SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

GENE FRANCIS,

Plaintiff,

-against-

THE MANLYN DEVELOPMENT GROUP, INC., *et al.*,

Defendants.

----------x

Index No. 151335/14

Motion seq. nos. 001, 003, 004

DECISION AND ORDER

THE MANLYN DEVELOPMENT GROUP, INC.,

Third-Party Plaintiff,

-against-

BEDROCK PLUMBING AND HEATING, INC.,

Third-Party Defendant.

----------x

Third Party Index No. 595378/14

11110 FLATLANDS AVENUE, LLC, *et al.*,

Second Third-Party Plaintiffs,

-against-

THE MANLYN DEVELOPMENT GROUP, INC., *et al.*,

Second Third-Party Defendants.

----------x

BARBARA JAFFE, J.S.C.:

For plaintiff:
Natascia Ayers, Esq.
Law Office of Eric Richman
350 E. 82nd St., 16th fl.
New York, NY 10028
212-688-3965

For Flatlands defendants:
Marc Metson, Esq.

For Manlyn:
Matthew P. Cueter, Esq.
Lewis Brisbois *et al.*
77 Water St., 21st fl.
New York, NY 10005
212-232-1300

For Bedrock:
Lina C. Rossillo, Esq.

Kaufman Borgeest & Ryan LLP
200 Summit Lake Dr.
Valhalla, NY 10595
914-449-1000

Morris Duffy Alonso & Faley
Two Rector St., 22nd fl.
New York, NY 10006
212-766-1888

These motions arise from an accident suffered by plaintiff on December 17, 2013. Employed by Bedrock as a construction worker, plaintiff was performing construction and plumbing work that day at 11000 Flatlands Avenue in Brooklyn, also known as 11110 Flatlands Avenue, 11110-11124 Flatlands Avenue, and 11010 Flatlands Avenue (collectively, the premises), when he allegedly fell from a ladder and sustained injury. (NYSCEF 66).

By notice of motion, second third-party plaintiffs 11110 Flatlands Avenue, LLC (Flatlands), Feinrose Associates (Feinrose), and Goodrich Management Corp. (Goodrich) (collectively, Flatlands defendants) move pursuant to CPLR 3212 for an order granting them partial summary judgment on their claims for: (1) indemnification against defendant/second third-party defendant The Manlyn Development Group, Inc. (Manlyn) and third-party defendant/second third-party defendant Bedrock Plumbing and Heating, Inc. (Bedrock), (2) assumption of Flatlands defendants' defense by Manlyn and Bedrock, and (3) reimbursement and payment of attorney fees by Manlyn and Bedrock, and for summary dismissal of plaintiff's claims against them pursuant to Labor Law §§ 200 and 241(6). (Seq. 001). Bedrock partially opposes the motion as to Flatlands defendants' claims against it. (NYSCEF 145). Manlyn opposes the motion as to Flatlands defendants' claims against it for contractual indemnification and insurance procurement. (NYSCEF 171).

By notice of motion, Bedrock moves pursuant to CPLR 3212 for an order summarily dismissing the third-party and second third-party claims against it for contractual indemnity, and dismissing plaintiff's claims under Labor Law §§ 200, 240(1), and 241(6), premised on certain

violations of the Industrial Code. (Seq. 003). Manlyn opposes dismissal of its claims against Bedrock for contractual indemnity and failure to procure insurance (NYSCEF 206), and Flatlands defendants oppose dismissal of their contractual indemnification claim against Bedrock (NYSCEF 225).

By notice of motion, Manlyn moves pursuant to CPLR 3212 for an order dismissing plaintiff's complaint, granting it summary judgment on its third-party action against Bedrock, and dismissing any and all cross claims and counterclaims against Manlyn. (NYSCEF 175). (Seq. 004). Bedrock partially opposes the motion seeking summary judgment on the third-party action and seeks dismissal of plaintiff's Labor Law § 200 claim (NYSCEF 214), and Flatlands defendants oppose the dismissal of their claims for contractual indemnity against Manlyn (NYSCEF 226).

By identical notices of cross motion, plaintiff opposes all of the defendants' motions for summary dismissal, and moves for partial summary judgment on liability as to his claims pursuant to Labor Law §§ 240(1), 241(6), and 200, and common law negligence. (NYSCEF 153, 162, 288). All of the defendants oppose. (NYSCEF 205, 209, 224).

I. PERTINENT BACKGROUND

By lease dated July 1, 1981, the premises' owner leased the premises to a nonparty for a 25-year initial term and continuing thereafter through 2036. The lease obligates the nonparty to pay for all utilities, taxes, insurance, and costs of repair and maintenance, and permits it to develop the premises at its own cost. (NYSCEF 87).

On June 21, 1983, the nonparty-lessee assigned the lease to Feinrose, and in 2007, the owner assigned the lease to another nonparty. (*Id.*).

A. Agreements and indemnification

1. Agreement between Flatlands defendants and Manlyn

By agreement dated October 29, 2013, Feinrose, c/o Goodrich, identified as the owner of the premises at issue, and Manlyn, as the contractor, agreed to the renovation and demising of the premises. The agreement contains the following indemnification clause:

> As used in this paragraph ( ), "Claims" means any claims, suits, proceedings, and actions, causes of action, responsibility, liability, demands, judgments, and executions.
>
> Unless said Claims are due to the negligence or willful misconduct of Owner or Owner's agents (other than Contractor), Contractor hereby indemnifies and agrees to hold Owner, Owner's managing agent, and Owner's mortgagee harmless from and against any and all Claims, which either (i) arise from or are in connection with the performance or improper performance of the Work specified hereunder by Contractor; (ii) arise from or are in connection with any act or omission of Contractor or Contractor's agents; (iii) result from any defaults, breach, violation or nonperformance of this Agreement or any provision of this Agreement by Contractor; or (iv) result in injury to person or property or loss of life sustained in or about the Property due to the negligence or willful misconduct of Contractor. Contractor shall defend any Claims against Owner, Owner's managing agent, and Owner's mortgagee with respect to the foregoing or in which they may be impleaded. Contractor shall pay, satisfy and discharge any judgments, orders and decrees which may be recovered against Owner, Owner's managing agent, or Owner's mortgagee in connection with the foregoing.
>
> The aforementioned indemnification shall include reimbursement of reasonable attorneys' fees.

