Ajche v Park Ave. Plaza Owner, LLC
2017 NY Slip Op 31209(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 156696/2012
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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JORGE AJCHE,

Plaintiff,

-against-

PARK AVENUE PLAZA OWNER, LLC, CPM BUILDERS, INC., 53rd ST. FOOD, LLC and BLAKE & TODD,

Defendants.

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PARK AVENUE PLAZA OWNER, LLC,

Third-Party Plaintiffs,

-against-

53rd ST. FOOD, LLC and BLAKE & TODD,

Third-Party Defendants.

----------x

53rd ST. FOOD, LLC and BLAKE & TODD,

Second Third-Party Plaintiffs,

-against-

COBRA KITCHEN VENTILATION, INC.,

Second Third-Party Defendant.

----------x

PARK AVENUE PLAZA OWNER, LLC,

Third Third-Party Plaintiff,

-against-

COBRA KITCHEN VENTILATION, INC.,

Third Third-Party Defendant.

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DECISION AND ORDER

Index No. 156696/2012

Bannon, J.:

Motion sequence numbers 003, 004, 007 and 008 are hereby consolidated for disposition.

I. INTRODUCTION

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Jorge Ajche, on January 3, 2012, when, while installing ductwork and insulation in the kitchen ceiling of a commercial property located at 52 East 53rd Street, New York, New York (the premises), he fell from a ladder or scaffold and sustained injuries.

In motion sequence number 003, the plaintiff moves, pursuant to CPLR 3212, for summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) causes of action as against the defendants Park Avenue Plaza Owner, LLC (Park Avenue), CPM Builders, LLC (CPM), 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd (together the 53rd St. defendants). In motion sequence number 004, CPM moves for summary judgment dismissing the complaint and all cross-claims as against it, and Park Avenue cross-moves for summary judgment dismissing the complaint and all cross-claims as against it. In motion sequence number 007, the 53rd St. defendants move for summary judgment dismissing the complaint and all cross-claims against them, on their cross-claims against CPM, and on its second third-party claims against second third-party defendant/third third-party defendant Cobra Kitchen Ventilation, Inc. (Cobra). Cobra cross-moves for summary judgment dismissing the second third-party complaint as against it. In motion sequence number 008, Park Avenue moves for summary judgment on its cross-claims against CPM, its third-party complaint against the 53rd St. defendants, and its third third-party complaint against Cobra.

II. BACKGROUND

On the day of the accident, the premises were owned by Park Avenue. Park Avenue leased the premises to 53rd St. Food, LLC, for use as a restaurant named Blake & Todd. The 53rd St. defendants retained the plaintiff's employer, Cobra, a ventilation company, to install ductwork and insulation at the premises as part of a larger project that entailed the build-out of a restaurant space and commercial kitchen (the project). Subsequently, pursuant to a general contract, the 53rd St. defendants retained CPM as the general contractor for the project. The plaintiff commenced this action against Park Avenue, CPM, and the 53rd St. defendants, asserting causes of action to recover for common-law negligence and violation of the Labor Law §§ 200, 240(1), and 241(6). Park Avenue cross-claimed against CPM, and commenced separate third-party actions against the 53rd St. defendants and Cobra, seeking contribution, common-law indemnification, and contractual indemnification, and the 53rd St. defendants commenced its own third-party action against Cobra, seeking the same relief.

A. Plaintiff's Deposition Testimony

At his deposition, the plaintiff testified that, on the date of the accident, he was employed by Cobra as a "helper" on the project. He explained that Cobra's work for the project included the installation of an air conditioning system for the premises, as well air extraction/ventilation ducts in the kitchen. The plaintiff's responsibilities included installing insulation and assisting his foreman, Roman Huesca, and other coworkers by "giving [them] the things that [they] needed or cutting insulation." The plaintiff maintained that he "only received orders from Roman." The plaintiff further testified that, at the time of the accident, he was assisting Huesca with the installation of insulation. As the plaintiff explained it, typically Huesca installed the insulation

while standing on his ladder, while the plaintiff ran materials and tools up another ladder to Huesca as needed. The plaintiff used an 8-foot-high aluminum A-frame ladder, which was supplied by Cobra. He described the ductwork as 13 to 17 feet from the floor, and asserted that he stood on the second to top rung when assisting Huesca. The plaintiff testified that, on other occasions, he had used a wheeled scaffold for this work.

The plaintiff testified that, just prior to the accident, in order to assist Huesca, he moved his ladder near an air extractor duct. He inspected the ladder and found it to be in good condition. He then set the ladder up on a concrete floor that was free from debris. He also checked it to make sure that it was stable. After confirming its stability, the plaintiff climbed the ladder. Specifically, he testified as follows:

> "[T]he first time I went up, nothing happened. So when I came down for the second time, that's when up [sic], and then the step before the last one on the ladder and the ladder moved and I fell."

