SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------X

FRANK GERAGHTY,

Plaintiff,

- against -

METRO NORTH COMMUTER RAILROAD d/b/a MTA METRO NORTH RAILROAD and ANDRON CONSTRUCTION CORP.,

Defendants.

----------X

METRO NORTH COMMUTER RAILROAD d/b/a MTA METRO NORTH RAILROAD and ANDRON CONSTRUCTION CORP.,

Third-Party Plaintiffs,

- against -

SEIKO IRON WORKS, INC.,

Third-Party Defendant.

----------X

DECISION AND ORDER

Index No. 158511/2014
Mot. Seq. 003 & 004

Third-Party Index No. 595220/2016

KELLY O'NEILL LEVY, J.:

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

This is an action arising from an accident where an ironworker fell from a ladder at a construction site and consequently suffered personal injuries.

Plaintiff Frank Geraghty moves, pursuant to CPLR § 3212, for summary judgment in his favor as to liability on his Labor Law §§ 240(1) and 241(6) claims against defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad (hereinafter, Metro North) and Andron Construction Corp. (hereinafter, Andron) (together, Defendants). Defendants oppose. Third-Party Defendant Seiko Iron Works, Inc. (hereinafter, Seiko) opposes. Seiko cross-moves

for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims which Plaintiff opposes.

Defendants move for summary judgment on plaintiff's Labor Law § 200 claim. Plaintiff opposes. Defendants further move for contractual indemnification from Seiko which Seiko opposes. Finally, defendants move for reasonable attorneys' fees from Seiko.

BACKGROUND

On the date of the accident, May 15, 2014, plaintiff was working for Seiko as an ironworker at the Metro North train station in Harrison, New York. Andron, a general contractor, hired Seiko as a subcontractor for the Harrison train station work. Metro North hired Andron as the on-site general contractor for this work as part of the New Haven project, a $20 million project involving the renovation of six train stations, including the Harrison station. On that date, Seiko's workers were installing metal decking on Harrison station's outbound platform canopy. Plaintiff alleges that at approximately 1:00 AM, he fell from a ladder that had shifted, suffering injuries.

Defendants argue that plaintiff's claims must be dismissed as several issues of fact relating to the cause of the accident remain. Defendants also contend that the Labor Law § 200 claim must be dismissed, as defendants exercised no control or supervision of Seiko's employees and provided no equipment to Seiko. They further argue that the presence of Andron employees at the work site is insufficient to raise an issue of fact on the claim, among other issues of fact. Defendants also contend that contractual indemnification by Seiko is warranted and seek reasonable attorneys' fees to be paid for by Seiko due to contractual obligations.

Seiko opposes defendants' motion and argues that plaintiff failed to make a prima facie case for a Labor Law § 241(6) claim. Seiko also contends that the Labor Law § 240(1) action must be dismissed because plaintiff was provided sufficient safety equipment and his own negligence was the sole proximate cause of his accident. Seiko further argues that a question of fact exists on the contractual indemnity claims such that defendants' motion against Seiko must be denied.

Plaintiff testified that on the date of the accident he was working as a Seiko ironworker at the Metro North station in Harrison [Geraghty tr. (ex. C to the Moore aff.) at 14-15]. The accident occurred near a canopy that was being replaced by Seiko on the outbound side of the track (*id.* at 26-28, 46). The work could not begin until Metro North gave permission (*id.* at 37). Seiko provided the only ladder on site (*id.* at 68, 96-97). Isaac Rodriguez, the truck driver for Seiko (hereinafter, Rodriguez), picked up the truck with the decking and ladder on it and drove it from Seiko's yard to the job site (*id.* at 76; [Rodriguez tr. (ex. H to the Moore aff.) at 8-10]). The ladder that arrived by truck was approximately a sixteen-foot extension ladder which was shorter than the twenty or twenty-four foot extension ladder originally used on the project [Geraghty tr. (ex. C to the Moore aff.) at 69-70]. The longer ladder was last seen at the site four or five weeks prior to the accident, and was not on the truck with Rodriguez on the night of the accident (*id.* at 71). Plaintiff complained to Rodriguez about the size of the ladder and told him he had the wrong ladder [Geraghty tr. (ex. D to the Moore aff.) at 61-63]. Plaintiff wanted the longer ladder because the shorter one could not be tied off at the top and because the longer one would give better access to the roof [Geraghty tr. (ex. C to the Moore aff.) at 76-78]. The ladder used on the night of the accident was not long enough to tie off but it may have reached the edge of the roof (*id.*). The canopy roof was approximately fourteen feet high (*id.* at 73). On the night of the

