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 SPRING PARTNERS, L.P., CONDOMINIUM BOARD OF THE NOLITA PLACE, CONDOMINIUM MIDBORO MANAGEMENT, INC., BAKERS DOZEN ASSOCIATES LLC, EMM GROUP HOLDINGS LLC and THE WALSH COMPANY LLC,

Defendants. x

Index Number: 702405/12

Motion Date: November 20, 2015

Motion Seq. No.: 10

Motion Cal. No.: 88

The following papers numbered EF180 to EF398 read on this motion by Bakers Dozen Associates LLP ("Bakers Dozen") and EMM Group Holdings, LLC ("EMM"), for summary judgment in their favor dismissing the amended complaint as to these parties; for summary judgment in favor of Bakers Dozen as to its cross-claims against the Walsh Company ("Walsh"); and for summary judgment in favor of these parties as to their third-party complaint against Scottsdale Insurance Company ("Scottsdale").

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF180- EF208,EF306
Answering Affidavits - Exhibits	EF345-EF346, 365,367
Reply Affidavits	EF391-EF393, 395-398

Upon the foregoing papers it is ordered that the motion is 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 (the "Premises"). 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. Plaintiff was working for Mission installing drywall when he fell from a scaffold. 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 known 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 on plaintiff's side 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.

As herein relevant, Bakers Dozen and EMM move for summary judgment in their favor dismissing the complaint, insofar as asserted against it; for summary judgment in favor of Bakers Dozen as to its cross-claims against the Walsh Company ("Walsh"); and for summary judgment in favor of these parties as to their third-party complaint against Scottsdale.

Facts

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 dated 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.

Discussion

I. The branch of the motion by Bakers Dozen and EMM which is to dismiss all claims against EMM, is granted. The parties established EMM's prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law sections 240 (1) and 241 (6), by demonstrating that EMM was not an owner, contractor or statutory agent under those provisions of the law (*see Caiazzo v Mark Joseph Contracting, Inc.*, 119 AD3d 718, 720 [2014]). Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). Labor Law § 241 (6) requires that owners and contractors and their agents "provide reasonable and adequate protection and safety" for workers and comply with specific safety rules and regulations promulgated by the Commissioner of the New York State Department of Labor (Labor Law § 241 [6]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). A general contractor may be held liable under Labor Law §§ 240 (1) and 241 (6) if it was "responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Temperino v DRA, Inc.*, 75 AD3d 543, 544 [2010] [internal quotation marks omitted]; *Aversano v JWH Contr., LLC*, 37 AD3d 745 [2007]; *Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855 [2000]). Moreover, a contractor may be held liable as an agent of the owner, where it had the authority to supervise and control the work at issue (*see Herrel v West*, 82 AD3d 933 [2011]; *Bakhtadze v Riddle*, 56 AD3d 589 [2008]).

Here, EMM established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action insofar as asserted against it by demonstrating that it was neither a general contractor nor an agent of the owner with regard to the plaintiff's work (*see Herrel v West*, 82 AD3d 933 [2011]; *Kilmetis v Creative Pool & Spa, Inc.*, 74 AD3d 1289 [2010]; *Temperino v DRA, Inc.*, 75 AD3d 543 [2010]; *Aversano v JWH Contr., LLC*, 37 AD3d 745 [2007]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

EMM also established its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence insofar as asserted against it through the submission of evidence which demonstrated that it did not have the authority to supervise or control the manner in which the injured plaintiff performed his work (*see Medina v R.M. Res.*, 107 AD3d 859, 861 [2013]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 832 [2012]; *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646 [2010]; *Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

In opposition to EMM's prima facie showing, plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

II. The branch of the motion which is to dismiss plaintiff's Labor Law §200 claims against Bakers Dozen is granted. Labor Law § 200 codifies the common-law duty imposed on an owner or a general contractor to provide construction site 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; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123; *Kajo v E.W. Howell Co., Inc.*, 52 A.D.3d 659, 661). Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If, as here, the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law (*see La Veglia v St. Francis Hosp.*, 78 AD3d at 1123; *Ortega v Puccia*, 57 AD3d 54, 60–62; *Kajo v E.W. Howell Co., Inc.*, 52 AD3d at 661).