Manlyn also agreed to procure certain insurance and provide a certificate of insurance reflecting the coverage, with the certificate naming Feinrose and Goodrich as additional insureds. (NYSCEF 89).

2. Agreement(s) between Manlyn and Bedrock

It is undisputed that on or about December 12, 2013, Bedrock submitted a proposal/quote to Manlyn to perform plumbing work at the premises, which Manlyn's principal signed and

accepted that day. (NYSCEF 147, 148). An employee of Manlyn emailed the signed proposal to Bedrock, attaching thereto "insurance requirements" for the project. (NYSCEF 148). The proposal contains no indemnification provision.

On December 12, 2013, Manlyn signed a purchase order for the project containing an indemnification clause by which Bedrock agrees to indemnify and hold harmless Manlyn and "owners" against claims or damages arising out of or resulting from the performance of subcontracted work to the extent caused in whole or in part by Bedrock, with a proviso that "signing this purchase order is an agreement to all the terms and conditions that it contains . . ." On March 6, 2014, Manlyn advised Bedrock that it had learned that Bedrock had not signed the purchase order and asked that it sign and return it. Bedrock signed it on March 7, 2014. (NYSCEF 149).

3. Insurance and tender letters

A certificate of liability insurance, dated November 26, 2013, reflects the insured as Bedrock, and Manlyn as an additional insured. The effective date of the policy is April 6, 2013; the termination date is April 6, 2014. The certificate holder is Feinrose c/o Goodrich. (NYSCEF 93).

By letter dated May 1, 2014, Flatlands defendants demanded that Manlyn defend and indemnify it against plaintiff's claims. (NYSCEF 90). Manlyn's insurer denied the tender by letter dated May 19, 2014, claiming that plaintiff's accident had occurred before the effective period of the insurance policy and that Flatlands defendants were not named as additional or named insureds on the policy. Even if named, it observed, coverage was unavailable. (NYSCEF 91).

B. Plaintiff's accident

At a deposition held on April 29, 2015, and continued on December 9, 2015, plaintiff testified, as pertinent here, as follows: Plaintiff worked for Bedrock as a lead mechanic for 14 years before his accident, and that on the day of his accident, he was assigned to cap pipes at the premises for the first time. Plaintiff's supervisor, Robert McDonough, Sr. (McDonough Sr.), instructed him to bring with him a 14-foot ladder; plaintiff selected a ladder owned by Bedrock, which was new and defect-free. Plaintiff arrived at the premises with McDonough Sr.'s son, Robert McDonough, Jr. (McDonough Jr.), and a co-worker, and was shown around the worksite by a Bedrock supervisor. When plaintiff saw that the pipes he was hired to cap were located in a high ceiling, he told the supervisor that he should use a Baker scaffold to do the work, and called McDonough Sr. to express his concern that the ladder he had selected was not tall enough for the job. McDonough Sr. dismissed plaintiff's concerns and told him to go home if he did not want to do the job and that someone else would do it. (NYSCEF 77). When plaintiff saw another worker using a Baker scaffold and asked Manlyn's site supervisor, Manuel Ortiz, if there was another scaffold he could use given the height of the ceiling, Ortiz told him to resolve the issue with plaintiff's supervisor.

A four-foot long, 70-pound wrench was needed to cap off the pipes. Plaintiff began his work in a room with the same height as the room in which his accident was to occur. He cut and capped pipes using the ladder without incident for an hour and a half. McDonough Jr.'s role was to hold plaintiff's ladder while he worked. (*Id.*).

When plaintiff arrived at the room where he fell, he placed the ladder on the floor and climbed up, but felt that the ladder was shaky and saw that the floor was uneven and appeared to

have been chipped or manipulated by a chipping gun or jackhammer. He again called McDonough Sr., who again told him to keep working. Plaintiff stood on the last "legal" step of the ladder, that directly beneath the top step, placed the wrench on the pipe cap and pulled the wrench toward him. McDonough Jr., who was supposed to be holding the ladder, had walked away to attend so something else. The cap snapped, causing plaintiff to lose his grip on the pipe. The ladder moved forward, and plaintiff fell backward, landing on his feet and breaking both ankles. (*Id.*).

On December 17, 2013, plaintiff signed a statement written and also signed by Ortiz, which reads as follows: "Gene Francis. He fall off the latter (sic) while fixing some pipe he landed on his feet his saying his legs are hurting. It was about 9:30 am and had a helper with him, Robert McDonough. There were carpenters here (Permit # 340102249-LAA)." (NYSCEF 93). A supervisor's accident investigation report of the same day, also signed by Ortiz, reflects that plaintiff had fallen from a ladder while connecting a pipe, and that he and McDonough Jr. were witnesses. Boxes indicating whether there was an unsafe act, unsafe conditions, and any steps taken to prevent a recurrence were not checked. (*Id.*).