accident, the workers used the ladder to access the canopy roof; they placed it in the parking lot of the train station, laid up against the waiting room area (*id.*). Plaintiff was not sure who set up the ladder and he did not set it up himself (*id.*). Andron employees told the workers that they did not need to tie off the ladder when working on the canopy [Geraghty tr. (ex. D to the Moore aff.) at 57-58]. Plaintiff climbed the ladder to get to the roof at approximately 1:00 AM on the night of the accident to give advice to the workers and help them move the steel around because of a problem with the decking [Geraghty tr. (ex. C to the Moore aff.) at 64-65]. Two Metro North employees, Flagman John O'Rourke and safety representative Jeff Wagner, asked plaintiff for jumper cables for a Metro North truck that had broken down on the tracks, which prompted plaintiff to descend the ladder to get the cables from his truck (*id.* at 102-103). He walked to the ladder, got down on his hands and knees because the ladder did not come up high enough and he put his left leg on the top rung of the ladder; as he started to bring his right leg down, the ladder started shifting and tipped all the way to the side; plaintiff fell and hit the ground on his left side (*id.* at 104-105). Plaintiff testified that if the longer ladder had been used he would not have had to get down on his knees and he would have been able to grab the ladder firmly; his hands were still on the roof as he was placing his legs on the ladder (*id.* at 105).

Defendants assert that plaintiff had a discussion on the date of the accident with Willie Armstrong, an Andron employee on the site, regarding plaintiff's physical capability to climb the ladder, and that Willie Armstrong told plaintiff not to climb the ladder [Armstrong tr. (ex. G to the Moore aff.) at 50-52].

Seiko asserts that Rodriguez testified that the ladder had been moved on site more than two times as the decking was being installed on the date of the accident before the accident took place [Rodriguez tr. at 36-37]. Seiko also asserts that plaintiff testified that he had the authority

to stop his crew from working if he was concerned about a safety aspect of the job [Geraghty tr. (ex. F to the Ronemus aff.) at 115], but he did not stop the work or stop his crew from using the ladder (*id.* at 98, 117). Seiko also asserts that plaintiff was aware that Rodriguez could have driven back to the shop to obtain a different ladder, as he had previously asked Rodriguez to return to the shop for materials, but on the night of the accident he did not ask Rodriguez to bring a new ladder [Rodriguez tr. at 63].

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Plaintiff's Labor Law § 240(1) Claim Against Defendants

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240(1) claim against defendants. 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 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

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

Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008), *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007).

To prevail on a § 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1).'" *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 174 (1st Dep't 2004) (where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240(1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent) (quoting *Kijak v. 330*

Madison Ave. Corp., 251 A.D.2d 152, 153 [1st Dep't 1998]); *Klein v. City of New York*, 89 N.Y.2d 833, 835 (1996); *Hart v. Turner Constr. Co.*, 30 A.D.3d 213, 214 (1st Dep't 2006) (plaintiff met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground).

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 572 (2d Dep't 2000); *Cuentas v. Sephora USA, Inc.*, 102 A.D.3d 504, 504 (1st Dep't 2013); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 618 (defendant not entitled to dismissal of Labor Law § 240(1) claim where it failed to establish that the ladder, which had slipped out from underneath the plaintiff, provided proper protection); *Peralta v. American Tel. and Tel. Co.*, 29 A.D.3d 493, 494 (1st Dep't 2006) (unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240(1)); *Chlap v. 43rd St.-Second Ave. Corp.*, 18 A.D.3d 598, 598 (2d Dep't 2005); *Sinzieri v. Expositions, Inc.*, 270 A.D.2d 332, 333 (2d Dep't 2000) (Labor Law § 240(1) liability where the plaintiff "presented undisputed evidence that, while dismantling the . . . exhibit, he fell when an unsecured ladder upon which he was standing and which had no protective rubber skids, slipped from underneath him").