Here, plaintiff's acts were under the sole control of the foreman of the subcontractor who employed him. Bakers Dozen did not exercise control over the means and method by which the plaintiff performed work on the scaffold (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 908 09 [2011]).

III. The branch of the motion which is to dismiss plaintiff's Labor Law §240 (1) claims, as against Bakers Dozen, is denied. Defendant's liability under section 240(1) was

established as a matter of law by the uncontradicted evidence that plaintiff was injured when he fell from a scaffold that lacked guardrails or other protective devices (*see Gonzalez v 1251 Americas Associates*, 262 AD2d 210, 210 [1999]).

IV. The branch of the motion which is to dismiss plaintiff's Labor Law §241(6) claims, as against Bakers Dozen, is denied. Labor Law Section 241(6) imposes upon the owner, general contractor and agents a non- delegable duty to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Allen v Cloutier Const. Corp.*, 44 NY2d 290 [1978]). This statute imposes a nondelegable duty upon the owner and general contractor or agent which applies regardless of considerations of notice or knowledge (*Allen, Id*). The underlying purpose of the Labor Law is to place responsibility for safety practices upon the owner and general contractor or agent. As a consequence of that objective, Labor Law Section 241(6) imposes a nondelegable duty upon the owner and contractor irrespective of their control or supervision of the construction site (*Allen, Id.*48).

For an owner and a contractor or agent to be liable under Labor Law Section 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command (*Rizzuto v Wenger Construction Co.*, 91 NY2d 343 [1998]). In failing to ensure that the subject mobile rolling scaffold was equipped with functioning, properly and fully attached guardrails, the defendant violated, inter alia, section 23-5.18(b) of the Industrial Code, which mandates that "(t)he platform of every manually-propelled mobile scaffold shall be provided with a safety railing ..."

V. The branch of the motion by Bakers Dozen which is for summary judgment on its claims against Scottsdale, is granted. On June 21, 2012, Bakers Dozen entered into the A1A with Mission for the construction to be completed by Mission. On or before August 6, 2012, Scottsdale issued the Scottsdale Policy, the policy period of which was from August 6, 2012 to August 6, 2013. Pursuant to Article 10 of the A1A agreement, Mission was to purchase and maintain insurance and provide bonds as set forth in Article 11 of A1A Document A201-2007. While Article 11 has multiple subsections, section 11.1.3 provides that "[t]he Contractor shall cause all liability coverage . . . to include (1) . . . the Owner [Bakers Dozen] . . . as additional insureds for claims caused in whole or in part by Contractor's negligent acts or omissions. . . and (2) the Owner as insured for claims caused in whole or part by the Contractor's negligent acts or omissions during the Contractor's completed operations."

In addition, the Scottsdale Policy contains an endorsement that covers Bakers Dozen by reference as an additional insured:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE
Name of Additional Insured Person(s) or Organizations:

Location and Description of Completed Operations

ANY PERSON OR ORGANIZATION WHEN ALL LOCATIONS YOU AND SUCH PERSON OR ORGANIZATION HAVE AGREED IN WRITING IN A CONTRACT OR AGREEMENT, EXECUTED PRIOR TO THE "OCCURRENCE" TO WHICH THIS INSURANCE APPLIES, THAT SUCH PERSON OR ORGANIZATION BE ADDED AS AN ADDITIONAL INSURED ON YOUR POLICY.

The subject accident or "occurrence" took place in September 2012, during the time that the policy was in effect.

In interpreting policy language, New York focuses on the "reasonable expectations of the average insured upon reading the policy and employing common speech" *(Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]). Here, a duty to defend is triggered by the allegations in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured "[and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435 [2002]).

"An additional insured is a recognized term in insurance contracts . . . [and] the well-understood meaning of the term is an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]). The standard for determining whether an additional insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense (BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708 [2007]). To the extent that the policy language is ambiguous, the ambiguity must be resolved in favor of the insured (*Garnar v NY Cent. Mut. Fire Ins. Co.*, 96 AD3d 715, 716 [2012]; *Tower Ins. Co of New York v Diaz*, 58 AD3d 495 [2009]).

