SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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YUN HA PARK, **Index No.: 155475/2014**

Plaintiff,

-against-

AMHERST II VF L.L.C., D.F. PRAY, INC. and VORNADO REALTY TRUST, **DECISION/ORDER**

Defendants.

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D.F. PRAY, INC., **Third-Party Index No.:**

Third-Party Plaintiff,

-against-

ENVIRONMENTAL REMEDIATION SERVICES, INC.,

Third-Party Defendant.

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AMHERST II VF L.L.C. and VORNADO REALTY TRUST, **Second Third-Party Index No.: 595422/2016**

Second Third-Party Plaintiffs,

-against-

ENVIRONMENTAL REMEDIATION SERVICES, INC.,

Second Third-Party Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 001, 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an asbestos handler on April 19, 2012, when, while working at a construction site located at the

Amherst Shopping Center in Amherst, New York (the "Premises"), the ladder that he was working on allegedly shifted, causing him to fall to the ground and become injured.

In motion sequence number 001, plaintiff Yun Ha Park moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Amherst II VF L.L.C. ("Amherst"), Vornado Realty Trust ("Vornado") (together, the "Amherst defendants") and D.F. Pray, Inc. ("Pray") (collectively, "defendants").

The Amherst defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them.

In motion sequence number 002, Pray moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, as well as for summary judgment in it favor on its third-party claim for contractual indemnification against third-party/second third-party defendant Environmental Remediation Services, Inc. ("ERS").

In motion sequence number 003, the Amherst defendants move, pursuant to CPLR 3212, for summary judgment in their favor on their cross-claim for contractual indemnification against Pray, including all costs and attorneys' fees, and their second third-party claim for contractual indemnification against ERS, including all costs and attorneys' fees.

BACKGROUND

On the day of the accident, Amherst owned the Premises where the accident occurred. Vornado was the parent company and owner of Amherst. Pursuant to a contract, Amherst hired Pray to serve as the general contractor on a project at the Premises (the "Amherst/Pray Contract"), which entailed preparing the building for demolition and separating the portion of the building being demolished from the remaining portion (the "Project"). Pursuant to a contract,

Pray hired ERS to perform asbestos abatement services relating to the Project (the "Pray/ERS Contract"). ERS's services included removing asbestos from the roof of the Premises, and then placing the resulting debris into a dumpster located on the ground floor. Plaintiff was employed by ERS as an asbestos handler on the day of the accident.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by ERS as an asbestos handler for the Project. Plaintiff asserted that his work was supervised solely by his ERS supervisor, Cliff Wood ("Wood"). On that day, Wood instructed him to remove asbestos materials from the roof of the Premises and then bring them down to a dumpster located at the ground level of the Premises. Plaintiff described the dumpster as standing approximately 13 feet above ground level. Just prior to the accident, Wood instructed plaintiff to place a tarp over the dumpster and to secure the tarp's straps to it, so that the asbestos debris could be hauled away safely. Wood provided plaintiff with an extension ladder, so that he could climb to the top of the dumpster and reach the straps.

Plaintiff testified that he then placed the ladder against the dumpster. At this time, the top of the ladder was one foot higher than the top of the dumpster. Plaintiff placed the ladder against the dumpster at a 40 degree angle. Plaintiff maintained that no one helped him use the ladder. In addition, although Wood provided him with a harness, he was not tied off, because there was "no place where [he] could be tied to anything" (plaintiff's tr at 87). Plaintiff was not provided with any other safety devices, so as to prevent him from falling.

Prior to climbing the ladder, plaintiff made sure that it was steady and secure. Plaintiff could not recall whether the ladder had any type of footing, such as slip stoppers, at the bottom of

it. Plaintiff explained that, just moments before the accident, while standing on the third or fourth rung from the top of the ladder, he began the process of pulling the tarp from one end of the dumpster to the other, so as to cover the materials inside the dumpster. At this time, no one was helping plaintiff with this work, as no one was available. Plaintiff found the tarp "very heavy" and quite difficult to pull (*id.* at 84). As he tugged on the tarp with both hands and "all [his] might," suddenly, "the ladder moved and [he] fell" (*id.*).

The Deposition Testimony of Cliff Wood (Plaintiff's ERS Supervisor)

Wood testified that he was employed by ERS as a supervisor on the day of the accident. As such, he was responsible for making sure that ERS was complying with the scope of the work, and for making sure that ERS's workers were safe on the Project. He also instructed the ERS workers in regard to their daily duties and provided them with the materials and equipment necessary to do their asbestos abatement work. On the day of the accident, he supplied plaintiff with a 32-foot fiberglass extension ladder to perform his work. He noted that the top of the ladder was comprised of rounded plastic, and the bottom of the ladder had rubber feet with steel riggers, or teeth, on them.

