Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE VALERIE BRATHWAITE NELSON** IA Part 7
Justice

JUAN MAURISACA, x

Plaintiff,

-against-

BOWERY AT SPRINGS PARTNERS, L.P. CONDOMINIUM BOARD OF THE NOLITA PLACE CONDOMINIUM, MIDBORO MANAGEMENT, INC., BAKER'S DOZEN ASSOCIATES LLC, EMM GROUP HOLDINGS LLC, and THE WALSH COMPANY, LLC,

Defendants. x

Index Number: 702405/12

Motion Date: November 5, 2015

Motion Seq. No.: 9, 11,12, 14, 15, 16

Motion Cal.Nos.: 117, 118, 15, 12

The following papers numbered EF153 to EF400 read on this (1) motion by Nolita Place Condominium i/s/h/a "Condominium Board of the Nolita Place Condominium", and Midboro Management, Inc., hereinafter collectively referred to as "the Nolita defendants", for summary judgment in their favor pursuant to CPLR 3212; (2) motion by Mission Design and Management Inc., (Mission), for summary judgment in its favor dismissing all claims and cross and counterclaims against it pursuant to CPLR 3212; (3) motion by Scottsdale for summary judgment in its favor dismissing the third third-party complaint; (4) motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law §§240 (1) and 241 (6); (5) motion by Bowery at Spring Partners, L.P. (Bowery), for summary judgment in its favor dismissing the complaint, insofar as asserted against it; and (6) motion by Bakers Dozen and EMM to extend their time to submit opposition papers to the motion for summary judgment previously filed by Walsh.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	EF153-EF178, 209-301, 308-314
Answering Affidavits - Exhibits	EF315-329,334-344, 347-364, 369-378
Reply Affidavits	EF 380-383, 390, 399-400

Upon the foregoing papers it is ordered that the motions are consolidated for disposition and are determined as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained while working at a construction site at 199 Bowery Street in New York City. Plaintiff was working for Mission installing drywall when he fell from a scaffold. The construction project consisted of a major renovation of commercial space for a new restaurant called "The General". The property itself is divided into two lots/parts: the commercial/retail space and the residential tower. The owner of the retail property lot was Bowery. The residential tower was owned and operated by Condominium Board of the Nolita Place Condominium and Midboro Management, Inc., respectively.

Bowery leased the commercial space to Bakers Dozen, which was in the restaurant business and was renovating the commercial space at 199 Bowery for their new restaurant. Bakers Dozen is the alter ego for EMM Group Holdings LLC (EMM). EMM entered into various agreements and contracts on behalf of Bakers Dozen as an agent of the lessee. Bakers Dozen hired Mission as the general contractor for the renovation project. According to Hoon Lee, produced by Walsh as a deposition witness, the Walsh Company, LLC was hired to be the owners' representative.

Plaintiff's accident occurred while he was utilizing a wheeled scaffold know as a baker's scaffold. He was in the process of Sheet rocking a wall. In order to accomplish this task, it was necessary for plaintiff and his co-worker to continue to move the scaffold as they were installing the Sheetrock. The scaffold was owned by Mission and assembled by its workers. The scaffold had four wheels with each wheel having a locking mechanism. After the Sheetrock was installed at a particular location, plaintiff and his coworker would get off the scaffold, unlock the wheels and move it to a new location. The coworker would check the two wheels on his side of the scaffold and plaintiff would unlock and then relock the other two wheels after it had been moved to its location. Plaintiff testified that he and his coworker were standing on the scaffold in the process of installing a piece of Sheetrock when the scaffold on plaintiff's side moved away from the wall causing plaintiff to fall and sustain injuries. The parties dispute whether there was anything wrong with the scaffold, and argue that the sole cause of plaintiff's accident was plaintiff's negligence in not locking the two wheels on his side of the scaffold, which caused the accident. Nonetheless, it is undisputed that the scaffold did not have any guardrails. Plaintiff's complaint contains causes of action based on common law negligence and violations of Labor Law sections 200, 240 (1) and 241 (6), against the various defendants.