Here, plaintiff's work activities were at an elevated height and were related to the performance of the Harrison station project. Thus, plaintiff was engaged in protected activity under Labor Law § 240(1). Andron, as the on-site general contractor, had responsibility to coordinate and supervise the work done at the site. *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 (2005); *Rauls v. DirecTv, Inc.*, 113 A.D.3d 1097, 977 N.Y.S.2d 864 (4th Dep't 2014) (the

plaintiff established as a matter of law that the defendant is a "contractor" within the meaning of Labor Law §§ 240(1) and 241(6)). As a general contractor and agent for Metro North for this project, Andron would be responsible for safety at the site and would be the responsible party for providing proper safety protection to workers on the project. Plaintiff was injured when he fell from an unsecured extension ladder and the only elevation related safety device provided to plaintiff was the unsecured extension ladder. The ladder was not physically tied off to anything. Moreover, the ladder was too short for plaintiff to safely descend from the canopy, and therefore the ladder was inadequate in and of itself to protect plaintiff from the hazards of the job.

To the extent plaintiff's alleged conduct goes to the issue of comparative fault or negligence, this theory is not a defense to a Labor Law § 240(1) claim because the statute imposes absolute liability once a violation is shown as is the case here. *Bland v. Manocherian*, 66 N.Y.2d 452, 460 (1985); *Dwyer v. Central Park Studios, Inc.*, 98 A.D.3d 882, 884 (1st Dep't 2012); *Orphanoudakis v. Dormitory Auth. of State of N.Y.*, 40 A.D.3d 502, 502 (1st Dep't 2007) (where there was no question that the ladder was defective due to its missing rubber feet, plaintiff was not the sole proximate cause of the accident); *Velasco v. Green-Wood Cemetery*, 8 A.D.3d 88, 89 (1st Dep't 2004) ("Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"); *Klein v. City of New York*, 222 A.D.2d 351, 352 (1st Dep't 1996). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.'" *Hernandez v. Bethel United Methodist Church of N.Y.*, 49 A.D.3d 251, 253 (1st Dep't 2008) (quoting *Blake v. Neighborhood Hous. Servs. of N.Y.*, 1 N.Y.3d 280, 290 [2003]). Even if there is evidence of negligence, it is not a defense to a Labor Law § 240(1) claim. Plaintiff's actions were not the

sole proximate cause of the accident. Here, the ladder's inadequate length and that it was not tied off to anything constituted a Labor Law § 240(1) violation and even if there were evidence of plaintiff's negligence, it would not constitute a defense to a Labor Law § 240(1) claim.

Defendants argue that plaintiff's assertion that the subject ladder was of improper size is unsupported by expert witness opinion and thus raises an issue of fact as to whether the length of the ladder was proper. It is undisputed that the ladder was too short to be tied off at the top at the site where it was placed and therefore, the length of the ladder does not present an issue of fact.

Seiko argues in its cross-motion for summary judgment that its expert witness, professional engineer Bernard P. Lorenz, concluded that the ladder could have been set up at an alternate location with the top of the legs extending the required minimum three feet above the top of the canopy (Expert Aff. of Bernard Lorenz at ¶ 13-16). This opinion is speculation and thus does not raise an issue of fact. *See Timmins v. Tishman Constr. Corp.*, 9 A.D.3d 62, 70 ("opinions, based on speculation, conjecture and without an evidentiary basis, are potently inadequate to create an issue of fact.").

Therefore, plaintiff is entitled to summary judgment on the Labor Law § 240(1) claim against defendants and the branch of Seiko's cross-motion seeking summary judgment in its favor on the Labor Law § 240(1) claim is denied.

Plaintiff's Labor Law § 241(6) Claim Against Defendants

Plaintiff also moves for summary judgment in his favor on the Labor Law § 241(6) claim against defendants. 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:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped ... as to provide

> reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff seeks summary judgment on his Labor Law § 241(6) claim predicated on violations of Industrial Code §§ 23-1.7(b)(1)(iii), 23-1.16, and 23-1.21(d)(1) and Seiko seeks summary judgment in its favor on that claim. The court will consider each alleged code violation in turn.

§ 23-1.7 Protection from general hazards.

...

(b) Falling hazards.

(1) Hazardous openings.

...