The next thing that the plaintiff recalled was waking up in the hospital.

When questioned in more detail about the above recitation of events, the plaintiff clarified that he did not recall any details about his fall, including whether the ladder moved prior to his fall. Rather, he stated that "[his wife] was told how [his] accident had happened. [Huesca] told her everything." The plaintiff further testified as follows:

> "Q. Do you actually remember falling from the ladder or is that what other people told you happened?
>
> A. I don't remember when I fell down.
>
> Q. Do you have a direct recollection of the ladder moving before you fell?
>
> A. No.

* * *

Q. So, what I'm saying is in terms of your understanding as to how the accident happened, it's based on not what you remember, but what other people- either your wife or Roman-had told you?

A. Yes."

B. Deposition Testimony of Roman Huesca

Huesca testified at his deposition that, on the day of the accident, he was employed by Cobra as an "installer" and that his work included installing duct work and insulation in the kitchen of the premises. In order to perform his work, it was necessary for Huesca to use scaffolds or ladders, which were supplied by CPM. Huesca averred that, on that date, he decided that he and the plaintiff should use one of CPM's scaffolds. After working for an hour, Huesca went out to buy coffee. At this time, plaintiff remained on the scaffold. When Huesca returned, he saw plaintiff lying on the floor and unconscious, "maybe two feet" from the scaffold and "a few feet" from a ladder. Although he did not witness the accident, he believed that the plaintiff fell from the scaffold, since that was where he last saw the plaintiff. Huesca spoke with the plaintiff several times after the accident. Each time, the plaintiff told him "[t]hat he really did not remember what happened" at the time of the accident. Huesca also maintained that he did not tell the plaintiff or the plaintiff's wife that the plaintiff fell from a ladder.

C. Deposition Testimony of Freddy Quezada

Freddy Quezada testified that he was CPM's superintendent for the project, and that his duties included "translating what's in the technical drawings and coordinat[ing] with the contractors." Quezada's typical day on the project included opening and closing the job site,

reviewing the job plans and coordinating the trades. Quezada explained that, generally, when a trade showed up to a job site, he spoke with the trade's foreman "about safety at work and [he would] make sure that he tells that to his workers." His interaction with Cobra was limited to discussions of the area where Cobra intended to work, and what Cobra intended to do there.

As Quezada recalled it, at the time of the accident, Cobra workers were performing work in the kitchen area on a Baker scaffold that did not belong to CPM. Quezada maintained that, while CPM had a scaffold at the site, it was in the dining area at the time of the accident. Quezada testified that, although he was working at the premises on the day of the accident, he did not witness the accident. Rather, "[he] heard a noise and then an impact to the ground floor," and when he looked into the kitchen, he saw the plaintiff lying on the floor "unconscious, and his body was trembling, shaking." Quezada did not see a ladder at this time, only an upright scaffold. He inspected the scaffold, but did not see any defects.

D. Deposition Testimony of Kevin J. Cassidy

Kevin Cassidy testified that he was CPM's project manager on the day of the accident, and that CPM worked at the project site pursuant to a contract with the 53rd St. defendants. Cassidy's duties at the premises included assessing job progress, scheduling the trades, and hiring subcontractors. He stated that, in order to accomplish those tasks, he visited the premises approximately once per week while the project was ongoing. According to Cassidy, however, CPM did not hire Cobra but, instead, the 53rd St. defendants' owner, Alex Rachowin, retained it. As Cassidy explained it, CPM was specifically instructed not to supervise Cobra's work on the project, and Rachowin "was adamant" about that arrangement.

E. Deposition Testimony of Mark Goldberg

Mark Goldberg testified that he was the president of CPM, and that the 53rd St. defendants retained CPM to be the general contractor for the project. In general, Goldberg was in charge of sales, marketing and "preconstruction consulting."

Goldberg testified that the scope of CPM's work for the project involved hiring subcontractors to build out the restaurant, but he corroborated Cassidy's testimony that, the 53rd St. defendants directly retained Cobra and a few other contractors. He noted that Rachowin "was adamant that he would be hiring [Cobra] to do the HVAC portion of the work directly." In addition, Goldberg averred that CPM did not interact with or direct the contractors hired directly by the 53rd St. defendants, such as Cobra, although CPM did "provid[e] access for [those] subcontractor[s] to do their work."

F. Deposition Testimony of Peter Corba

Peter Corba testified that he was the owner of Cobra as of the day of the accident. He testified that Cobra, a kitchen ventilation installation company, was hired by the 53rd St. defendants to install the ventilation and HVAC systems at the Project. Corba stated that, once per week, he met with Huesca and Quezada to make sure "everything [was] running properly." Corba maintained that, although CPM, as the project's general contractor, coordinated the timing of Cobra's work at the site, it did not direct Cobra's work.