The record indicates that on or about January 18, 2012, Bowery and Bakers Dozen entered into a lease agreement with regard to the use and occupancy of the premises (the "Lease Agreement). On or about February 10, 2012, Walsh submitted a Project Management Services Proposal to EMM Group Holdings LLC (EMM), wherein Walsh, as Project Manager, was to provide project management services to Bakers Dozen, as client in connection with Bakers Dozen's design and construction of a restaurant and night club at the premises (the "Walsh Proposal"). The Walsh Proposal was executed on behalf of EMM on April 12, 2012, by Adam Landsman, the Director of Operations, but is not executed on behalf of Walsh.

Thereafter, on or about June 21, 2012, Bakers Dozen, as Owner, entered into an AIA A101-2007 Standard Form Agreement between Owner and Contractor, with Mission whereby Mission agreed to perform a variety of tasks related to the renovation of the premises, including demolition, masonry and carpentry (the "Mission Contract").

On or about June 21, 2012, Bakers Dozen and Mission also entered into a separate Indemnity Agreement pertaining to the work at the premises.

After the alleged accident, on August 20, 2013, Bakers Dozen and Mission entered into another Indemnity Agreement whereby Mission purported to agree to indemnify various entities in connection with its work at the premises.

Thereafter, on September 3, 2013, a Supplemental Agreement was executed by Mission which contains another indemnity provision regarding the work being performed at the Premises and specifically with regards to the claims set forth in the Underlying Action.

Scottsdale issued a commercial general liability insurance policy to Mission, under policy number BCS0028530, in effect for the policy period August 6, 2012 through October 5, 2012, when the policy was cancelled by endorsement (the "Scottsdale Policy").

In connection with the Underlying Action, by electronic correspondence date August 16, 2013, Century Surety Company (Century), Mission's excess carrier, forwarded to Scottsdale correspondence dated July 15, 2013, which was received by Century from Walsh's general liability carrier, "CNA". In its correspondence, CNA tendered Walsh's defense and indemnity in the Underlying Action as an additional insured to Century. By correspondence dated August 16, 2013, Scottsdale responded to CNA and advised them that it was in receipt of Walsh's tender and had undertaken an investigation into the claim. It was requested that CNA forward copies of any additional information available, including contracts and incident reports. By correspondence dated August 29, 2013, Scottsdale advised CNA that coverage

was being disclaimed as there was no evidence that Walsh was to be an additional insured to the Scottsdale Policy.

On April 9, 2014, CNA again tendered the defense and indemnity of Walsh as an additional insured to Scottsdale. By correspondence dated April 28, 2014, Scottsdale reiterated its disclaimer of coverage to Walsh, explaining that Walsh did not satisfy the terms of the Scottsdale Policy and had not demonstrated that it was entitled to additional insured status under the policy.

By correspondence dated October 6, 2014, CNA renewed its request that Scottsdale agree to defend and indemnify Walsh based on the terms of the Mission Contract on the ground that Walsh was an additional insured under the Scottsdale Policy. By correspondence dated November 19, 2014, Scottsdale again disclaimed coverage to Walsh because Walsh was not an additional insured under the Scottsdale Policy. In addition, the Contractual Liability exclusion precluded coverage for any claims arising out of the Supplemental Agreement.

As provided above, defendants move for summary judgment in their favor on various grounds. Plaintiff opposes the motions and separately moves for partial summary judgment in his favor on his claims pursuant to Labor Law sections 240(1) and 241 (6). The motion by plaintiff is opposed by defendants.

Motion by the Nolita Defendants (Sequence #9)

The motion by the Nolita defendants for summary judgment in their favor dismissing all claims and cross claims against them is granted as unopposed and otherwise on the merits.

The issue of whether a condominium board and its managing agent can be held liable to a plaintiff as "owners" under Labor Law sections 240(1) and 241 (6), has been decided by the Court of Appeals in *Guryev v Tomchinsky*, 20 NY3d 957 [2012]. In that case, a construction worker brought suit against the condominium board and its property manager for injuries sustained while working in a condominium unit owned by the *Tomchinsky* defendants. The *Tomchinskys* had hired plaintiff's employer to perform renovation work on their condominium unit. In affirming the Appellate Division's decision granting the condominium defendants summary judgment dismissing plaintiff's claims under Labor Law sections 240(1) and 241(6), the Court of Appeals pointed out that "the threshold issue on this appeal is whether the condominium defendants are 'owners or agents of owners' of the Tomchinskys' apartment." The Court went on to hold that "the Tomchinskys' apartment is real property separate and apart from the land beneath the condominium building. . . and since the Tomchinskys, not the condominium, own the Tomchinskys' apartment, the Board

and Trump (its managing agent), are not the owner's agents within the meaning of the Labor Law."