Wood further testified that, just prior to the accident, he instructed plaintiff to pull a tarp over the dumpster, which contained asbestos debris. In order for plaintiff to do so, he needed to get to the top of the dumpster via the extension ladder and retrieve the tarp's straps with his hands.

Wood did not witness plaintiff's accident, although he heard about it soon after it happened. When he went to investigate the situation, Wood observed the ladder to be in good condition, with no defects. Wood testified that he also noticed that the ladder was lying in a

position "where it shouldn't have been . . . the top of the ladder was pointed away from the [dumpster]" (Wood tr at 43). He explained that "[i]f the ladder was - - properly used, and it slid - - which I don't think it could have because it had [feet "designed for slip-resistance"] - - it would have been - - the top of the ladder would have been facing the wall of the [dumpster]" (*id.* at 43-44). He also maintained that, after the accident, he observed some scratches "on the ground where the [top] of [the] ladder stood on the ground" (*id.* at 52).

Deposition Testimony of Vincent Villella (Pray's Vice-President)

Vincent Villella ("Villella") testified that he was Pray's vice-president on the day of the accident. He explained that Pray was hired to demolish a portion of the Premises, so that a new tenant could build in the space. Pray hired ERS to perform certain asbestos abatement work for the Project. As part of its duties, ERS set up containment areas and conducted asbestos waste removal at the site. Wood was responsible for the safety of the ERS workers.

Villella further maintained that Pray did not have any supervisory role over ERS's workers, and that Pray did not provide any materials or equipment, such as ladders or dumpsters, to those workers. In fact, all of the necessary equipment and/or materials needed for the subject work was provided solely by ERS.

The ERS Incident Report

After the accident, Wood prepared an incident report (the "ERS Report"). In it, Wood stated that, at the time of the accident, plaintiff was "using an extension ladder to retrieve straps hung up on a rail and [the] ladder slid out from underneath him" (Notice of the Amherst defendants' cross-motion, Exhibit K, the ERS Report). He also stated that "[he] observed [the] ladder upside down when [he] picked it up," and that "if [the ladder's slip stoppers] were

correctly on the ground [the accident] could not have happened" (*id.*). In the ERS report, Wood also noted that, after the accident, he observed the ladder still to be in good condition.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 Claim (motion sequence numbers 001 and 002 and the Amherst Defendants' cross motion)

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. In their separate motions, the Amherst defendants and Pray move for dismissal of said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a

> building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "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 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 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 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Here, plaintiff has met his prima facie burden of establishing that Labor Law § 240 (1) was violated, through his uncontested testimony that, while he performed his assigned work, the 32-foot extension ladder on which he was working shifted, causing him to fall to the ground and become injured. Importantly, "'[w]here 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 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of an unsteady ladder, the 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 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the 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"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *affd* 11 NY3d 757 [2008]). "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 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011] [where the plaintiff was injured when the top of the ladder that he was working on slid away from the house, Court held that "[t]he defect in the ladder, and the fact that it was not secured, were substantial factors in causing plaintiff to fall"]).

Initially, contrary to defendants' contention, it is not necessary for plaintiff to show that the ladder was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

It is also insufficient to deny plaintiff summary judgment merely because no other witnesses observed the accident (*Orellano,* 292 AD2d at 290 [where plaintiff fell from an A-frame ladder that had no protective devices, the Court granted plaintiff, who was alone at the time of the accident, summary judgment on his section 240 (1) claim "[r]egardless of the precise reason for his fall"]; *Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721, 722 [2d Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]).

In addition, due to the ladder's height, and, as it was foreseeable that the force of plaintiff's tug on the tarp might cause the ladder to wobble and/or shift, an additional and/or different safety device, such as someone placed at the foot of the ladder to secure it, a securing

device at the ladder's top and/or the use of a baker scaffold with rails, was required to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them, because plaintiff's own improper placement of the ladder makes him the sole proximate cause of the accident. To that effect, defendants argue that plaintiff improperly placed the ladder upside down against the dumpster, so that the ladder's rubber feet were in the air, rather than on the ground, where they could prevent slippage.

Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed

and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

Here, defendants' entire sole proximate cause argument is based upon the testimony of Wood, who did not observe the position of the ladder before the accident, plaintiff's performance of the subject work or even the accident itself. In addition, Wood's only support for his assertion that plaintiff placed the ladder upside down was the fact that, when he observed the ladder lying on the ground after the accident, the top of the ladder was pointing away from the dumpster and there were some scratches on the floor. Moreover, it has not been established that Wood is an accident reconstruction expert, so as to lend credibility to his opinion regarding the cause of the accident.