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

(a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or

(b) An approved life net installed not more than five feet beneath the opening; or

(c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Despite plaintiff's contention, Industrial Code § 23-1.7(b)(1)(iii) applies to hazardous openings, not elevated hazards such as the one in this case. *Ramirez v. Metropolitan Transp. Authority*, 106 A.D.3d 799, 801 (2d Dep't 2013); *see Allan v. DHL Express [USA], Inc.*, 99 A.D.3d at 831, 952 N.Y.S.2d 275; *Forschner v. Jucca Co.*, 63 A.D.3d 996, 999, 883 N.Y.S.2d 63. As this provision of the Industrial Code does not apply here, the branch of plaintiff's Labor Law § 241(6) claim predicated on violation of Industrial Code § 23-1.7(b)(1)(iii) is dismissed.

§ 23-1.16 Safety belts, harnesses, tail lines and lifelines.

(a) Approval required. Safety belts, harnesses and all special devices for attachment to hanging lifelines shall be approved.

(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

(c) Instruction in use. Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline.

(d) Tail lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level. Tail lines shall be first grade manila or synthetic fibre rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds or shall be fabricated of other approved materials.

(e) Lifelines. Any hanging lifeline required by this Part (rule) shall be not more than 300 feet in length from the point of suspension to grade, building setback or other surface. Every hanging lifeline shall be securely attached to a sufficient anchorage. Every hanging lifeline shall be provided with padding, wrapping, chafing gear or similar means of protection from contact with building edges or other objects which may cut or abrade such lifeline. Lifelines shall be fabricated of wire rope at least five-sixteenths inch in diameter or first grade manila or synthetic fibre rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds.

(f) Inspection and maintenance.

(1) Every safety belt, harness, tail line and lifeline shall be inspected by a designated person prior to each use. Employers shall not suffer or permit any employee to use any such equipment which shows any indication of mildew, broken fibre or fabric, excessive wear or any other damage or deterioration which could materially affect the strength of such safety belts, harnesses, tail lines or lifelines. Any such equipment found to be unsafe shall be removed from the job site.

(2) When not in use, safety belts, harnesses, tail lines and lifelines shall be stored in such areas and in such a manner as to prevent their deterioration and to protect them from being damaged.

Since no safety belt, harness, tail line, or lifeline was provided to plaintiff, Industrial Code § 23-1.16 does not apply. *See Avendano v. Sazerac, Inc.*, 248 A.D.2d at 341 (2d Dep't 1998); *see also Partridge v. Waterloo Cent. School Dist.*, 12 A.D.3d at 1056 (4th Dep't 2004). Accordingly, the branch of plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-1.16 is dismissed.

§ 23-1.21 Ladders and ladderways.

...

(d) Extension ladders and sectional ladders.

(1) Length. Extension ladders shall consist of not more than three sections and shall not exceed 60 feet in length when fully extended. The maximum working

length from an extension ladder shall be the length of the ladder minus the minimum overlap. Minimum overlaps shall be as follows:

Length of Ladder in Feet	Minimum Overlap in Feet
Up to and including 36	3

(the remainder of the chart in this section is not included, as it is inapplicable to the present case)

Industrial Code § 23-1.21(d)(1) is sufficiently specific to maintain a Labor Law § 241(6) cause of action, as it is not a generalized requirement for worker safety. *See Liu v. Sanford Tower Condominium, Inc.*, 35 A.D.3d at 379 (2d Dep't 2006). Plaintiff contends that defendants are in violation of Industrial Code § 23-1.21(d)(1) for the failure to provide a ladder of the appropriate length with the appropriate amount of overlap over the canopy. The ladder was approximately sixteen feet long and the height of the canopy was approximately fourteen feet, hence the overlap was approximately two feet. The ladder did not overlap the canopy by the required minimum of three feet, which is prima facie evidence of a violation of this section of the Industrial Code. As stated above, Seiko argues in its cross-motion for summary judgment that the ladder could have been set up at an alternate location such that it would be compliant with the Industrial Code (Expert Aff. of Bernard Lorenz at ¶ 13-16). Again, this opinion is speculative and does not raise an issue of fact. Defendants' violation of Industrial Code § 23-1.21(d)(1) is a proper basis for a Labor Law §241(6) claim, and the violation proximately caused plaintiff's injuries. Therefore, plaintiff is entitled to summary judgment on his Labor Law §241(6) claim predicated on Industrial Code § 23-1.21(d)(1).