Similarly here, the undisputed record indicates that Nolita Place and Midboro Management, Inc., are the condominium board and its managing agent. They did not own the commercial condominium unit where plaintiff's accident occurred. To the contrary, the unit was owned by Bowery and leased to Bakers' Dozen. Bakers' Dozen then contracted with Mission to perform the renovation of the subject unit into a restaurant and night club. Therefore, since the Nolita defendants are not "owners" under Labor Law sections 240(1) and 241 (6), plaintiff's claims under Labor Law sections 240(1) and 241 (6), are dismissed as against them.

Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352; *Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876, 877; *Lombardi v Stout,* 80 NY2d 290, 294; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d 847, 850; *Brown v Brause Plaza, LLC,* 19 AD3d 626, 628; *Everitt v Nozkowski,* 285 AD2d 442, 443; *Giambalvo v Chemical Bank,* 260 AD2d 432, 433). Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). These two categories should be viewed in the disjunctive (*Id*).

Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Azad v 270 5th Realty Corp.,* 46 AD3d 728, 730; *Kerins v Vassar Coll.,* 15 AD3d 623, 626; *Kobeszko v Lyden Realty Invs.,* 289 AD2d 535, 536).

By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v City of New York,* 304 AD2d 611, 612; *see Comes v New York State Elec. & Gas Corp.,* 82 NY2d at 877; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d at 851; *Colon v Lehrer, McGovern & Bovis,* 259 AD2d 417, 419). Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the defendant cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co., Inc.,* 91 NY2d 343, 352; *Russin v Louis N. Picciano & Son,* 54 NY2d 311, 317; *Gallello v MARJ Distrib., Inc.,* 50 AD3d 734, 735; *Dooley v Peerless Importers, Inc.,* 42 AD3d 199, 204–205; *Guerra v Port Auth. of N.Y. & N.J.,* 35

AD3d 810, 811; *Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 683; *Everitt v Nozkowski,* 285 AD2d at 443; *Reynolds v. John T. Brady & Co.,* 38 A.D.2d 746, 746–747, 329 N.Y.S.2d 624). Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 (*see Natale v City of New York,* 33 AD3d 772, 773; *Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d at 683; *Dos Santos v STV Engrs., Inc.,* 8 AD3d 223, 224). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*Ortega v Puccia,* 57 AD3d at 61).

In this case, plaintiff's accident did not involve any dangerous or defective condition on the defendants' premises. The accident instead involved the manner in which the plaintiff performed his work, which was not supervised by the defendants, and which was performed on equipment provided by the plaintiff's employer, not by the defendants. As stated by the Court of Appeals, "the duty to provide a safe place to work is not breached when the injury arises out of 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" (*Persichilli v Triborough Bridge & Tunnel Auth.,* 16 NY2d 136, 145). In *Persichilli,* the Court of Appeals further stated that while a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective. The allegedly defective scaffold should instead be viewed as a device involving the methods and means of the work. Under such circumstances, Labor Law § 200 imposes no liability upon owners (*see Persichilli v. Triborough Bridge & Tunnel Auth.,* 16 NY2d at 146), absent evidence of the owner's authority to supervise or control the manner and methods of the work.

Here, there is nothing in the record to indicate that the Nolita defendants either had the authority to control the manner or method by which the plaintiff performed his work or provided the subject scaffold. Thus, the plaintiffs failed to satisfy the requisite elements of Labor Law § 200 (*see Dupkanicova v Vasiloff,* 35 AD3d 650, 651; *Reilly v Loreco Constr.,* 284 AD2d 384, 385; *Benefield v Halmar Corp.,* 264 A.D.2d 794, 795, 695 N.Y.S.2d 394).0 Accordingly, the branch of the motion which is to dismiss the claims pursuant to Labor Law section 200 and common law negligence, as against the Nolita defendants is granted.