Corba testified that, in addition to supplying personal safety gear, such as hardhats and harnesses, Cobra "most likely" supplied ladders and scaffolds to the site, "because most of the job[s] we have our own equipment."

G. Deposition Testimony of Alex Rachowin

Alex Rachowin testified that he was a member of 53rd St. Food, LLC. He explained that Park Avenue leased the premises to the 53rd St. defendants, who then contracted with Cobra for the installation of the kitchen ventilation and HVAC system at the premises, and that they thereafter hired CPM to serve as the general contractor for the project.

Rachowin testified that it was his intention that CPM would oversee and supervise Cobra's work, as well as the work of the other contractors. He explained that CPM "was acting as general contractor for all work performed in the direct or supervising position," regardless of who hired the contractor. Rachowin explained that, in that regard, CPM was "responsible for the whole project," but that CPM nonetheless contacted him in connection with issues regarding Cobra's work "[b]ecause [he] was paying Cobra directly."

III. DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986) (citations omitted). Once prima facie entitlement has been established, the opposing party, to defeat the motion, must "'assemble, lay bare and reveal his or her proof in order to show that [his or her] defenses are real and capable of being established at trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.'" Genger v Genger, 123 AD3d 445, 447 (1st Dept. 2014), quoting Schiraldi v U.S. Min. Prods., 194 AD2d 482, 483 (1st Dept. 1993). If there is any doubt as to the existence of a triable fact, the motion for

summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223 (1978).

A. Labor Law § 240 (1) (motion sequence numbers 003, 004, and 007 and Park Avenue's Cross Motion)

The plaintiff moves for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action against all of the defendants. In their respective cross motion and separate motions, Park Avenue, the 53rd St. defendants, and CPM move for summary judgment dismissing that cause of action insofar as asserted against each of them.

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

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

"'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). Labor Law § 240(1) "is designed to protect workers from gravity related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed." Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 (2nd Dept. 2006) (citations omitted). Not every worker who falls at a construction site is afforded the 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). To prevail on a Labor Law section 240(1) claim, a plaintiff must thus show that the statute was violated, and that this violation was a proximate cause of his or her injuries. See Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 (2004).

1. Liability of Owners Under Labor Law § 240(1)

"The meaning of 'owners' under Labor Law § 240(1) . . . has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit.'" Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 618 (2nd Dept. 2008), quoting Copertino v Ward, 100 AD2d 565, 566 (2nd Dept. 1984); see Kane v Coundorous, 293 AD2d 309 (1st Dept. 2002). Here, the 53rd St. defendants, although tenants of Park Avenue, fulfilled the role of owner by contracting with both CPM and Cobra to perform work at the premises for its own benefit. Therefore, the 53rd St. defendants, as well as Park Avenue, are "owners" within the meaning of Labor Law § 240(1).

2. Liability of General Contractors Under Labor Law § 240(1)

The court rejects CPM's argument that, although it was a general contractor on the project, Labor Law § 240(1) does not apply to it because it was not a contractor with respect to Cobra's work, as it did not have the power to supervise or control the work of Cobra's employees, including the plaintiff. Since CPM was the overall general contractor for the project, and Cobra's work, including that undertaken by the plaintiff, was part of that project and was undertaken at the same time as the remainder of the work on the project, CPM remains subject to Labor Law § 240(1). CPM's claim that its responsibilities were limited to certain portions of the

premises is not supported by any references to its contract with the owner, which describes the project as simply as "restaurant construction." There is no evidence that other prime contractors with other responsibilities had been hired. In addition, the work that the plaintiff was performing was related to the construction of a restaurant, as described in the contract between Park Avenue and CPM. Moreover, CPM's project proposal makes reference to Cobra's work, and Cobra's contract with the 53rd St. defendants refers to work on the same restaurant. Accordingly, CPM is general contractor within the meaning of Labor Law § 240(1). See Biondo v World Comp Communications, 306 AD2d 212 (1st Dept. 2003).

3. Applicability of Labor Law § 240(1) to the Plaintiff's Accident

The plaintiff asserts that Labor Law § 240(1) applies to the facts of this case, because, while working at an elevation, the ladder that he was working on moved, causing him to fall. Under Labor Law § 240(1), "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff." Nelson v Ciba-Geigy, 268 AD2d 570, 572 (2nd Dept. 2000); see Quattrocchi v F.J. Sciame Constr. Corp., 44 AD3d 377 (1st Dept. 2007), affd 11 NY3d 757 (2008). "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions for no apparent reason." Quattrocchi v F.J. Sciame Constr. Corp., supra, 11 NY3d at 759.

The plaintiff, however, failed to establish his prima facie entitlement to judgment as a matter of law, because his testimony revealed the existence of a triable issue of fact as to whether the failure of a safety device proximately caused his accident. See Cahill, supra. The plaintiff first testified that, as he descended a ladder and reached the second step from the bottom, the

ladder moved for no apparent reason, and he consequently fell. He later testified that he does not remember how or why he fell, or whether the ladder even moved, and gave no testimony indicating that he climbed upon or fell from the Baker scaffold that was present in the same area as the ladder.

