SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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WILLIAM CASTILLA,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN & CONSTRUCTION, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, B Q E INDUSTRIES, INC., and XAREN CORPORATION,

Defendants.

Index No. 152863/12

Motion Seq. Nos. 010 & 011

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B Q E INDUSTRIES, INC.,

Third-Party Plaintiff,

-against-

DOSANJH CONSTRUCTION CORP. and XAREN CORPORATION,

Third-Party Defendants.

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B Q E INDUSTRIES, INC.,

Second Third-Party Plaintiff,

-against-

SUPERSTRUCTURES ENGINEERING + ARCHITECTURE, PLLC,

Second Third-Party Defendant.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of plaintiff's motion for partial summary judgment and for leave to supplement the bill of particulars, second third-party defendant's motion for summary judgment, and defendants' cross motion for summary judgment:

Papers	**NYSCEF Documents Numbered**
Notice of Motion in Support of Motion Sequence 010	353
Affirmation in Support of Motion Sequence 010	354 (exhibits 355-385)

Affirmation in Opposition	392 (exhibits 393-402)
Affirmation in Opposition	410 (exhibit 411)
Affirmation in Opposition	403 (exhibits 404-408)
Reply Affirmation	478 (exhibits 479-480)
Notice of Motion in Support of Motion Sequence 011	412
Affirmation in Support of Motion Sequence 011	413 (exhibits 414-428)
Memorandum of Law in Support	429
Affirmation in Opposition	463
Affirmation in Opposition	466 (exhibits 467-470)
Affirmation in Opposition	473 (exhibit 474-477)
Reply Memorandum of Law	481
Notice of Cross Motion	430
Affirmation in Support of Cross Motion	431 (exhibits 432-459)
Affirmation in Opposition	461
Affirmation in Opposition	462
Affirmation in Opposition	464 (exhibit 465)
Affirmation in Reply	471 (exhibits 472-474)

GERALD LEBOVITS, J.:

Motion sequence numbers 010 and 011 are consolidated for disposition.

This is an action arising out of a construction site accident that occurred on November 10, 2011 at the Clemente Soto Velez Cultural Center located at 107 Suffolk Street in Manhattan (hereinafter, the premises). Plaintiff William Castilla, a laborer, alleges that he was seriously injured when the bulkhead roof that he was standing on collapsed, causing him to fall to a stairwell below.

Plaintiff moves for an order: (1) pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability under Labor Law § 240 (1), and setting this matter down for an assessment of damages; (2) pursuant to CPLR 3025 (b), granting leave to supplement his bill of particulars to add an alleged violation of 12 NYCRR 23-3.3 (c); and (3) pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability under Labor Law § 241 (6) based upon said violation (motion sequence number 010).

Second third-party defendant Superstructures Engineering + Architecture, PLLC (SSX) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims, cross claims, and counterclaims against it (motion sequence number 011).

Defendants City of New York, New York City Department of Design & Construction (DDC), New York City Department of Education, New York City Department of Cultural Affairs, and New York City Department of Citywide Administrative Services (collectively, the City) cross-move, pursuant to CPLR 3212, for summary judgment on their contractual indemnification claims against defendant/third-party plaintiff/second third-party plaintiff BQE Industries, Inc. (BQE).

BACKGROUND

It is undisputed that the City owned the building, and that DDC managed the building where the accident occurred. BQE was the general contractor on an asbestos abatement and roof replacement project at the premises. BQE hired defendant Dosanjh Construction Corp. (Dosanjh) as a roofing subcontractor. BQE also retained defendant Xaren Corporation (Xaren) to perform asbestos abatement. Pursuant to a master professional services agreement dated April 28, 2004, DDC hired SSX to perform professional design and engineering services in accordance with the terms of "Task Orders" that would be issued by DDC. DDC issued a Task Order in connection with the premises in April 2006.