Motion by Mission (Sequence #11)

The branch of the motion by Mission which is to dismiss the complaint, insofar as asserted against it, on the ground that plaintiff was the sole proximate cause of the subject accident, is denied. As further discussed below, "proximate cause is established as a matter of law by the undisputed fact that plaintiff fell off a scaffold without guardrails that would

have prevented his fall.... The claims concerning plaintiff's failure to use the locking wheel devices and his movement of the scaffold while standing on it are not determinative, since contributory negligence is not a defense (citation omitted)" (*see Crespo v Triad*, 214 AD2d 145, 147 [2002]).

The branch of the motion by Mission which is to dismiss the second third-party complaint, is denied as academic in light of the court's decision [dated October 5, 2015], granting Walsh's motion for summary judgment in its favor dismissing all claims and cross claims against it.

The branch of the motion by Mission which is for summary judgment in its favor dismissing the second third-party complaint, is denied. As pertains to Mission, the second third-party complaint by Bakers Dozen and EMM Group alleges a cause of action for breach of contract by Mission for its failure to comply with its contractual indemnification obligations and further seeks contribution from Mission in the event plaintiff is awarded damages.

The record indicates that Mission was hired as a contractor to perform a variety of tasks related to the renovation of the premises, including demolition, masonry and carpentry. In relation to the said work, Mission entered into a standard form contracting agreement with Bakers' Dozen entitled "A1A A101-2007 Standard Form of Agreement between Owner and Contractor" (hereinafter "A1A"). The A1A, which governs the parties' relationship, adopts by reference the "A1A A201-2007 General Conditions of the Contract for Construction". Mission was paid by Bakers' Dozen for the construction services rendered pursuant to the terms of the A1A. Articles 9 and 9.1.2 of the A1A subsequently reaffirm the General Conditions are part of the "Contract" or A1A.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930; *see Canela v TLH 140 Perry St., LLC*, 47 A.D.3d 743, 849 N.Y.S.2d 658). "When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274–275). Here, the indemnification clause in the first of the three indemnification provisions entered into between Bakers Dozen and Mission provides that,

> "To the fullest extent permitted by law, the Contractor [Mission] shall indemnify and hold harmless the Owner [Bakers' Dozen]. . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury. . . but only to the extent caused

> by the negligent acts or omission of the Contractor [Mission] . . . anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . ."

In addition to the A1A indemnification clause, there are a series of separate indemnification agreements by which, Bakers' Dozen and EMM contend that, Mission is obligated to indemnify Bakers' Dozen and EMM. The first of which, dated June 21, 2012, obligated Mission to indemnify Bakers' Dozen and its "members, managers, consultants, parents, subsidiaries or affiliated companies, successors and assigns. . . for the acts and omissions of the Contractor's [Mission] employees, subcontractors, suppliers, guest and their agents and employees, and other persons performing any portion of the Work on behalf of the Subcontractor." This language, the parties contend, would include EMM as an indemnified party, and EMM as an express third party beneficiary under the terms of the agreement.

Mission argues that the June 2012 agreement limits its indemnity obligation to losses arising solely out of Mission's negligence. However, the June 2012 agreement is very broad and is not limited to liability based upon the negligence of Mission. Specifically, the agreement, authenticated by Kim in his deposition, provides in relevant part, that:

> "Contractor [Mission] agrees to defend, indemnify, and/or hold harmless Indemnified parties from any and all claims, demands, suits, actions, proceedings, losses, damages arising out of or in any way connected with the work performed or to be performed under this Agreement by Contractor, its agents, subcontractors, suppliers, guests and their agents or employees and other such persons performing any portion of the Work on behalf of the Contractor, even though such claims may prove to be false, groundless or fraudulent, and subject to the limitations provided below."

In addition to the June 21, 2012 agreement, second third-party plaintiffs contend that there are two other indemnification agreements which were entered into between Mission and Bakers Dozen necessitating Mission's indemnification of Bakers Dozen and EMM. The first, effective August 20, 2013, essentially mirrors the June 2012 agreement. The second, identified as a Supplemental Agreement and executed by James Han of Mission, specifically requires indemnification of both Bakers Dozen and EMM.