At a deposition held on September 16, 2015, McDonough Sr. testified that his employees rarely used scaffolds for their projects and that if they used anything other than a ladder, it would be a manlift, with all necessary equipment provided by Bedrock. He did not remember if plaintiff took with him a 10-, 12-, or 14-foot ladder, and denied that plaintiff had asked him for a scaffold or that he had complained that the ladder was insufficient for his work. Before plaintiff's accident, he or the other Bedrock supervisor usually visited the premises daily, and he denied that the floor on which plaintiff fell was defective or unsafe. While McDonough Sr.

initially confirmed that a picture taken after plaintiff's accident by the other supervisor depicted a Bedrock ladder, he later could not recall seeing the picture and could not identify it as the one taken by the supervisor after the accident. (NYSCEF 84). The picture was produced by Manlyn during discovery, and is described "upon information and belief," as depicting the ladder "allegedly involved" in plaintiff's accident. (NYSCEF 159).

McDonough Jr. testified at his deposition that the floor of the room where plaintiff fell was smooth, covered with cement, and intact, that plaintiff had neither asked for a scaffold nor complained about the ladder or his work assignment, and that he was not holding the ladder when plaintiff was standing on it and using the wrench. He saw plaintiff fall and land on his feet, and thereafter examined the ladder, finding no defects and using it later that day to complete the job. While he stated that the aforementioned photograph depicted the ladder on which plaintiff was working when he fell, he did not know who had taken the picture and was not sure if it was taken in the room where plaintiff fell. (NYSCEF 85).

Ortiz testified at a deposition that he was responsible for opening the site, telling contractors what work needed to be performed, and ensuring that the work was completed. No other Manlyn employee was onsite except for a Manlyn project manager who had periodically stopped by. Ortiz recalled speaking to plaintiff and his coworker, and confirming their work assignments. He recounted having been seated at a table in the room while plaintiff performed his work, when he saw him fall, although he did not see how he fell but observed that the ladder had remained upright after the fall. While Ortiz had the authority to stop unsafe work, he denied having spoken to plaintiff about the ladder. (NYSCEF 78).

Goodrich's property manager testified that Flatlands owned the land at the location, and

that Feinrose leased it from Flatlands and built the buildings thereon. Flatlands had no office at the location, nor did it participate in the construction or leasing there. Rather, Flatlands received rent from Feinrose for the ground lease, and Feinrose and Goodrich contracted with Manlyn to do all renovations at the site. The property manager visited the worksite once every two or three weeks for Feinrose to see how work was progressing, and denied that Feinrose provided equipment, tools or materials for the construction work, that it supervised any work done by Manlyn or Manlyn's subcontrators or that it was authorized to stop unsafe work. No other employee from Goodrich, Feinrose or Flatlands visited the site. (NYSCEF 86).

By affidavit offered by plaintiff and dated September 6, 2016, an expert in construction site safety, states, as pertinent here, that if plaintiff had been standing on a 12-foot ladder, the highest permissible step would have been at nine feet, seven inches, "close enough to 10 feet to require that the ladder be secured," and that if he had been standing on a 14-foot ladder, the last legal step would have been at 11 feet, six inches. (NYSCEF 157).

Plaintiff alleges in his amended complaint, in pertinent part, that defendants were reckless, careless, and negligent in failing, among other things, to perform work safely and properly coordinate the work, provide proper equipment and ladders, provide a safe place to work, have efficient and sufficient personnel, provide safe footing, and warn of hazardous conditions; in creating a trap, hazard, and nuisance; and in violating Labor Law §§ 200, 240, 241(6) and Industrial Code §§ 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-2.1, 23-2.2, 23-2.4, 23-3.3, and rules and regulations promulgated thereunder. (NYSCEF 9).

II. INDEMNIFICATION

A. Applicable law

A party is entitled to be indemnified by another party pursuant to a contract or agreement if the intent to indemnify is "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (*Drzewinski v Atl. Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]; *see also Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361 [1st Dept 2004]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). Moreover, "[a]dditional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement." (*Millennium Holdings LLC v Glidden Co.*, 146 AD3d 539 [1st Dept 2017]). Summary judgment on a contractual indemnification claim may be granted when the parties' agreement is unambiguous and clearly reflects their intention that one party indemnify the other for the injuries sustained. (*Roddy v Nederlander Prod. Co. of Am., Inc.*, 44 AD3d 556 [1st Dept 2007]).

Pursuant to Workers' Compensation § 11, a claim for indemnification or contribution against an employer for its employee's injury may be maintained if it is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." While the statute requires that the agreement be entered into before an employee's accident, an agreement entered into after an accident may be applied retroactively where "evidence establishes as a matter of law that the agreement pertaining

to the contractor's work 'was made "as of" [a pre-accident date], and that the parties intended that it apply as of that date.'" (*Podhaskie*, 3 AD3d at 362, *quoting Stabile v Viener*, 291 AD2d 395, 396 [2002], *lv dismissed* 98 NY2d 787). However, "an indemnity contract will not be held to have retroactive effect 'unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations.'" (*Cacanoski v 35 Cedar Pl. Assocs., LLC*, 147 AD3d 810 [2d Dept 2017], quoting *Kane Mfg. Corp. v Partridge*, 144 AD2d 340 [2d Dept 1988]).

B. Flatlands defendants' indemnification claim against Manlyn

Flatlands defendants assert that Manlyn is obligated to indemnify them as the complaint contains claims arising from or in connection with an act or occurrence by Manlyn or its agents that resulted in plaintiff's injury, and absent any evidence that Flatlands defendants were negligent, as they did not direct plaintiff's work, were not at the premises when the accident occurred, and were not responsible for providing plaintiff with the ladder at issue. They also contend that even though Flatlands is not named in the agreement between Feinrose and Manlyn, its inclusion is implicit, given its status as an out-of-possession owner and as the agreement requires that Manlyn indemnify the site "owners." (NYSCEF 65).

