curtis

Partition Corp., 106 AD3d 963, 964 [2d Dept 2013], quoting Narducci v Manhasset Bay Assoc., 96 NY2d at 268). While plaintiff has not put forth direct evidence explaining exactly what safety mechanism failed, causing the Elevator to fall onto plaintiff, "[a] lack of certainty as to exactly what preceded plaintiff's [accident] does not create a material issue of fact here as to proximate cause" (Vergara v SS 133 W. 21, LLC, 21 AD3d 279, 280 [1st Dept 2005] [where either defective or inadequate protective devices constituted the proximate cause of the plaintiff's accident, it did not matter whether the plaintiff's fall was the result of the scaffold tipping over or whether it was the result of plaintiff misstepping off its side]; see also Humphrey v Park View Fifth Ave. Assoc. LLC, 113 AD3d 558, 559 [1st Dept 2014] [where a worker was injured when an aluminum beam fell from above, struck a stringer that he was carrying and then knocked him to the ground, the worker did not have to establish where the beam fell from in order to recover under Labor Law § 240 (1)]; Mercado v Caithness Long Is. LLC (104 AD3d 576, 577 [1st Dept 2013] [the plaintiff was not required to show exactly how the pipe that struck him fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries"] Agresti v Silverstein Props.,

Inc., 104 AD3d 409, 409 [1st Dept 2013] [where a wooden plank from an improvised scaffold fell and hit the plaintiff in the head, "the fact that plaintiff failed to point to a specific defect in the scaffold [did] not require denial of the motion]).

Here, it is enough that plaintiff has adequately established, through circumstantial evidence, that while he was working at the Building, the inadequacy or defect in some safety device caused the Elevator to fall from an elevated height and strike him, resulting injuries (Rios v 474431 Assoc., 278 AD2d 399, 399 [2d Dept 2000] ["plaintiff established, through the use of circumstantial evidence, that . . . a piece of pipe fell from an elevated height, where a co-worker had been cutting pipes, and struck him in the face"]; Cosgriff v Manshul Constr. Corp., 239 AD2d 312, 312 [2d Dept 1997] [recovery under Labor Law § 240 (1) where circumstantial evidence indicated that the plaintiff was struck in the head by an object which came from the roof of a building at the location where he was working, and that no safety devices were provided]).

Finally, Arnlie argues that plaintiffs are not entitled to judgment in their favor on the Labor Law § 240 (1) claim, because issues of fact exist as to whether plaintiff was the sole proximate cause of his accident. "[T]he duty to see that safety

devices are furnished and employed rests on the employer in the first instance" (Aragon v 233 W. 21st St., 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (Ball v Cascade Tissue Group-N.Y., Inc., 36 AD3d 1187, 1188 [3d Dept 2007]; see also Robinson v East Med. Ctr., LP, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

In support of its argument that plaintiff was the sole proximate cause of the accident, Arnlie puts forth the professional engineer expert affidavit, wherein the expert states that plaintiff failed to properly utilize a lockout/tagout device which was available to him. However, Arnlie's expert offers no opinion about the absence of a stop switch in the pit of the Elevator, which he agrees with plaintiff was not present. Nor did the defense expert address plaintiff's testimony that, before plaintiff began his work on the Elevator, he disabled it by pushing in the relay buttons or raise an issue of fact with

respect to plaintiff's explanation that, once the relay buttons were pushed in, there was no way that "the [E]levator could move if someone on an upper floor pushed a call button".

Moreover, the Service Agreement explicitly required Arnlie to "shut down the equipment immediately upon manifestation of an irregularity in operation or appearance in the equipment" and "keep the equipment shut down until completion of repairs."

In any event, as plaintiff did attempt to disable the Elevator by pushing in the relay buttons, whether or not plaintiff was negligent in not undertaking the lockout/tagout process goes to the issue of comparative fault, and 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]; Dwyer v Central Park Studios, Inc., 98 AD3d 882, 884 [1st Dept 2012]). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (Hernandez v Bethel United Methodist Church of N.Y., 49 AD3d 251, 253 [1st Dept 2008], quoting Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 290).

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]; see Ranieri v Holt Constr. Corp., 33 AD3d 425, 425 [1st Dept 2006] [Court found that the 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 injur(ies); Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]).

In addition, defendants have not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (see Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 [1st Dept 2008]; Olszewski v Park Terrace Gardens, 306 AD2d 128, 128-129 [1st Dept 2003]; Morrison v City of New York, 306 AD2d 86, 86-87 [1st Dept 2003]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]; Sanango v 200 E. 16th St. Hous. Corp., 290 AD2d 228, 228-229 [1st Dept 2002]).

Importantly, 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 [internal citation 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).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against Arnlie, and Arnlie is not entitled to dismissal of such claim against it.

Labor Law § 241 (6) Claim Against Arnlie

Arnlie moves for dismissal of the Labor Law § 241 (6) claim against it. Labor Law § 241 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, [and] 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 a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Labor Law § 241 (6) does not apply to this case, because a review of the record reveals that no "construction, excavation or demolition work" was underway at the time of the accident, so as to fall within the purview of the statute. Thus, Arnlie is entitled to dismissal of the Labor Law § 241 (6) claim against it.

Common-Law and Labor Law § 200 Claims Against Arnlie

Arnlie moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. 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 311, 316-317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> 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 the means and methods used by the contractor to do its work, and (2) 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]).

Plaintiffs do not allege that plaintiff's injuries were caused by any dangerous condition in the Building, but instead allege that his injuries arose from the means and methods used in carrying out his work.