Defendants' Motion to Dismiss Labor Law §200 Claim

Defendants move to dismiss the Labor Law § 200 claim. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d at 316-317). Labor Law § 200(1) states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending on whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep't 2007).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dep't 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dep't 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (199) (no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to moved); *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep't 2008).

"Under either liability standard, the common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200(1), has been extended to include the tools and appliances without which the work cannot be performed and completed." *Chowdhury v Rodriguez*, 57 AD3d 121, 128-129 (2d Dep't 2008). It is "well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work." *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d 136, 145 (1965). For example, "[i]f the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance, but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency." *Id.* at 146.

Accordingly, where a defendant who provides the plaintiff worker with a piece of defective equipment has moved for summary judgment on a Labor Law § 200 claim, it must be shown that the defendant neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the defective condition. *Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955, 959 (2nd Dep't 2013); *Cevallos v. Morning Dun Realty, Corp.*, 78 A.D.3d 547, 549 (1st Dep't 2010); *Navarro v. City of New York*, 75 A.D.3d 590, 592 (2nd Dep't 2010);

Chowdhury v. Rodriguez, 57 A.D.3d at 131). As in the case of other dangerous premises conditions, "it logically follows that a property owner's liability should be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises." *Chowdhury v. Rodriguez*, 57 A.D.3d at 130.

However, where, as here, "a worker's injury results from [the plaintiff's] employer's own tools or methods . . . a defendant property owner [will] be liable only if possessed of authority to supervise or control the work." *Id.*; *see Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d at 146). "[I]t makes sense that a defendant property owner be liable only if possessed of authority to supervise and control the work, since such defendant is vested with the authority to remedy any dangers in the methods or manner of the work." *Chowdhury v. Rodriguez*, 57 A.D.3d at 130.

There is no evidence to support an argument that defendants either supplied the ladder or directed and/or supervised plaintiff's use of the ladder to perform his work and here, it is undisputed that Seiko supplied the subject ladder. The mere presence of Metro North and Andron employees at the site does not amount to the requisite amount of supervision or control over plaintiff's work.

Thus, defendants are entitled to dismissal of the Labor Law § 200 claim.

Defendants' Claim for Contractual Indemnification against Seiko

Defendants move for summary judgment in their favor on their contractual indemnification claims against Seiko.

An indemnification provision contained in Section 5 of the contract between Andron and Seiko for the Harrison train station project (hereinafter, the Contract) provides:

> "To the fullest extent allowed by law, [Seiko Iron Works] hereby agree to hold each Indemnitee harmless from all bodily injury … claims against the Indemnitee which may arise from your work …"

Paragraph 5 also defines "claims" arising from Seiko's "work" as:

> "(a) in connection with or as a consequence of your work or operations under the subcontract.
>
> (b) which may arise out of your acts or omissions, or the acts or omissions of your employees … whether from negligence or otherwise."

Paragraph 5 of the Contract defines "Indemnitee" to include Andron and the "Owner." The "Owner" here is Metro North, as Metro North is the owner of Harrison train station. Pursuant to the Contract, defendants are "Indemnitees" under the Contract.

"The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract." *Suazo v. Maple Ridge Assocs., L.L.C.*, 85 A.D.3d 459, 460 (1st Dep't 2011). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Id.* "A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous." *Id.* The intent to indemnify can be "unambiguously evinced" by the requirement to indemnify for "any" accident, as is the case here. *See Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006).

In a contractor-subcontractor context "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Tarpey v. Kolanu Partners, LLC*, 68 A.D.3d 1099, 1100 (2d Dep't 2009) (quoting *Cava Const. Co. Inc v. Gealtec Remodeling Corp.*, 58 A.D.3d 660 [2d Dep't 2009]); *see also* NY General Obligations Law § 5-322.1.