Manlyn denies that Flatlands defendants are entitled to indemnity as Manlyn was not negligent in relation to plaintiff's accident, observing that plaintiff had worked for Bedrock and used Bedrock's equipment, and that Manlyn provided no equipment to Bedrock, did not decide what equipment should be used, nor did it supervise Bedrock's work for safety. It also denies that the term "agent" in the parties' indemnity agreement encompasses subcontractors such as Bedrock, and maintains that in any event, Flatlands would not be entitled to indemnity as

Feinrose is identified as the owner in the agreement and Flatlands is nowhere so identified or referenced. (NYSCEF 171).

Here, Flatlands defendants submit no authority or evidence indicating that the term "agent" in the indemnification provision encompasses or was intended to encompass a subcontractor hired by Manlyn, and any ambiguity in the parties' use of the term "agent" must be construed against the drafters, Feinrose and Goodrich. (*327 Realty, LLC v Nextel of New York, Inc.*, 150 AD3d 581 [1st Dept 2017]).

Rather, in *Retta v 160 Water St. Assocs., LP,* the Court held that a contractor had no duty to indemnify a building owner for injuries sustained by a subcontractor's employee, where the indemnity clause required the contractor to indemnify from injuries related to any wrongful act or omission on its part or of its agents, servants, employees, and the like. The Court rejected the owner's argument that a subcontractor or its employee is an agent, servant, or employee of a contractor or akin to them, observing that "[a]gents, employees, and servants are all in relationships where they consent to act on behalf of another, i.e. principals, employers, and masters, respectively, and remain subject to the other's control. Independent contractors differ in that important respect from agents, employees or servants." (94 AD3d 623, 624 [1st Dept 2012]).

Absent evidence that the term "agent" in the parties' agreement includes a subcontractor such as Bedrock, Manlyn is not obliged to indemnify Flatlands defendants. (*See e.g., Lipshultz v K & G Indus., Inc.*, 294 AD2d 338 [2d Dept 2002] [indemnification claim dismissed as contract referenced only owner, contractors, and agents; thus, general contractor not entitled to indemnity as parties could have, but did not, include it; that general contractor could be entitled to indemnification based on status as owner's statutory agent insufficient]; *see also Tonking v Port*

Auth. of New York and New Jersey, 2 AD3d 213 [1st Dept 2003], *affd* 3 NY3d 486 [2004] [indemnification claim properly dismissed as use of term "agent" did not clearly manifest intention to impose obligation to indemnify construction manager; parties could have used term "construction manager" rather than "general, often referentially treacherous term 'agent'"]).

In any event, absent a finding that Manlyn was negligent here or otherwise liable to plaintiff, a summary disposition of Flatlands defendants' claim for contractual indemnification against Manlyn is premature. (*Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534 [1st Dept 2012] [as issues remained as to whether and to what extent each defendant might be negligent in causing scaffold to collapse, summary judgment on claim for contractual indemnification not yet warranted]).

C. Flatlands defendants' and Manlyn's contractual indemnification claims against Bedrock

1. Motions for summary judgment on claims

For its claim that Bedrock intended to be bound retroactively by the purchase order, Flatlands defendants rely on the facts that Bedrock accepted the proposal, obtained the required insurance, performed the work, and requested payment. (NYSCEF 227). Manlyn relies on the same evidence, and also argues that during his deposition, McDonough Sr. conceded that the purchase order was in effect on the day of the accident by testifying, in response to the question whether the contracts between Manlyn and Bedrock were in full force and effect on the date of the accident, that "I guess if we got a [purchase order], I assume they were." (NYSCEF 176, 192). It also submits an affidavit from its principal, wherein he states, without specifying the source of his information or offering supporting proof, that Bedrock was provided with a copy of the purchase order before it commenced work, and was aware of its terms and agreed to be bound

by it, and that the purchase order emailed to Bedrock in March 2014 was a "courtesy copy." (NYSCEF 210).

McDonough Sr. and Bedrock's office manager deny receipt of a copy of the purchase order until after plaintiff's accident or that Bedrock intended that the order apply retroactively. (NYSCEF 151, 152). Bedrock also argues that the purchase order became effective when it signed it, which was after plaintiff's accident. (NYSCEF 118).

As Bedrock was plaintiff's employer, section 11 of the Workers' Compensation Law applies, and requires a showing that Bedrock and Manlyn entered into an indemnification agreement before plaintiff's accident and that they intended that it apply before the accident. Here, Bedrock denies having seen or received the purchase order containing the indemnification agreement before commencing and/or completing its work, and Flatlands defendants submit no contrary evidence, and the principal admitted nothing substantive at his deposition.

Manlyn's principal's statement that Bedrock had received a copy of the order before the accident is conclusory and unsubstantiated, containing no details as to when and how Bedrock received the order. The absence of any documentation is significant given the existence of documentation reflecting every aspect of the parties' negotiations before Bedrock submitted its proposal, before it transmitted the proposal to Manlyn, before Manlyn accepted it, and before Manlyn transmitted the unsigned purchase order in March 2014. The principal's recent affidavit attesting that the March 2014 email transmission of the order was intended only to provide Bedrock with a courtesy copy is contradicted by the email itself. In any event, the recent affidavit is not only fatally conclusory, but improperly tailored to create a triable issue. (*See Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968] [court may not assess credibility on

motion for summary judgment unless it appears issues are feigned]; *see also Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248 [1st Dept 2011] [rejecting affidavit as "last-minute attempt by defendant to tailor the facts and present a feigned factual issue," as well as self-serving affidavit offered to contradict other evidence as it did not raise factual issue and therefore was disregarded]).