Furthermore, it is well settled that "whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so "in clear and unmistakable" language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid

policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation." (*242 44 E. 77th St., LLC v. Greater New York Mut. Ins. Co.*, 31 A.D.3d 100, 103 [2006], citing *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citations omitted]).

The record indicates that Bakers Dozen is an additional insured pursuant to the Scottsdale Policy and, as such, summary judgment is granted in its favor.

VI. The branch of the motion which is for summary judgment in favor of Bakers Dozen and EMM on its claims for indemnification from Mission is granted. While the duty imposed by the New York Labor Law may not be delegated, the burden may be shifted to the party actually responsible for the accident, either by way of a claim for apportionment of damages under the rule of *Dole v Dow Chem. Co.*, (30 NY2d 143), or by contractual language requiring indemnification (*Allen v Cloutier Const. Corp.*, 44 NY2d 290 [1978], quoting *Kelly v Diesel Constr. Div. Of Carl A. Morse, Inc.*, 35 NY2d 1, 5-7).

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 Bakes' 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.

VII. Finally, the branch of the motion by Bakers Dozen and EMM for summary judgment on its claims against Walsh, is granted. The record indicates that on or about April 12, 2014, Bakers Dozen retained the services of Walsh to act as the project manager of the Premises. Pursuant to the terms of the agreement ("Walsh Agreement"), Walsh was retained as Bakers Dozen's agent to guide Bakers Dozen through various phases of the construction, including the design and bid process as well as throughout construction of the premises. Thus, Bakers Dozen hired Walsh to assist Mission in the management of the construction work necessary to build out the leased space at the premises. Bakers Dozen did not have a representative on the job site on a daily basis and, therefore, relied upon Walsh to inform it as to what was happening at the site.

Pursuant to the said Agreement, Walsh was contractually obligated to indemnify, hold harmless and pay for the defense of any claim as asserted by plaintiff. The contractual obligation arises from an agreement between Bakers Dozen, defined within the Walsh Agreement as the "Client" and Walsh, defined in the agreement as the "Project Manager". It is undisputed that Walsh failed to comply with its contractual indemnification and insurance coverage requirements. There is also no dispute that Walsh was paid for the work set forth in the Walsh Agreement. The project manager was essentially the eyes and ears of Bakers Dozen for the construction phase of the premises.

Although a construction manager is generally not considered a "contractor" or "owner" within the meaning of Labor Law, sections 240 or 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2007]). Thus, a construction manager may be held liable for a worker's injuries under the Labor Law if it had "the ability to control the activity which brought about the injury"

(*Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *see Lodato v Greyhawk N. Am., LLC*, 39 AD3d at 493).

Here, Hoon Lee, a representative of Walsh, testified regarding the Walsh Agreement. Lee was directed to the portion of the Walsh Agreement which required Walsh to "identify and examine potential risk areas that require effective and immediate interaction of the project team." Lee was then asked if this was done by Walsh, to which Lee responded, "No". Lee further testified that he observed Mission's employees working on the wheeled scaffolds. Upon observing an employee of Mission working on an unguarded wheeled scaffold, it was the responsibility of Walsh, as the construction manager, to immediately interact to resolve this risk. Walsh's failure to rectify that problem was an omission of its responsibility, requiring indemnification of Bakers Dozen (see Kenney v George A Fuller Co., 87 AD2d 183 [1982]).

The Walsh Agreement also required Walsh to name Bakers Dozen as an additional insured and, as set forth in the testimony of Lee, no insurance was procured for the project at the premises.

Conclusion

The branch of the motion by Bakers Dozen and EMM which is to dismiss all claims against EMM, is granted.

The branch of the motion which is to dismiss plaintiff's Labor Law §200 claims against Bakers Dozen is granted.

The branches of the motion which are to dismiss plaintiff's claims pursuant to Labor Law section 240 (1) and 241(6), as against Bakers Dozen, are denied.

The branch of the motion by Bakers Dozen which is for summary judgment on its claims against Scottsdale, is granted.

The branch of the motion which is for summary judgment in favor of Bakers Dozen and EMM on its claims for indemnification from Mission is granted.

The branch of the motion by Bakers Dozen and EMM which is for summary judgment on its claims against Walsh, is granted.

Dated: 3/3/16

VALERIE BRATHWAITE NELSON, J.S.C.

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