"'A mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker.'" McGill v Qudsi, 91 AD3d 1241, 1243 (3rd Dept. 2012), quoting Briggs v Halterman, 267 AD2d 753, 755 (3rd Dept. 1999). Where there is no evidence or testimony whatsoever as to how an accident occurred, "it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance," and "any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." Teplitskaya v 3096 Owners Corp., 289 AD2d 477, 478 (2nd Dept. 2001). "Even if the plaintiff suffers memory loss as a consequence of the . . . fall, he [or she] still must present a theory of liability and facts in support thereof on which the jury can base a verdict." Kane v Estia Greek Rest., Inc., 4 AD3d 189, 190 (1st Dept. 2004).

"Here, issues of fact exist regarding the manner in which the plaintiff fell from the ladder, due in part to his inconsistent deposition testimony with respect to the events leading up to the fall, and his inability to recall the fall, [thus] precluding a determination that the plaintiff is entitled to judgment as a matter of law." Boguszewski v Solo Salon & Spa, 309 AD2d 777, 778 (2nd Dept. 2003). Therefore, that branch of the plaintiff's motion which is for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action must be denied.

For the same reasons, CPM, the 53rd St. defendants, and Park Avenue are also not entitled

to summary judgment dismissing that cause of action against each of them. "Where, as here, there is inconsistent deposition testimony as to how the accident occurred, a triable issue of fact regarding the proximate cause of the accident exists, precluding summary judgment." Aslam v Weiss, 308 AD2d 426, 427 (2nd Dept. 2003).

B. Labor Law § 241(6) (motion sequence numbers 003, 004, and 007 and Park Avenue's Cross Motion)

The plaintiff moves for summary judgment on the issue of liability on the Labor Law § 241(6) cause of action against all defendants. In their separate cross motion and motions, Park Avenue, the 53rd St. defendants, and CPM move for summary judgment dismissing the Labor Law § 241(6) cause of action as against each of them. Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> "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 of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998) (citation and internal quotation marks omitted); see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). To sustain a Labor Law § 241(6) cause of action, it must be shown that the defendant violated a

specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. Ross, supra, at 505. Labor Law § 241(6) requires a determination of whether the safety measures actually employed on a job site were reasonable and adequate and whether a violation was a proximate cause of plaintiff's injuries. See Zimmer v Chemung County Performing Arts, 65 NY2d 513 (1985). The plaintiff asserts that Park Avenue, the 53rd St. defendants, and CPM violated Industrial Code sections 23-1.16, 23-1.21(b)(4)(iv), and 23-1.21(e)(3) (12 NYCRR 23-1.16, 23-1.21[4][iv], 23-1.21[e][3]).

The plaintiff failed to establish that 12 NYCRR 23-1.16, which requires the provision and use of approved harnesses and life lines in certain circumstances, is applicable to this action, which involves a fall from a ladder that allegedly moved or shifted when he descended it. See Spenard v Gregware Gen. Contr., 248 AD2d 868 (3rd Dept. 1998). Moreover, there is no evidence whatsoever that the plaintiff fell from the nearby Baker scaffold, other than Huesca's speculation based on the fact that the plaintiff was on the scaffold when Huesca left him.

Nor is 12 NYCRR 23-1.21(b)(4)(iv) applicable to this action. That rule requires that either a coworker or mechanical device be employed to secure a "leaning ladder" and prevent it from slipping, depending on the height of the rung on which a worker is standing and working. Here, the testimony demonstrates that the ladder from which the plaintiff allegedly fell was an A-frame ladder. Hence, the ladder was not a leaning ladder subject to these safety requirements. See Vivar v 441 Realty, LLC, 128 AD3d 810 (2nd Dept. 2015).

The provisions of 12 NYCRR 23-1.21(e)(3) require a standing stepladder to be used only on firm, level footings, and only require a coworker to steady the stepladder or a mechanical

device to secure the stepladder where work is being performed from a step of a stepladder 10 feet or more above the footing. Here, the testimony reveals that the plaintiff was working on an A-frame ladder that was only 8 feet tall. Consequently, he was not performing work from a step that was 10 feet or more above the ladder's footing and, thus, there was no requirement that a coworker or mechanical device be employed to secure the ladder and keep it steady. Moreover, there was no testimony from any witness that the floor on which the ladder was placed was not level or that it was not firm; indeed, there was testimony to the contrary. The only testimony given by the plaintiff was that the ladder moved, and he did not provide more detail as to why it moved. Since it is just as likely that the ladder itself was defective or unbalanced as it was that the floor was not level or firm, it would be mere speculation to infer that there was some problem with the floor that rendered it violative of the Industrial Code.