As Bedrock's procurement of insurance, performance of work, and request for payment is referable to the accepted proposal and not just to the purchase order, none of Bedrock's actions clearly evinces an intention that the purchase order be applied retroactively, especially as Manlyn annexed to its acceptance of Bedrock's proposal its insurance requirements for the job. (*See e.g., Rodriguez v Seven Seventeen HB Buffalo Corp.*, 56 AD3d 1280 [4th Dept 2008] [rejecting contention that certificate of liability insurance obtained prior to plaintiff's accident constituted "recognition" that indemnification agreement was in effect at time of accident]).

Moreover, nothing in the order itself reflects an intention that it apply before plaintiff's accident. While dated December 12, 2013, it provides that it becomes effective on signing. (*Compare Lafleur v MLB Indus., Inc.*, 52 AD3d 1087 [3d Dept 2008] [nothing in contract showed that parties intended terms to be retroactive or that effective date was other than date of execution; while contractor signed written proposal containing no indemnification clause submitted by subcontractor, no formal, written subcontract executed until after work completed and after accident]; *Temmel v 1515 Broadway Assocs., L.P.*, 18 AD3d 364 [1st Dept 2005] [purchase order containing indemnification clause dated more than one month after accident contained no language showing that parties intended retroactive appliction]; *Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410 [1st Dept 2001] [indemnity contracts dated and executed after plaintiff's

accident; no suggestion of intent to have retroactive effect]; *Beckford v City of New York*, 261 AD2d 158 [1st Dept 1999] [summary judgment properly denied as contract executed two days after accident]; *with Elescano v Eighth-19th Co., LLC*, 13 AD3d 80 [1st Dept 2004] [contract expressly provided, just above signature lines, that it was entered into as of date written on first page]; *Manns v Norstar Bldg. Corp.*, 4 AD3d 799 [4th Dept 2004] [while contract signed in January 2001, it expressly provided that it was "made as of" August 2000 and was then "entered into"]; *Pena v Chateau Woodmere Corp.*, 304 AD2d 442 [1st Dept 2003], *app dismissed* 2 AD3d 1488 [although contract signed after accident, it expressly provided that date of commencement was date written therein, which was before accident]).

Flores v Lower E. Side Serv. Ctr., Inc., is inapposite as there, it was undisputed that before the accident at issue, the contractor had received the written contract containing an indemnification clause, that it took certain actions required by the contract, performed the contracted-for work, and was paid for it, but nonetheless denied being bound by the contract for not having signed it. (4 NY3d 363 [2005]). Here, again, there is no evidence that Bedrock saw or received the purchase order before plaintiff's accident.

Flatlands defendants and Manlyn thus fail to establish, *prima facie*, that Bedrock is legally obligated to indemnify them. (*See e.g., Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464 [1st Dept 2016] [movants failed to establish that subcontractor executed indemnification agreement before plaintiff's accident or that it was intended to apply retroactively; agreement contained no specific language or necessary inferences clearly showing parties' intent to include past obligations]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910 [2d Dept 2010] [summary judgment on contractual indemnification claim properly denied as nothing in contract showed

parties' intent that terms be applied retroactively or that effective date other than date it was fully executed, and subcontractor did not execute agreement until after accident]; *see also Ruane v Allen-Stevenson Sch.*, 82 AD3d 615 [1st Dept 2011] [movant failed to show that unsigned documents containing indemnification clause part of purchase order contracts]).

In light of this result, I need not decide whether Flatlands defendants were covered under the purchase order as "owners."

2. Bedrock's motion to dismiss contractual indemnity claims against it

Based on the same evidence, Bedrock demonstrates that it did not intend to have the purchase order apply retroactively, and neither Flatlands defendants nor Manlyn submits evidence sufficient to create a triable issue of fact.

DiNovo v Bat Con, Inc., is directly on point. (117 AD3d 1130 [3d Dept 2014]). There, the subcontractor prepared and submitted a written proposal to the contractor, which accepted it. The proposal contained no indemnification provision that would have required the subcontractor to indemnify the contractor for the injuries sustained. When the subcontractor moved for dismissal of the contractor's contractual indemnification against it, relying on the proposal, the contractor produced an unsigned subcontract containing a different indemnification provision. While the subcontract was dated the same day as the proposal, the subcontractor submitted an affidavit from its principal wherein he denied having received the subcontract, having signed it, or having discussed retroactivity with the contractor until after the worker's accident, and substantiated the denial with a copy of a fax transmittal sheet showing that the subcontract was sent to it after the accident. Based on this evidence, the Court held that the subcontractor had met its burden of showing that it had neither entered into the indemnification agreement nor

agreed to its terms until after the accident, and that the contractor had failed to raise a triable issue, given the subcontractor's unchallenged denial of receipt of the subcontract before the accident. Moreover, there was no evidence that the subcontractor knew of the subcontract and acted on it, despite its procurement of insurance, as such did not constitute proof of an agreement to indemnify. (*Id.*).

The contractual indemnification claims asserted by Flatlands defendants and Manlyn against Bedrock thus have no merit. (*See Vail v 1333 Broadway Assocs., L.L.C.*, 105 AD3d 636 [1st Dept 2013] [dismissal of claim against subcontractor proper absent indemnification agreement existing at time of accident and nothing indicated that terms and conditions in purchase order, containing indemnification clause, were intended to have retroactive effect]).

III. ASSUMPTION OF DEFENSE AND ATTORNEY FEES

Given the above (II.C.) Flatlands' and Manlyn's motions seeking the assumption of their defense by Bedrock and reimbursement of their attorney fees are denied.

Moreover, while Flatlands defendants argue that Manlyn's insurance carrier has a duty to defend them, the carrier is not a party to this action, nor did Flatlands defendants commence a separate action against it. (*See Singh v New York City Tr. Auth.*, 17 AD3d 262 [1st Dept 2005] [court erred in granting summary judgment to defendant on its third-party claim against contractor for defense costs as insurer not party to lawsuit; contractor's obligation to indemnify separate from its insurer's duty to defend, and court improperly enforced non-party insurer's obligation through its insured]; *see also Garcia v Great Atlantic and Pacific Tea Co., Inc.*, 231 AD2d 401 [1st Dept 1996] [parties' contract did not obligate insured to cover cost of additional insured's defense and indemnification where insurer disclaimed coverage, and thus additional

insured's proper remedy was to bring declaratory judgment directly against insurer]).