Plaintiff testified that a man offered him work on the morning of his accident, and that he was going "to help cover" the roof of the subject building, which was located at 107 Suffolk Street in lower Manhattan (plaintiff tr at 22-25). Plaintiff went to the roof of the building to work, and plaintiff and his coworkers "started getting the material ready with which [they] were going to cover and [they] started cleaning the areas as well" (*id.* at 27). He signed the sign-in sheet (*id.* at 27-28). When shown the sign-in sheet, plaintiff acknowledged that he was listed as a roofer, and that the contractor next to his name was "Dosanjh" (*id.* at 29). Plaintiff received a hard hat and gloves (*id.* at 31-32). The man who had driven plaintiff and his three coworkers to the site told them on the roof that "it was going to rain and [they] had to cover the whole area" (*id.* at 35). He stated that the materials that they were going to use were on the roof (*id.*). According to plaintiff, it was rubber, "[l]ike a blanket to cover the whole area," and "[i]t was black, it was heavy, several pieces and rubber" (*id.* at 35-36). Plaintiff stated that there were between seven and 12 other people working on the roof, in addition to plaintiff and his four coworkers (*id.* at 38). Plaintiff testified that "they were cleaning the areas," and added that "[t]here were wood pieces, rocks, small rocks, there was waste, and they had to clean the area" (*id.*).

According to plaintiff, the workers had their lunch break at around 12:30 p.m.; "after that [they] started working on the front part of the building on the scaffolds" (*id.* at 49). There were workers cleaning the walls with pressure machines (*id.* at 50). Plaintiff was "covering the windows with tape and with plastic" for about an hour-and-a-half (*id.* at 51, 52). 45). After working for two hours on the main roof, the foreman told plaintiff to go to the small bulkhead roof above the stairwell entry (*id.* at 47-48). Plaintiff used a small aluminum ladder to reach the bulkhead roof (*id.* at 61). He stated that he placed the ladder against the stairwell bulkhead and climbed up the ladder in order to stand on the bulkhead roof (*id.* at 65). Plaintiff's coworker was going to hand the temporary protection to him once he got up there (*id.* at 67). He stated he "reached the small roof and [he] started walking. [He] walked two or three steps and the roof collapsed and [his] feet went through the roof, then [his] body . . . fell on the floor beneath it, beneath the floor and the staircase" (*id.* at 66-67). He fell about 18 to 20 feet to the stairwell below, hitting his back and his hip (*id.* at 74, 75). Plaintiff went to the hospital by ambulance (*id.* at 76). Plaintiff did not receive a harness (*id.* at 178).

Nehru Kataru (Kataru), BQE's project manager, testified that BQE is a construction company that performs exterior restoration and roofing work (Kataru tr at 9-10, 16). BQE subcontracted with four or five other companies to perform work on this project (*id.* at 48, 50-51). Advanced Scaffolding provided some exterior wall scaffolding along the high wall on the Suffolk Street side of the building (*id.* at 51-52). BQE hired Xaren to perform asbestos

abatement work on the roof before the roof could be installed (*id.* at 59-60). At the time of the accident, 99 per cent of the asbestos removal work had been completed (*id.* at 61). After performing asbestos abatement, Xaren removed the existing roof (*id.* at 67). According to Kataru, the roof "looked like old roof. It was covered with small stones, the stones you can see, that's it and underneath the stones you cannot see the roofing membrane" (*id.* at 68). In other words, the roof was so old that the roofing system had deteriorated into small stones, and the old roof membrane was no longer visible (*id.* at 69).