It is well settled that, in order to find an owner or his agent liable under Labor Law § 200 for injuries arising from a contractor's lack of care in methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff was injured as he was lifting a beam, and no evidence was put forth that the defendant exercised supervisory control or had any input into the method of moving the beam]).

Moreover, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (Hughes v Tishman Constr. Corp., 40 AD3d 305, 306 [1st Dept 2007]; see also Bednarczyk v Vornado Realty Trust, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; Burkoski v Structure Tone, Inc., 40 AD3d 378, 381 [1st Dept 2007] [no

Labor Law § 200 liability where the 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]).

The facts of this case indicate that plaintiff's accident was caused by the means and methods by which the work was carried out, the failure to carry out the lockout/tagout procedure, or to engage the kill switch, so as to ensure that the Elevator did not move while it was being investigated/repaired. Under the Service Agreement, Arnlie was required to "shut down the equipment immediately upon maintenance of any irregularity in operation or appearance in the equipment" and to "keep the equipment shut down until completion of the repairs". Arnlie's superintendent testified that the kill switch was located in his office, and admitted that he never touched it. Thus, Arnlie, the owner, had the requisite supervisory control over the plaintiff's work at the time of his injuries to be cast in damages under Labor Law § 200. Thus, Arnlie is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it, given this irrefutable evidence that Arnlie had the requisite authority to exercise supervisory control and had input in the method or means by which plaintiff carried out work, i.e., his inspection,

assessment and repair of the Elevator.

Arnlie's Common-Law Indemnification Claim Against Brink

Arnlie moves for conditional summary judgment in its favor on the common-law indemnification claim against Brink. Brink moves for dismissal of said third-party claim against it. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (Chapel v Mitchell, 84 NY2d 345, 347 [1994]).

On the day of the accident, plaintiff was working within the scope of his employment with Brink. As such, Workers Compensation Law § 11 is relevant to this case. Section 11 prescribes, in pertinent part, as follows:

"For purposes of this section the terms 'indemnity' and

> 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (Rubeis v Aqua Club, Inc., 3 NY3d 408, 412-413 [2004]). Here, as it is clear from the injuries alleged in the bill of particulars that plaintiff did not suffer a "grave injury" as defined by Workers' Compensation Law § 11, Brink is entitled to dismissal of any and all cross claims asserted against it sounding in common-law indemnification.

In opposition to Brink's motion, and in support of its own

motion, Arnlie argues that Brink is not entitled to the benefit of the statutory bar of third-party actions pursuant to Workers' Compensation Law § 11, because it did not purchase workers' compensation insurance for its employees, including plaintiff (see Boles v Dormer Giant, Inc., 4 NY3d 235, 237 [2005]).

> Section 10 (1) of the Workers' Compensation Law provides that '[e]very employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . . .'
>
> Section 11, entitled 'Alternative Remedy,' is composed of several undesignated paragraph, the first of which specifies that '[t[he liability of the employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee . . . or any person otherwise entitled to recover damages, contribution or indemnity . . . except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee . . . may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury '"

(*4 NY3d* at 238-239).

As the Court in Boles reasoned:

> Employers that do not secure workers' compensation for their employees are not holding up their end of the bargain between business and labor that undergirds section 11. The Legislature cannot have intended to extend the statute's heavily negotiated protections from third-party liability to scofflaws, which would be

> unfair to law-abiding employers and might discourage compliance with section 10"

(*id.* at 240).

However, a review of the Service Agreement in this action demonstrates that Brink did obtain workers' compensation insurance through the requirement that Arnlie purchase same, which is consistent with plaintiff's deposition testimony that his physical therapy was paid through "Workmen's Comp".

Thus, Arnlie is not entitled to summary judgment in its favor on the common-law indemnification claim against Brink, but Brink is entitled to dismissal of such third-party claim against it.

Arnlie's Contractual Indemnification Claim Against Brink

Brink moves for dismissal of Arnlie's third-party claim for contractual indemnification against it. "Even in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (Mentesana v Bernard Janowitz Constr. Corp., 36 AD3d 769, 771 [2d Dept 2007]; see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc., 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear

and unambiguous" (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 433 [2005]; Tullino v Pyramid Cos., 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed [internal quotation marks and citation omitted]" (Meabon v Town of Poland, 108 AD3d 1183, 1185 [4th Dept 2013]; Mikulski v Adam R. West, Inc., 78 AD3d 910, 911 [2d Dept 2010]).

Here, no written agreement exists between the parties which requires Brink to indemnify Arnlie, and incidentally the obligation under the Service Agreement in connection with indemnification as to any claims on the part of third persons is the reverse. Thus, Arnlie is not entitled to judgment in its favor on this third-party claim, and Brink is entitled to dismissal of such claim against it (Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d at 431-432; Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 365 [2005]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant/third-party plaintiff Arnlie Realty Company, LLC's (Arnlie) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment

dismissing the common-law negligence and Labor Law § 241 (6) claims against it is granted, and these claims are dismissed against this defendant/third-party plaintiff, and the motion is otherwise denied; and it is further

ORDERED that third-party defendant Brink Elevator Corp.'s (Brink) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, as well as any cross claims and/or counterclaims asserted against it, is granted, and the third-party complaint and all cross claims and/or counterclaims are dismissed as to Brink, with costs and disbursements to Brink as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of Brink; and it is further

ORDERED that plaintiffs William McCrea and Claudia McCrea's cross motion for summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against defendant Arnlie is granted, and searching the record pursuant CPLR 3212(b) summary judgment in favor of plaintiffs as to liability on the Labor Law § 200 claims is granted; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, New York on September 29, 2015, 12 noon.

Dated: August 6, 2015 ENTER:

J.S.C.

DEBRA A. JAMES