In any event, as Manlyn's duty to defend is no broader than its duty to indemnify, and absent a finding that plaintiff's accident was caused by any act or omission identified in the indemnification provision, an order requiring Manlyn to defend here is premature. (*Inner City Redev. Corp. v Thyssenkrupp Elev. Corp.*, 78 AD3d 613 [1st Dept 2010]).

IV. PROCUREMENT OF INSURANCE

In their reply papers, Flatlands defendants do not address Manlyn's opposition to their claim of failure to procure insurance. Moreover, it appears that Bedrock's insurance carrier has undertaken Manlyn's defense. Thus, any claims related to a breach of the failure to procure insurance are moot.

V. PLAINTIFF'S CLAIMS

A. Labor Law § 240(1)

In pertinent part, Labor Law § 240(1) "was designed to prevent those types of accidents in which the . . . ladder . . . proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]). To establish a violation of this section, the plaintiff must show both a statutory violation and that the "violation . . . was a contributing cause of his fall." (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 289 [2003]). The statute is violated not only when a safety device malfunctions, but when the provided safety device does not operate so as to give proper protection. (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

While comparative negligence does not constitute a defense to a section 240(1) claim (*Somereve v Plaza Constr. Corp.*, 136 AD3d 537, 539 [1st Dept 2016]), a defendant who provides adequate protections may raise as a defense that the injured worker, "who neglected to use or misused the available device–was the sole proximate cause of his or her injuries." (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014]).

Manlyn and Bedrock assert that plaintiff's claim has no merit as he was provided with a safe and adequate ladder, and he was the sole proximate cause of the accident. Bedrock contends, relying on its expert's affidavit stating that in standing on the last legal step of the ladder despite instructions and signs warning him not to, and improperly using the wrench, plaintiff thereby caused his loss of balance. The expert also asserts that the photograph of the ladder produced by Manlyn depicts a 12-foot, rather than 14-foot, ladder, and Bedrock observes that it is undisputed that the ladder was not defective, and that no other safety devices were required. (NYSCEF 118, 143).

Plaintiff argues that the ladder was not an adequate for his assigned task which required the use of both hands, leaving him with no ability or means to brace or catch himself upon losing his balance, and that the ladder moved because it was unsecured. Thus, he denies having been the sole proximate cause of his accident. (NYSCEF 163).

In *Caceres v Standard Realty Assocs., Inc.*, the plaintiff was injured when he fell from a ladder while affixing studs to a ceiling, after his helper had left him alone. The plaintiff was holding a drill in one hand and a stud in the other, and as he tried to install the stud, he lost his balance and fell from a non-defective ladder. The Court held that the plaintiff had established a *prima facie* violation of the statute as "no equipment was provided to plaintiff to guard against

the risk of falling from the ladder while operating the drill, and [] plaintiff's coworker was not stabilizing the ladder at the time of the fall," and rejected the defendants' argument that the plaintiff had caused his own injuries by placing himself in a position which led to his loss of balance, finding that at most it established comparative negligence. (131 AD3d 433, 434 [1st Dept 2015], *app dismissed* 26 NY3d 1021).

Here too, although the ladder was not defective, it was not secured, and there is no evidence that other safety devices were available and declined by plaintiff. Nor is there any dispute that plaintiff fell from the ladder while doing his work and after losing his balance, and that there was no way for him to prevent his fall. Plaintiff thus demonstrates, *prima facie*, a violation of Labor Law § 240(1) and that the violation caused his injury. (*See Hill v City of New York*, 140 AD3d 568 [1st Dept 2016] [liability established by plaintiff's testimony that unsecured ladder wobbled, causing him to fall; irrelevant that plaintiff fell because ladder wobbled or because wrench he was using slipped and fell, causing him to lose his balance]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013] [well-settled that failure to secure ladder so that it stays steady and erect while being used is violation of section 240(1)]).

Whether plaintiff lost his balance because he was improperly standing on the last step of the ladder and/or improperly using the wrench or removing the cap at most raise issues as to his comparative negligence, which is no defense to a violation of section 240(1). Bedrock and Manlyn therefore fail to raise a triable issue as to whether plaintiff's actions were the sole proximate cause of the accident. (*See Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016] [undisputed that ladder kicked out because unsecured, whether plaintiff descended dangerously from ladder by carrying equipment irrelevant]; *Cuentas*, 102 AD3d at 504 [as no

adequate safety device provided to prevent plaintiff's fall from ladder, irrelevant whether plaintiff was standing on top of ladder]; *see also Cardona v New York City Hous. Auth.*, AD3d , 2017 NY Slip Op 06620 [1st Dept 2017] [defendants' argument that plaintiff fell due to his "carelessness" and "bad decisions" unavailing]). "This is not a case where [the] plaintiff simply lost his balance and fell from a secured ladder." (*Lipari v AT Spring, LLC*, 92 AD3d 502, 503 [1st Dept 2012]).

B. Labor Law § 200 and common law negligence

1. Flatlands defendants

a. Dangerous condition

An owner may be held liable for a dangerous condition on the premises only if the owner created the condition or had actual or constructive notice of it. (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621 [1st Dept 2015]).