Thus, plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 241(6) cause of action, and that branch of his motion which is for summary judgment thereon must be denied, regardless of the sufficiency of the opposing papers. Conversely, CPM, the 53rd St. defendants, and Park Avenue all established, prima facie, that none of the Industrial Code provisions relied upon by the plaintiff were applicable or, in the case of 12 NYCRR 23-1.21(e)(3), violated. See Noor v City of New York, 130 AD3d 536 (1st Dept. 2015). In opposition to those showings, the plaintiff failed to raise a triable issue of fact as to whether the provisions were in fact applicable or violated, since neither his testimony nor that of his coworkers or supervisors tended to show that he actually fell from a scaffold and thus required an approved harness or life line. Nor did the testimony reflect that the subject ladder was in fact a leaning ladder, that the floor on which the ladder was placed was not

level or not firm, or that he fell from a step more than 10 feet above the footing of the ladder. Accordingly, the defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) cause of action against each of them.

C. The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequences 004, 007, and Park Avenue's Cross Motion)

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." Singh v Black Diamonds, LLC, 24 AD3d 138, 139 (1st Dept. 2005), citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876 (1993). 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."

Where an accident at a construction site arises from the means and methods of work employed at the site, an owner or general contractor may only be held liable for violation of Labor Law § 200 or for common-law negligence where it had the authority to supervise the work that led to the accident. See Ortega v Puccia, 57 AD3d 54 (2nd Dept. 2008); see also Rizzuto v L.A. Wenger Contr. Co., supra; Russin v Louis N. Picciano & Son, 54 NY2d 311 (1981); Wunderlich v Turner Constr. Co., 147 AD3d 598 (1st Dept. 2017). Although property owners often have a general authority to oversee the progress of construction work,

> "'[t]he retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law § 200.'"

Griffin v Clinton Green S., LLC, 98 AD3d 41, 48 (1st Dept. 2012), quoting Dennis v City of New York, 304 AD2d 611, 612 (2nd Dept. 2003); see Austin v Consolidated Edison, Inc., 79 AD3d 682 (2nd Dept. 2010); Gasques v State of New York, 59 AD3d 666 (2nd Dept. 2009), affd 15 NY3d 869 (2010). Rather, 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, supra, at 61; see Marquez v L & M Dev. Partners, Inc., 141 AD3d 694 (2nd Dept 2016).

Where a worker falls from a ladder provided by his or her employer, the means and methods of the work are implicated, and liability may only be imposed against an owner or general contractor under the common law or Labor Law § 200 if the plaintiff establishes that the owner or general contractor had authority to supervise or control his or her work. See Ortega v Puccia, supra. Where, however, the owner or general contractor provided the ladder, the question becomes whether the owner or general contractor created a dangerous or defective condition or had actual or constructive notice thereof, and the standards applicable to the imposition of liability upon an owner or general contractor for accidents arising out of the means and methods of the plaintiff's work are inapplicable. See Jaycoxe v VNO Bruckner Plaza, LLC, 146 AD3d 411 (1st Dept. 2017); Chowdhury v Rodriguez, 57 AD3d 121 (2nd Dept. 2008).

Park Avenue and the 53rd St. defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action against them by demonstrating, through the deposition testimony of the parties, that they did not provide the plaintiff with the subject ladder, and did not have authority to supervise or control the means and methods of the plaintiff's work. The plaintiff did not oppose those

branches of Park Avenue's cross motion or the 53rd St. defendants' motion and, hence, failed to raise a triable issue of fact. CPM demonstrated, through the same deposition testimony, that if it in fact provided the plaintiff and his coworkers with the subject ladder, as stated by Huesca, it did not create a dangerous condition, or have actual or constructive notice that the ladder was defective and that, if Cobra provided the ladder, as Corba testified, it did not have authority to supervise the plaintiff's work. The plaintiff also did not oppose that branch of CPM's motion, and thus failed to raise a triable issue of fact in that regard as well.

Consequently, Park Avenue, the 53rd St. defendants, and CPM are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

D. The Common-Law Indemnification Claims (motion sequence numbers 004, 007, 008, and Cobra's Cross Motion)

Park Avenue, the 53rd St. defendants, and CPM each cross-claimed against each other and asserted third-party causes of action against Cobra for common-law indemnification. Each of these parties moves or cross-moves for summary judgment dismissing these causes of action as asserted against each of them.

To establish the right to 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 (2nd Dept. 2005), quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 (1st Dept. 1999).