In determining whether the parties entered into a contractual agreement and what its terms were, it is necessary to look to the objective manifestations of the intent of the parties, as evidenced by the totality of their expressed words and deeds. The court must look to the

attendant circumstances, the situation of the parties, and the objectives they were striving to attain (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397 [1977]; *see also Kowalchuk v Stroup,* 61 AD3d 118 [2009]; *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201 [2008]). Here, it is clear from the language of the indemnification provisions between Bakers Dozen and Mission that the parties intended for Mission to indemnify Bakers Dozen and EMM based upon a claim arising out of the contract.

A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see George v Marshalls of MA, Inc.*, 61 AD3d 931; *O'Brien v Key Bank,* 223 AD2d 830, 831). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65; *see Tranchina v Sisters of Charity Health Care Sys. Nursing Home,* 294 A.D.2d 491, 493). Here, Bakers Dozen and EMM met their initial burden of demonstrating their prima facie entitlement to judgment as a matter of law on their contractual indemnification claims against Mission by submitting evidence establishing that they were free from any negligence and can only be held liable based on statutory or vicarious liability as the owner of the subject property where the accident occurred (*Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616 [2011]). In response, Mission failed to raise a triable issue of fact. Accordingly, the motion by Mission for summary judgment in its favor dismissing the third-party complaint is denied.

Motion by Scottsdale (Sequence #12)

The branch of the motion by Scottsdale for summary judgment in its favor dismissing the third third-party complaint, is denied. An insurer's obligation to defend is broader than its obligation to indemnify, and arises whenever the allegations in a complaint against the insured fall within the scope of the risk undertaken by the insurer (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304 , 310). "To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175; *see Fortress Ins. Co. v Kollander,* 41 AD3d 423, 424). Here, Scottsdale, the insurer of Mission failed to establish, prima facie, its entitlement to judgment as a matter of law. Scottsdale failed to submit any evidence establishing that there was no possible basis upon which it may be obligated to indemnify Bakers Dozen and EMM since there was no evidence that Mission and Bakers Dozen and EMM did not enter into an indemnification agreement in 2012.

Accordingly, Scottsdale's failure to make a prima facie showing of entitlement to judgment as a matter of law requires a denial of its motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The branch of the motion by Scottsdale which is to sever the third third-party complaint is granted. "It is generally recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (*Burlington Ins. Co. v Guma Const. Corp.*, 66 A.D.3d 622, 625 [2009], *citing Christensen v Weeks,* 15 AD3d 330, 331 [2005] [internal quotation marks omitted]; *see Kelly v Yannotti,* 4 NY2d 603 [1958]).

Motion by Plaintiff (Sequence #14)

The branch of the motion by plaintiff which is for partial summary judgment in his favor on his claim pursuant to Labor Law section 240(1), is granted. Labor Law §240(1) imposes a non-delegable duty upon the owner and contractor to supply necessary security devices for workers at an elevation, to protect them from falling (*see Bland v Manocherian,* 66 NY2d 452, 458–459 [1985]; *Rodriguez v Forest City Jay St. Assoc.,* 234 AD2d 68 [1996]). A violation of this duty results in absolute liability where the violation was the proximate cause of the accident (*see Crespo v Triad, Inc.,* 294 AD2d 145 [2002]). Plaintiff made a prima facie showing that he was not provided with the adequate protection required, and nothing in defendants' submissions created material issues of fact in this regard. There is no dispute that the [[[six-foot-high]]], manually propelled scaffold, which plaintiff was directed to use in order to Sheet Rock the [[[fifteen-foot-high]]] [walls]] [[ceiling]], had no guard/side rails, and no other protective device was provided to protect him from falling off the sides (*see Vergara v SS 133 W. 21, LLC*, 21AD3d 279, 280 [2005]; *Vanriel v A. Weissman Real Estate,* 262 AD2d 56 [1999]).

There is no merit to the defendants' claims that factual issues with respect to proximate cause preclude summary judgment in favor of plaintiff on the section 240(1) claims. Proximate cause is established as a matter of law by the undisputed fact that plaintiff fell off a scaffold without guardrails that would have prevented his fall (*see, Boss v Integral Constr. Corp.,* 249 AD2d 214), and the "precise manner in which plaintiff's fall occurred is immaterial" (*Laquidara v. HRH Constr. Corp.,* 283 AD2d 169). The claims concerning plaintiff's failure to properly lock the four wheels and his movement on the scaffold while standing on it are not determinative, since contributory negligence is not a defense (*see, Vanriel v Weissman Real Estate,* 262 AD2d 56).