Flatlands defendants argue that plaintiff alleges only an inadequate safety device, not a dangerous or hazardous condition at the premises, and that absent evidence that they supervised or controlled plaintiff's work, they may not be held liable. (NYSCEF 65). Plaintiff contends that not only was the ladder unsecured, but the floor was uneven, which contributed to the instability of the ladder, of which Flatlands defendants must have had notice as they owned the property, observing that they do not deny control over the floor. (NYSCEF 163). In reply, Flatlands defendants deny having had notice of the alleged dangerous condition of the floor, relying on the property manager's testimony that he visited the premises only once every two or three weeks and that their contract with Manlyn shifted responsibility for the maintenance of the premises to Manlyn. (NYSCEF 227).

The alleged infrequency of the property manager's visits to the premises and the shifting of maintenance responsibility to Manlyn does not satisfy Flatlands defendants' burden of proving, *prima facie*, that they neither created the condition nor had actual or constructive notice of it. (*See Maggio*, 134 AD3d at 626-7 [defendants' witnesses lacked personal knowledge of owner's involvement with construction and no testimony showed that owners could not have been on notice, especially as other testimony indicated that owner walked through construction site several times and owner's representative attended weekly meetings and also walked through site]; *see also Gardner v Tishman Constr. Corp.*, 138 AD3d 415 [1st Dept 2016] [owner failed to meet *prima facie* burden for dismissal of section 200 claim absent affirmative evidence showing that it had no notice of hole in floor in which plaintiff fell]).

However, plaintiff offers no evidence demonstrating that Flatlands defendants either created the dangerous condition of the floor or had actual or constructive notice of it.

b. "Means and methods"

Pursuant to Labor Law § 200, an owner may not be held liable for failing to provide a safe place to work for injuries arising out of the method and manner of the work performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [2012]). The dispositive issue is whether the owner supervised or instructed the plaintiff as to how to perform the work alleged to have led to his injury, or whether it "controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed." (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Here, based on the testimony of all of the witnesses, Flatlands defendants establish, *prima*

facie, that they did not supervise, instruct, or control plaintiff's work, and plaintiff raises no triable issue. (*See Gonzalez v Utd. Parcel Svce.*, 249 AD2d 210 [1st Dept 1998] [no proof that owner of premises had control over manner in which work at issue was done]; *see also Pipia v Turner Constr. Co.*, 114 AD3d 424 [1st Dept 2014] [defendant not liable as plaintiff testified that his supervisor was person who instructed him on how to perform work]).

2. Manlyn

As both Manlyn and plaintiff also offer no evidence as to whether Manlyn created or had actual or constructive notice of the allegedly defective condition of the floor, neither sustains its burden here. Even if the affidavit of Manlyn's principal establishes that it did not create the condition on the floor, it does not address Manlyn's actual or constructive notice of it (NYSCEF 177), and its denial that the floor was uneven creates a factual issue to be resolved at trial.

Plaintiff contends that Manlyn may be held liable based on supervision and control because Ortiz was at the site at all times, was responsible for ensuring the safety of workers, and ignored plaintiff's request for a scaffold. (NYSCEF 232). Manlyn denies that Ortiz was responsible for workers' safety, that he supervised or had the authority to supervise plaintiff's work or that he was responsible for telling workers how to perform their jobs. (NYSCEF 256).

Manlyn's evidence that it did not provide plaintiff, or have the responsibility to provide him with, safety equipment including the ladder, establishes, *prima facie*, that it may not be held liable for the means and methods of his work under Labor Law § 200. (*Ciechorski v City of New York*, AD3d , 2017 NY Slip Op 06891 [1st Dept 2017] [Labor Law § 200 and common law negligence claims properly dismissed against contractor as means and methods of plaintiff's work decided solely by plaintiff's employer; contractor's general oversight of work performance

and site safety insufficient]; *Willis v Plaza Constr. Corp.*, 151 AD3d 568 [1st Dept 2017] [defendants could not be held liable for accident as they had at most general authority over work site safety]). Plaintiff's conclusory assertion that Ortiz supervised or controlled his work raises no triable issue of fact.

3. Bedrock

Bedrock moves to dismiss the statutory and common law negligence claims against it solely on the ground that plaintiff was the sole proximate cause of his accident, an issue resolved *supra*, V.A.

4. Common law negligence

As Labor Law § 200 is a codification of common law negligence, the determination as to plaintiff's common law cause of action requires the same analysis and outcome. (*Supra*, V.B.).

C. Labor Law § 241(6)

Pursuant to section 241(6) of the Labor Law, owners and contractors bear a non-delegable duty to provide reasonable and adequate protection and safety to workers. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct. (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013]).

Plaintiff relies on the following rules and regulations as the bases for his Labor Law § 241(6) claim: 12 NYCRR §§ 23-1.7(e)(2), 1.21(e), 3.3(c), and 3.3(l). He is deemed to have waived his claims as to any other regulations.

1. 12 NYCRR § 23-1.7(e)(2)

Section 23-1.7 provides:

> (e) Tripping and other hazards. (2) Working areas. The parts of floors . . . shall be kept free . . . from sharp projections insofar as may be consistent with the work being performed.

While plaintiff contends that the floor of the room contained sharp projections that caused the ladder to be unstable and his resulting fall, a violation of this section requires a showing that the hazardous condition caused plaintiff to slip or trip or which cut him, and is thus inapplicable. (*See Gaspar v Pace Univ.*, 101 AD3d 1073 [2d Dept 2012] [section did not apply as plaintiff did not trip nor did he cut himself on hazard on floor]; *Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549 [1st Dept 2012] [section 23-1.7(e) concerns hazards which could cause workers to fall by slipping or tripping or which would cut them]).

2. 12 NYCRR § 23-1.21(e)(3)

Pursuant to 12 NYCRR § 23-1.21(e)(3):

> Stepladder footing. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means.