1. Common-Law Indemnification Claims Against Cobra

Workers' Compensation Law § 11 bars common-law indemnification claims against a

plaintiff's employer, except where the plaintiff has suffered a grave injury. See Rubeis v Aqua Club, Inc., 3 NY3d 408 (2004). In his bill of particulars, the plaintiff alleges that he sustained "[a]cute traumatic brain injury." A brain injury is "grave" under Worker's Compensation Law § 11 when the "injur[ies] to the brain caused by an external physical force result[s] in permanent total disability." Workers' Compensation Law § 11. Cobra argues that, while the plaintiff has alleged a brain injury, he did not set forth any evidence supporting the existence of a permanent total disability which would establish a "grave injury." However, on a motion for summary judgment, a "moving defendant does not meet its burden of affirmatively establishing its entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its claim or defense." Collado v Jiacono, 126 AD3d 927, 928 (2nd Dept. 2015); see Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1st Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1st Dept. 2016). Cobra did not establish, prima facie, either that the plaintiff sustained no brain injury at all, or that the brain injury that he did sustain did not result in a permanent total disability.

Inasmuch as the court is dismissing the common-law negligence, Labor Law § 200, and Labor Law § 241(6) causes of action against Park Avenue, the 53rd St. defendants, and CPM, the only basis for the imposition of liability against these defendants would be their violation of the strict liability provisions of Labor Law § 240(1). Moreover, the deposition testimony of the parties reveals that the plaintiff's coworkers, who also worked for Cobra, left him alone while he stood on a scaffold or ladder. Consequently, Cobra failed to establish, prima facie, that Park Avenue, the 53rd St. defendants, or CPM were negligent or could be held liable for negligence, or that it was itself free from negligence.

Cobra's motion for summary judgment dismissing the causes of action for common-law indemnification, as alleged in the second third-party complaint, must thus be denied, regardless of the sufficiency of the papers filed in opposition.

2. Common-Law Indemnification Claims Against Park Avenue, the 53rd St. Defendants, and CPM

In light of the court's dismissal of the common-law negligence, Labor Law § 200, and Labor Law § 241(6) causes of action against Park Avenue, the 53rd St. defendants, and CPM, none of those defendants will be able to establish that any of the other defendants was negligent or may be held liable for negligence. A fortiori, each of them established that it was not negligent. Thus, none of these defendants are entitled to summary judgment on their common-law indemnification claims against each other. Rather, they are each entitled to summary judgment dismissing the cross claims for common-law indemnification against them.

E. The 53rd St. Defendants' Contractual Indemnification Claim Against Cobra (motion sequence number 007 and Cobra's Cross Motion)

The 53rd Street defendants move for summary judgment on their second third-party cause of action for contractual indemnification against Cobra. Cobra cross-moves for summary judgment dismissing that cause of action.

"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 (2nd Dept. 2007); see Echevarria v 158th St. Riverside Dr. Hous. Co., Inc., 113 AD3d 500 (1st Dept. 2014). "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes

of the entire agreement and the surrounding facts and circumstances.'" Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486 (2004).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability." Correia v Professional Data Mgt., supra, 259 AD2d at 65; see Murphy v WFP 245 Park Co., L.P., 8 AD3d 161 (1st Dept. 2004). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant." Correia, supra, at 65.

Paragraph 2 of the contract between the 53rd St. defendants and Cobra (the Cobra contract) includes an indemnification provision, which recites, in pertinent part, as follows:

> "Cobra agrees to indemnify, defend and hold harmless [53rd St.](and each of his heirs, successors and assigns) from any and all claims . . . [and] attorneys' fees . . . which [53rd St.] incurs because of injury to, or sickness, illness or death of, any person, including but not limited to, any employee of Cobra or . . . any other claim arising out of, in connection with, or as a consequence of the performance or nonperformance of Cobra's Work . . .
>
> "This indemnification provision is limited only to the extent that the General Obligations Law of the state of New York is applicable, in that this provision does not require indemnification for [53rd St.'s] own negligence."

Since the plaintiff was injured while working on the project, the accident arose out of Cobra's work at the premises. Accordingly, the indemnification provision of the Cobra contract is triggered, Cobra must indemnify the 53rd St. defendants in this action, and those defendants are entitled to conditional summary judgment on their second third-party cause of action for contractual indemnification against Cobra in the event that they are held liable under Labor Law

§ 240(1). For the same reasons, Cobra is not entitled to summary judgment dismissing that cause of action.

F. The 53rd St. Defendants' Breach of Contract Claim Against Cobra (Cobra's Cross Motion)

The second third-party complaint also alleges a cause of action against Cobra to recover for breach of contract based on Cobra's failure to procure insurance. Cobra moves for summary judgment dismissing this cause of action, submitting proof that it procured insurance that affords coverage as "required by contract." The 53rd St. defendants have submitted no opposition to this showing. Accordingly, Cobra is entitled to summary judgment dismissing the 53rd St. defendants' breach of contract cause of action.