The evidence offered demonstrates that Andron subcontracted with Seiko. The Contract states that Seiko is obligated to indemnify defendants for claims arising "in connection with or a consequence" of Seiko's work. The relevant language of the Contract is sufficiently clear and unambiguous regarding indemnification. Seiko furnished the ladder used on the night of plaintiff's accident [Rodriguez tr. (ex. H to the Moore aff.) at 8-10]. The ladder was put in place by Seiko's employees and used by Seiko's employees to reach the canopy where they were working. Defendants did not supply the ladder, did not help set up the ladder, and did not supervise or control Seiko's employees during the course of their work. Thus, defendants are free from negligence and Seiko's indemnity obligation is triggered by the Contract.

Seiko argues that the claims asserted against it did not arise out of Seiko's contracted work, as plaintiff was injured while descending the ladder to assist Metro North with obtaining jumper cables to jump start a Metro North vehicle.

"[C]ourts focus not on whether the injury occurs while actions are currently in progress, but rather whether it occurs before the work has been completed." *Liberty Mut. Fire Ins. Co. v EE. Cruz & Co.*, 475 F. Supp. 2d 400, 411 (S.D.N.Y. 2007) ("ongoing operations" encompasses injuries occurring prior to completion of work, not just those occurring while active work is being done); *see also O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518, 444

N.E.2d 982 (N.Y. 1982) (an injury sustained by a worker "arises out of the work" of the indemnitor even though the injury occurred while the worker was leaving for a lunch break).

Plaintiff's injury occurred in the course of his work for Seiko, as the ladder was used by Seiko and its employees, including plaintiff, to access and descend from the canopy on which they were working. Plaintiff was on the roof of the canopy for the purpose of instructing Seiko's employees prior to his injury. Thus, the court rejects Seiko's argument and grants defendants summary judgment for contractual indemnification on their claims against Seiko.

Defendants' Claim for Attorneys' Fees against Seiko

Defendants move for reasonable attorneys' fees from Seiko arising from the third-party action for contractual indemnification.

According to Section 5 of the Contract, defendants are entitled to attorneys' fees as part of Seiko's contractual indemnification obligations. The language in the Contract regarding attorneys' fees is plain and unambiguous. Seiko has not opposed this branch of defendants' motion.

Therefore, pursuant to the indemnification provision in the Contract, the court finds that defendants are entitled to reasonable attorneys' fees from Seiko arising from the third-party action for contractual indemnification and refers the issue of the amount of attorneys' fees for which Seiko is responsible to a Special Referee to hear and report with recommendations.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff Frank Geraghty's motion, pursuant to CPLR § 3212, for summary judgment in his favor as to liability on the Labor Law § 240(1) claim against defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad and Andron Construction Corp. is granted; and it is further

ORDERED that the branch of plaintiff Frank Geraghty's motion for summary judgment in his favor as to liability on the Labor Law § 241(6) claim is granted as to the branches predicated on violation of Industrial Code § 23-1.21(d)(1) and otherwise denied; and it is further

ORDERED that Third-Party Defendant Seiko Iron Works, Inc.'s cross-motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims is granted only to the extent that the branches of plaintiff's Labor Law § 241(6) claim predicated on alleged violations of Industrial Code §§ 23-1.7(b)(1)(iii) and 23-1.16 are dismissed and is otherwise denied; and it is further

ORDERED that defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad and Andron Construction Corp.'s motion for summary judgment dismissing plaintiff Frank Geraghty's Labor Law § 200 claim is granted; and it is further

ORDERED that defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad, and Andron Construction Corp.'s motion for summary judgment awarding contractual indemnification from Third-Party Defendant Seiko Iron Works, Inc. is granted; and it is further

ORDERED that defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad and Andron Construction Corp.'s motion for attorneys' fees from Third-Party Defendant Seiko Iron Works, Inc. is granted; and it is further

ORDERED that the issue of the amount of attorneys' fees incurred by defendants Metro North Commuter Railroad, d/b/a MTA Metro North Railroad, and Andron Construction Corp.

for which Third-Party Defendant Seiko Iron Works, Inc. is responsible is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel are directed to the Rules of the Special Referees' Part[1] and defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk who is directed to place this matter on the calendar of the Special Referees' Part for the earliest convenient date; and it is further

ORDERED that the remainder of the action shall continue; and it is further

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

1/17/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE

[1] Available at www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/Rules-SRP.pdf

[2] Available at www.nycourts.gov/supctmanh