Defendants also fail to raise an issue of fact with respect to their recalcitrant worker defense, where they fail to adduce any evidence that plaintiff refused to obey an order to utilize safety devices immediately available to him. The evidence that there was a safety

device somewhere on the job site, and that plaintiff failed to heed a general instruction given at some point in the past, does not suffice (*see, Gordon v Eastern Ry. Supply,* 82 NY2d 555, 562–563; *Crespo v Triad, Inc.*, 294 AD2d at 146; *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96, 99; *Powers v Del Zotto & Son Bldrs.*, 266 AD2d 668).

The branch of the motion by plaintiff which is for summary judgment on his claims pursuant to Labor Law §241(6), is also granted. Plaintiff also satisfied his prima facie burden of establishing his entitlement to judgment as a matter of law on his Labor Law § 241(6) cause of action insofar as predicated on a violation of 12 NYCRR 23–5.18(b) (*see Moran v 200 Varick St. Associates, LLC*, 80 AD3d 581, 582; *Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 413). This code provision, specifically applicable to manually propelled scaffolds, requires safety railings without reference to the height of the scaffold (*Vergara v SS 133 W. 21, LLC*, 21 A.D.3d 279, 281, 800 N.Y.S.2d 134, 136 (2005). Here, it is undisputed that the subject scaffold had no safety railings.

Motion by Bowery at Spring Partners, L.P. (Sequence #15)

The branch of the motion by Bowery which is to dismiss plaintiff's complaint, insofar as asserted against it, is denied. Bowery's argument that plaintiff was the sole proximate cause of the subject accident, is without merit, as addressed by the court above.

The branch of Bowery's motion which is, alternatively, for summary judgment dismissing the cross claims is properly denied as premature, since the motion was made prior to the joinder of issue by Bakers Dozen (*see* CPLR 3212 [a]; *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]; *Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171 [2004], *affd* 4 NY3d 858 [2005]; *Chakir v Dime Sav. Bank of N.Y.*, 234 AD2d 577, 578 [1996]). A motion for summary judgment may not be made before issue is joined (CPLR 3212 [a]) and the requirement is strictly adhered to (*see,* Enriquez v. Home Lawn Care & Landscaping, Inc., 49 A.D.3d 496, 497 [2008]]). Bowery may properly move for the same following service upon Bakers Dozen of the cross claims.

The branch of the motion by Bowery which is for contractual indemnification from Mission, is granted. Mission was contractually obligated by its agreement with Bakers Dozen to provide all necessary safety devices, which would include the guard railing on the scaffold at issue. Bowery was a third-party beneficiary of the said agreement. Further, Bowery submitted evidence that it neither controlled the plaintiff's activities or was negligent in any manner, and therefore was entitled to judgment as a matter of law (*see Montour v City of New York*, 270 AD2d 236, 239 [2000]; *Brown v Two Exch. Plaza Partners,* 76 NY2d 172). Mission failed to rebut this showing.

Motion by Bakers Dozen and EMM (Sequence #16)

The motion by Bakers Dozen and EMM to extend their time to submit opposition to the motion for summary judgment filed by Walsh is granted (*see Bakare v Kakouras*, 101 AD3d 838 [2013]; *see also Lawrence v Celtic Holdings, LLC*, 85 AD3d 874 [2011]).

Conclusions

The motion by the Nolita defendants for summary judgment in their favor dismissing all claims and cross claims against them is granted.

The motion by Mission for summary judgment in its favor is denied.

The branch of the motion by Scottsdale for summary judgment in its favor dismissing the third third-party complaint, is denied. The branch of the motion by Scottsdale which is to sever the third third-party complaint is granted.

The motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law sections 240(1) and 241(6), is granted.

The branch of the motion by Bowery which is to dismiss plaintiff's complaint, insofar as asserted against it, is denied. The branch of Bowery's motion which is, alternatively, for summary judgment dismissing the cross claims is denied without prejudice, as provided above. The branch of the motion by Bowery which is, alternatively, for contractual indemnification from Mission, is granted.

The motion by Bakers Dozen and EMM to extend their time to submit opposition to the motion for summary judgment filed by Walsh is granted.

Dated: 2/18/16

VALERIE BRATHWAITE NELSON, J.S.C.