As such, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiff[s'] showing or to raise a bona fide issue as to how the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Melchor*, 90 AD3d at 869; *Ward v Urban Horizons II Hous. Dev. Fund Corp.*, 128 AD3d 434, 435 [1st Dept 2015]).

In any event, as discussed previously, as the ladder was not the proper device for the task at hand, and, as the ladder stood at a height requiring a securing device or a person to steady it, any alleged negligence on plaintiff's part in not properly placing the ladder right side up goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [Court noted that "[e]ven if there were admissible evidence [that the

'plaintiff failed to attach his safety harness to the lifeline in the proper manner'], the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[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 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

It should be noted that, as additional safety devices were necessary to keep plaintiff safe from falling, due to the height of the ladder and the nature of plaintiff's work, the instant case can be distinguished from those cases wherein plaintiff's own "misuse [of] an otherwise adequate ladder" was determined to be the sole proximate cause of the accident (*Santiago v Fred-Doug*

117, L.L.C., 68 AD3d 555, 556 [1st Dept 2009]; *Scofield v Avante Contr. Corp.*, 135 AD3d 929, 931 [2d Dept 2016]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to summary judgment dismissing the same.

"Since plaintiff is entitled to summary judgment as to liability on his section 240 (1) claim, we need not address plaintiff's Labor Law § 200 [and] § 241 (6) . . . claims" (*Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617 [1st Dept 2014]). Nevertheless, this Court will address said claims below.

The Labor Law § 241 (6) Claim (motion sequence number 002 and the Amherst Defendants' cross motion)

In their separate motions, the Amherst defendants and Pray move for dismissal of the Labor Law § 241 (6) claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (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."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, 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.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.16 (b) and 23-1.21 (b) (4) (iv), plaintiff does not oppose dismissal of these sections, and therefore, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

Industrial Code 12 NYCRR 23-1.16 (b)

Initially, section 23-1.16 (b) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d at 618; *see* e.g. *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]).

Section 23-1.16 (b) states, in pertinent part, as follows:

> "*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."

Section 23-1.16 (b), which sets standards for when safety belts and harness are in use, applies to the facts of this case. That said, while plaintiff was, in fact, wearing a harness at the time of the accident, he testified that there was no place to tie off said harness. In support of their motions, defendants offer no evidence to refute plaintiff's assertion in regard to this issue, nor do they offer any argument that plaintiff's work did not require said safety device.

Thus, defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.16 (b).

Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv)

Initially, Industrial Code 12 NYCRR 23-1.21 (b) (4) (iv) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d at 176).

Section 23-1.21 (b) (4) (iv) requires that

> "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means."

Here, it is undisputed that plaintiff was working on a rung between six and 10 feet above the ladder footing at the time of the accident. It is also undisputed that, at the time of the accident, no one was stationed at the foot of the ladder to steady it, nor was the top of the ladder secured in any way against slippage (*see Melchor v Singh*, 90 AD3d at 871 [section 23-1.21 (b)

(4) (iv) applied where the plaintiff testified that he was working approximately 26 to 39 feet above the ground, and the top of the ladder was not secured and no one was holding the bottom of the ladder at the time of the accident]).

Thus, defendants are not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.21 (b) (4) (iv).

The Common-Law Negligence and Labor Law § 200 Claims (motion sequence number 002 and the Amherst Defendants' cross motion)

As plaintiff does not oppose those parts of defendants' motions seeking dismissal of the common-law negligence and Labor Law § 200 claims against them, defendants are entitled to dismissal of said claims against them.

The Cross-Claims Against the Amherst Defendants (the Amherst Defendants' Cross-Motion)

It should be noted that the Amherst defendants move to dismiss all cross-claims against them. However, they do not identify said cross-claims, nor do they offer any evidence or argument in support of their dismissal.

Thus, the Amherst defendants are not entitled to dismissal of all cross-claims against them.

Pray's Third-Party Claim for Contractual Indemnification Against ERS and the Amherst Defendants' Second Third-Party Claim for Contractual Indemnification Against ERS (motion sequence numbers 002 and 003)

In their separate motions, Pray and the Amherst defendants move for summary judgment in their favor on their contractual indemnification claims against ERS.