G. The 53rd St. Defendants' Contractual Indemnification Claim Against CPM (motion sequence numbers 004 and 007)

The 53rd St. defendants and CPM entered into a construction contract (the CPM contract) which included a separate indemnification provision, which recites:

> "[CPM] agrees to indemnify, defend and hold harmless [53rd St.] . . . from any and all claims [and] attorneys' fees . . . which [53rd St.] incurs because of injury to . . . any person, including but not limited to, any employee of [CPM] or any employee of any of its Subcontractors . . . and any other claim arising out of, in connection with, or as a consequence of the performance of [CPM]'s or any Subcontractors Work . . . .
>
> "This indemnification provision is limited only to the extent that the General Obligations Law of the state of New York is applicable."

The 53rd St. defendants move for summary judgment on their cross claim for contractual indemnification against CPM. CPM moves for summary judgment dismissing that cross claim.

CPM argues that it does not owe the 53rd St. defendants such indemnification because the accident did not arise out of its work or the work of its subcontractors, as required by the subject provision. In support of this argument, CPM contends that it did not hire Cobra, the plaintiff's employer.

However, as the 53rd St. defendants correctly argue, the indemnification provision requires CPM to indemnify them for claims arising out of or in connection with "any Subcontractor's work," and Cobra falls within the definition of that term for this purpose. Thus, the 53rd St. defendants are entitled to conditional summary judgment on their cross claim for contractual indemnification against CPM, and CPM is not entitled to summary judgment dismissing that cross claim against it.

H. Park Avenue's Contractual Indemnification Claims (motion sequence number 004 and 008)

Park Avenue established its prima facie entitlement to judgment as a matter of law on its cross claim against CPM for contractual indemnification. The general contract between Park Avenue and CPM provides, in pertinent part, that,

> "[t]o the extent permitted by law, contractor agrees to defend, protect, indemnify and save harmless [Park Avenue] . . . from and against each and every claim, demand, cause of action and liability on account of bodily injury . . . caused by, arising out of, or in any way incidental to or in connection with the performance of the work hereunder. All costs and expenses, including . . . reasonable attorney's fees . . . shall be borne by [CPM] . . . except to the extent and of any degree of a negligence finding against [Park Avenue]."

Park Avenue established that CPM was hired to oversee the restaurant construction at the premises, CPM's own project proposal references Cobra's work in installing ventilation ducts, and CPM coordinated Cobra's work on the project. Thus, while CPM may not have hired Cobra

or directly supervised its work on the project, Cobra's work was, nevertheless, "incidental to or in connection with" CPM's work. In opposition to this showing, CPM failed to raise a triable issue of fact as to whether the indemnification provision in the general contract was unenforceable, or whether Cobra's work, and hence the plaintiff's work, was somehow not undertaken in a manner incidental to or in connection with its own work.

Thus, Park Avenue is entitled to conditional summary judgment on its cross claim for contractual indemnification against CPM, and, for the same reason, CPM is not entitled to summary judgment dismissing that cross claim against it.

Park Avenue is also entitled to conditional summary judgment on its third-party cause of action for contractual indemnification against the 53rd St. defendants by virtue of a lease dated July 1, 2011. Section 36.01 of the lease obligates the 53rd St. defendants to "indemnify, defend and save [Park Avenue] harmless from and against any liability or expense arising from the use or occupation of the demised premises by" the 53rd St. defendants or anyone occupying the premises with their permission, "or from any breach of this Lease" by the 53rd St. defendants. Section 5.01 of the lease requires the 53rd St. defendants to maintain commercial general liability insurance "in respect of the demised premises and the conduct or operation of business therein, with [Park Avenue] . . . as additional insureds."

Contrary to the contention of the 53rd St. defendants, the indemnification provision set forth in the lease does not run afoul of General Obligations Law § 5-322.1, which provides that an agreement "purporting to indemnify or hold harmless the promisee against liability for damage . . . caused by or resulting from the negligence of the promisee . . . is against public policy and is void and unenforceable." See Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.,

89 NY2d 786 (1997). Since Park Avenue may not be held liable in negligence here, but may only be held liable, if at all, under the strict liability provisions of Labor Law § 240(1), the indemnification provision in the lease is enforceable. See Brown v Two Exch. Plaza Partners, 76 NY2d 172 (1990); Nazario v 222 Broadway, LLC, 135 AD3d 506 (1st Dept. 2016). Moreover, in a commercial lease that has been negotiated between two sophisticated parties, an indemnification provision coupled with an insurance procurement provision will not run afoul of General Obligations Law § 5-322.1. See Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, (2006).

Nor are the lease terms ambiguous, as the term "use and occupancy" of the premises clearly encompasses work on the project, inasmuch as the lease contains paragraphs governing "Tenant's Work at Demised Premises" and "Tenant's Initial Work," which refer to annexed documents that describe and refer to the project.

Thus, Park Avenue established its prima facie entitlement to judgment as a matter of law by demonstrating that the indemnification provision in the lease is enforceable, and that its potential liability for any personal injury claim arising from the work on the project is encompassed within the terms of the provision. In opposition, the 53rd St. defendants failed to raise a triable issue of fact, as its submissions do not negate the enforceability of the provision or the applicability of the provision to the plaintiff's injuries here.