Plaintiff contends that this section was violated as the floor was not level and his helper did not steady the ladder at the time of the accident. Flatlands defendants deny that plaintiff was working above a height of 10 feet. Manlyn denies that the floor was uneven or misleveled, and argues that the failure to hold the ladder was not the proximate cause of plaintiff's fall as the ladder remained upright after the fall, and that plaintiff could have secured the ladder by holding onto the rafters. (NYSCEF 256).

Bedrock asserts that the ladder was 12 feet tall, and that as plaintiff should not have been above the second to last step, at the highest, he could have been only nine feet and seven inches

above the ground, and that in any event, the failure of McDonough Jr. to hold the ladder is irrelevant as plaintiff's own actions caused the accident, and the ladder remained standing after his fall. (NYSCEF 205).

In reply, plaintiff observes that he was standing on either a 12- or 14-foot ladder and performing work on a pipe 17 feet above the ground, and that he thus worked at a height above 10 feet. (NYSCEF 232).

Manlyn cites no authority to support its arguments that the unsecured ladder could not have been a proximate cause of plaintiff's accident as the ladder itself did not fall, or that plaintiff was required to secure himself by holding onto the rafters.

To the extent that the ladder was 12 feet tall, as the last "legal" step is less than 10 feet high, plaintiff does not allege a violation of this section. (*See Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883 [2d Dept 2013] [section inapplicable as plaintiff was standing on step less than 10 feet above the footing]). To the extent that *Roman v 360 Builders, LLC,* 2012 WL 5829739, 2012 NY Slip Op 32740(U) (Sup Ct, New York County), and *Chacha v Metro. Museum of Art*, 2010 WL 4155283, 2010 NY Slip Op 32869(U) (Sup Ct, New York County), are to the contrary, I am bound by *Vega*, which is, in any event, more persuasive.

However, plaintiff asserts that the ladder was 14 feet tall, not 12 feet, and the photograph of the ladder on which defendants rely is unauthenticated and none of witnesses testified definitively that it depicts the ladder in issue here, or that the ladder was 12 feet, rather than 14 feet tall. Defendants therefore offer no admissible evidence to controvert plaintiff's allegation that the ladder was 14 feet tall.

Given my finding that plaintiff's actions were not the sole proximate cause of his accident

(V.B.), he establishes, *prima facie*, a violation of this section of the Industrial Code.

3. 12 NYCRR § 23-3.3(c) and (l)

Plaintiff maintains that he was engaged in demolition work as he was removing and dismantling the pipes with the wrench. All of the defendants deny that this section applies as plaintiff was engaged in plumbing, not demolition work.

In *Garcia v 225 E. 57th St. Owners, Inc.*, the Court held that demolition work changes the structural integrity of a building or structure. It thus dismissed a claim by a plaintiff who alleged that he was injured while plastering and priming walls for painting when a piece of a wall panel he was removing broke and cut him. It observed that the hazard at issue must have been created through a weakening of the structure by demolition. (96 AD3d 88, 92 [1st Dept 2012]).

As plaintiff was capping pipes in the ceiling of an existing building and performing no work that changed the structural integrity of the building or structure, and absent any evidence that the floor was weakened by his work, plaintiff does not establish, *prima facie*, a violation of this section.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motions are resolved as follows:

(1) The motion of second third-party plaintiffs 11110 Flatlands Avenue, LLC, Feinrose Associates, and Goodrich Management Corp. (seq 001) is granted to the extent of:

(a) dismissing plaintiff's claims against pursuant to Labor Law 200 and common law negligence on the means and methods claim; and

(b) dismissing plaintiff's claims against them pursuant to Labor Law 241(6) except as to subsection 12 NYCRR 23-1.21(e)(3);

And the motion is denied as to:

(a) their claims for indemnification against defendant/second third-party defendant The Manlyn Development Group, Inc. and third-party defendant/second third-party defendant Bedrock Plumbing and Heating, Inc.;

(b) their claim for the assumption of their defense by Manlyn and Bedrock,

(c) their claim for reimbursement and payment of attorney fees by Manlyn and Bedrock; and

(d) the dismissal of plaintiff's claim pursuant to Labor Law 200 and common law negligence on the dangerous condition issue;

(2) Bedrock's motion (seq 003) is granted to the extent of dismissing:

(a) the third-party and second third-party claims against it for contractual indemnity,

(b) and plaintiff's claim under Labor Law § 241(6) except as to subsection 12 NYCRR 23-1.21(e)(3);

And the motion is denied as to:

(a) plaintiff's claims against Bedrock pursuant to Labor Law §§ 200 and 240(1);

(3) Manlyn's motion (seq 004) is granted to the extent of dismissing:

(a) plaintiff's claims against pursuant to Labor Law 200 and common law negligence on the means and methods claim; and

(b) plaintiff's claims against them pursuant to Labor Law 241(6) except as to subsection 12 NYCRR 23-1.21(e)(3);

(c) its motion for dismissal of all cross claims and counterclaims against it, as not addressed in Manlyn's motion papers; and

And the motion is denied as to:

(a) dismissal of plaintiff's claims pursuant to Labor Law 240(1);

(b) the dismissal of plaintiff's claim pursuant to Labor Law 200 and common law negligence on the dangerous condition issue;

(c) its motion for summary judgment on its third party action against Bedrock; and

(4) Plaintiff's cross motions are granted to the extent of granting him partial summary judgment on liability as to his claims pursuant to Labor Law 240(1) and Labor Law 241(6) predicated on a violation of 12 NYCRR 23-1.21(e)(3), and denied as to his claims pursuant to Labor Law 200 and common law negligence and 241(6) as to any subsections other than 12 NYCRR 23-1.21(e)(3).

ENTER:

Barbara Jaffe, JSC

DATED: October 10, 2017
New York, New York