Additional Facts Relevant to This Issue:

An indemnification provision contained in the Pray/ERS Contract (the ERS Indemnification Provision) states, in pertinent part, as follows:

> "To the fullest extent permitted by law, [ERS] shall indemnify, hold harmless and defend [the Amherst defendants], [PRAY] and the agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney[s'] fees, arising out of or resulting from the Services caused in whole or in part by the acts or omissions of [ERS], [ERS's] subcontractors of any tier, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(Pray's Notice of Motion, Exhibit N, the Pray/ERS Contract, the ERS Indemnification Provision at 3).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Pursuant to the ERS Indemnification Provision, ERS must indemnify Pray and the Amherst defendants for all claims "arising out of or resulting from the Services caused in whole or in part by the acts or omissions of [ERS]." As noted previously, plaintiff was employed by ERS on the day of the accident. In addition, not only was plaintiff's work on the Project

supervised by his ERS foreman, ERS supplied plaintiff with all of the safety devices he needed to perform his work. Accordingly, the accident arose directly from ERS's work on the Project.

Further, there is no evidence in the record establishing that any negligence on the part of defendants caused or contributed to the accident. In fact, plaintiff testified as such.

Thus, pursuant to the ERS Indemnification Provision, Pray is entitled to summary judgment in its favor on its third-party contractual indemnification claim against ERS, and the Amherst defendants are entitled to summary judgment in their favor on their second third-party contractual indemnification claim against ERS.

This Court has considered the parties' remaining arguments on these issues and finds them to be unavailing.

The Amherst Defendants' Cross-Claim for Contractual Indemnification Against Pray (motion sequence number 003)

The Amherst defendants move for summary judgment in their favor on their cross-claim for contractual indemnification against Pray.

Additional Fact Relevant to This Issue:

The Amherst/Pray Contract contains an indemnification provision (the Pray Indemnification Provision), which states, in pertinent part, as follows:

> "To the fullest extent permitted by law, [Pray] shall indemnify, defend . . ., and hold harmless the (1) Owner, Owner's parent, affiliates . . . [and] (3) any and all agents and employees . . . from and against all claims, damages, losses and expenses, including, without limitation, attorneys' fees, arising out of or resulting from the performance of [Pray's] Work under the Contract Documents, provided that any such claim, damages . . . is attributable to bodily injury . . . [and] is caused in whole or in part by any negligence act, omission or willful misconduct of [Pray] or anyone directly or indirectly employed by it or anyone else whose acts it may be liable, except to the extent caused by the negligence of an Indemnified Party"

(Pray's Notice of Motion, Exhibit M, the Amherst/Pray Contract, the Pray Indemnification Provision, ¶ 9.17.1).

As indicated above, the Pray Indemnification Provision requires that Pray indemnify the Amherst defendants for personal injury claims arising out of its services under the Amherst/Pray Contract, provided that the subject bodily injury was caused in whole or in part by Pray's negligence and/or the negligence of anyone directly or indirectly employed by it.

Initially, a subcontractor who has been hired by a contractor may be considered directly and/or indirectly employed by that contractor, so as to trigger an indemnification provision like the one in the instant case (*see Britez v Madison Park Owner, LLC*, 106 AD3d 531, 532 [1st Dept 2013]). As discussed previously, Pray hired ERS to perform asbestos abatement services for the Project. That said, although Pray was not guilty of any negligence that caused or contributed to the accident, ERS's negligence in failing to provide plaintiff with an adequate safety device, so as to keep him from falling off the ladder, did cause or contribute to the accident.

Thus, pursuant to the Pray Indemnification Provision, the Amherst defendants are entitled to summary judgment in their favor on their cross-claim for contractual indemnification against Pray.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Yun Ha Park's motion (motion sequence number 001), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Amherst II VF L.L.C. (Amherst), Vornado Realty Trust (Vornado) (together, the Amherst defendants) and D.F.Pray, Inc. (Pray) (collectively, defendants) is granted;

and it is further

ORDERED that the Amherst defendants' cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim predicated on abandoned provisions, is granted, and these claims are dismissed as against the Amherst defendants, and the cross-motion is otherwise denied; and it is further

ORDERED that the parts of Pray's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim predicated on abandoned provisions, is granted, and these claims are dismissed as against Pray; and it is further

ORDERED that the part of Pray's motion (motion sequence number 002) for summary judgment in it favor on its third-party claim for contractual indemnification against third-party/second third-party defendant Environmental Remediation Services, Inc. (ERS) is granted, and the motion is otherwise denied; and it is further

ORDERED that the Amherst defendants' motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in their favor on their cross claim for contractual indemnification against Pray, including all costs and attorneys' fees, and their second third-party claim for contractual indemnification against ERS, including all costs and attorneys' fees, is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 14, 2018

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.