Park Avenue also entered into a one-page indemnity agreement with Cobra, which provides, in relevant part:

> "To the extent permitted by law, contractor [Cobra] agrees to defend, protect, indemnify and save harmless [Park Avenue] . . . from and against each and every claim, demand, cause of action and liability. All costs and expenses, including

> but not limited to reasonable attorney's fees . . . incurred in the defense of [Park Avenue] . . . in the enforcement of this agreement, including but not limited to claims of contractual indemnification . . . shall be borne by the contractor . . . on account of bodily injury . . . arising out of, or in any way incidental to or in connection with the performance of the work hereunder except to the extent and of any degree of a negligence finding against [Park Avenue]."

In its response to a notice to admit, Cobra admitted that this agreement applied to the work that it performed at the premises on the date of the accident. By its terms, the indemnity agreement between Park Avenue and Cobra requires Cobra to indemnify Park Avenue for claims such as those asserted by the plaintiff herein. Since Park Avenue established that the indemnification provision in the letter agreement was enforceable and applicable, and Cobra's submissions do not negate either of those showings by raising a triable issue of fact as to whether Park Avenue was negligent or whether the plaintiff's injuries did not arise out of the work, Park Avenue is entitled to conditional summary judgment on the third third-party cause of action for contractual indemnification asserted against Cobra in the event that it is held liable to the plaintiff for violation of Labor Law § 240(1).

IV. CONCLUSION

Accordingly, the plaintiff's causes of action against all of the defendants for violation of Labor Law § 240(1) remain to be tried, and, if warranted, Park Avenue's third third-party cause of action against Cobra for common-law indemnification remains to be tried as well.

For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the issue of liability on the Labor Law §§ 240(1) and 241(6) causes of action against the defendants Park Avenue Plaza

Owner, LLC, CPM Builders, LLC, 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd (MOT SEQ. 003) is denied; and it is further,

ORDERED that the motion of the defendant CPM Builders, LLC, for summary judgment dismissing the complaint and all cross claims against it (MOT SEQ. 004) is granted to the extent that it is awarded summary judgment dismissing the common-law negligence, Labor Law § 200, Labor Law § 241(6), and common-law indemnification causes of action as against it, and its motion is otherwise denied; and it is further,

ORDERED that the cross motion of the defendant Park Avenue Plaza Owner, LLC, for summary judgment dismissing the complaint and all cross claims against it (MOT SEQ. 004) is granted to the extent that it is awarded summary judgment dismissing the common-law negligence, Labor Law § 200, Labor Law § 241(6), and common-law indemnification causes of action as against it, and its motion is otherwise denied; and it is further,

ORDERED that the motion of the defendants 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd for summary judgment (1) dismissing the complaint and all cross claims against them, (2) on their cross claims against the defendant CPM Builders, LLC, and (3) on the second third-party complaint against Cobra Kitchen Ventilation, Inc. (MOT. SEQ. 007), is granted to the extent that they are awarded summary judgment dismissing the common-law negligence, Labor Law § 200, Labor Law § 241(6), and common-law indemnification causes of action as against them, conditional summary judgment on their cross claim for contractual indemnification against the defendant CPM Builders, LLC, and conditional summary judgment on their second third-party cause of action for contractual indemnification against Cobra Kitchen Ventilation, Inc., in the event that 53rd St. Food, LLC, doing business as

Blake & Todd, and Blake & Todd are found liable to the plaintiff for violating Labor Law § 240(1), and their motion is otherwise denied; and it is further,

ORDERED that the cross motion of Cobra Kitchen Ventilation, Inc., for summary judgment dismissing the second third-party complaint asserted against it by the defendants 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd (MOT. SEQ. 007) is granted to the extent that it awarded summary judgment dismissing the second third-party cause of action alleging that it breached a contract for the procurement of insurance, and its cross motion is otherwise denied; and it is further,

ORDERED that the motion of the defendant Park Avenue Plaza Owner, LLC, for summary judgment on (1) its cross claims against the defendant CPM Builders, LLC, (2) its third-party complaint against the defendants 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd, and (3) on its third third-party complaint against Cobra Kitchen Ventilation, Inc. (MOT. SEQ. 008), is granted to the extent that it is awarded conditional summary judgment on the cross claim, third-party cause of action, and third third-party cause of action for contractual indemnification against CPM Builders, LLC, 53rd St. Food, LLC, doing business as Blake & Todd, and Blake & Todd, and Cobra Kitchen Ventilation, Inc., respectively, in the event that it is found liable to the plaintiff for violating Labor Law § 240(1), and its motion is otherwise denied; and it is further,

ORDERED that all other requests for relief not specifically addressed are denied.

This constitutes the Decision and Order of the court.

Dated: 6/5/17

ENTER: _____
J.S.C.
HON. NANCY M. BANNON