Kataru stated that at the corner of the building at Rivington Street and Suffolk Street is bulkhead number eight, where the accident occurred (*id.* at 77). The small, flat roofs of the bulkheads were composed of the same material as the main flat roof, and was in the same condition as the flat roof before Xaren performed its work (*id.* at 78, 79). He did not inspect the condition of bulkhead eight before the accident (*id.* at 137-138). BQE did not provide any safety equipment to the subcontractors' workers (*id.* at 178-180). After Xaren removed the asbestos from the roof, it laid down plastic to protect the roof from rain (*id.* at 204-205). When Xaren removed the asbestos from the flat and bulkhead roofs, there was nothing left except for the original layer of terra cotta tiles (*id.* at 252, 281). Xaren applied temporary plastic to the entire surface of bulkhead roof number eight (*id.* at 252). BQE employees repaired cracks in the façade, replaced bricks and terra cotta, and power-washed the façade (*id.* at 93-94, 99). Kataru testified that the daily reports indicated that asbestos removal began on September 14, 2011 (*id.* at 267-268). To cover and protect bulkhead eight from rain, Dosanjh accessed the roof either by an A-frame or fixed ladder (*id.* at 288). According to Kataru, a daily report dated November 10, 2011 states that BQE mason tenders were performing pressure washing on the second through fifth floors on the building façade along Suffolk Street, and that there were three Dosanjh workers, including plaintiff, working that day (*id.* at 311, 312; November affirmation in support, exhibit V). The report states that "Dosanjh Construction roofer, Mr. William Castilla, got hurt at about 1400 . . . [t]ook him to Hospital by ambulance" (November affirmation in support, exhibit V at 193).

A BQE accident report dated November 12, 2011, completed by Kataru, states that "William told 'when he was on the roof, small section of structural roof deck collapsed and he tried to protect himself by holding the deck. Then larger section of roof deck approximately 2' x 2' collapsed and he fall [sic] down on stairs underneath of deck' approx.. 12' below" (*id.*, exhibit C at 4).

Medhat Azer (Azer), a senior construction project manager employed by DDC, testified that he was responsible for overseeing the project, and that he was on the site daily (Azer tr at 10-12, 33). The project involved asbestos abatement and replacement of the roof, as well as façade restoration and window replacement for the second through fifth floors (*id.* at 17, 25). DDC issued safety citations for BQE's work, including the lack of safety equipment such as goggles, safety harnesses and scaffolding (*id.* at 41, 43-44). According to Azer, DDC did not provide safety equipment to Dosanjh workers on bulkhead roof number eight on the date of the accident (*id.* at 178-179).

Sabine Van Riel (Van Riel) testified that she was SSX's project manager for the Clemente Soto Velez project (Van Riel tr at 9-10, 13-15). She regularly visited the site, attended progress meetings, inspected the work for conformity with the contract documents, and wrote field reports (*id.* at 15-16). SSX's contractor took probes on the façade but not on the roof (*id.* at

18). Van Riel did not inspect the bulkhead substrate, since SSX's scope of work was limited to making "visual" observations of the building's exterior condition (*id.* at 24, 28). With respect to bulkhead number eight, Van Riel did not observe anything (*id.* at 29). Her observations took place during the survey phase and not during the construction phase (*id.*).

Harmel Singh (Singh), the sole owner of Dosanjh, testified that his company did not supply scaffolds or ladders for its workers (Singh tr at 10, 73-74). According to Singh, his employees did not inspect the bulkhead roofs (*id.* at 108-109).

Anthony Reilly (Reilly) stated that he was working for Dosanjh on the date of the accident, and so was plaintiff (Reilly tr at 22, 24, 36-37). Reilly testified that plaintiff and a coworker were up on the bulkhead waterproofing when the accident occurred (*id.* at 27, 41). Plaintiff "started working, and the roof collapsed in a matter of second . . . He fell and went down the stairs and he was there" (*id.* at 41). When asked whether there was any type of fixed or movable scaffolding around the bulkhead roof, Reilly stated that "[t]here was no safety at all" (*id.*). According to Reilly, plaintiff and his coworker were not wearing personal protective equipment (*id.* at 42).

After a hearing before a Workers' Compensation Board administrative law judge (ALJ), at which Dosanjh was represented by counsel, the ALJ found that "claimant was an employee of Dosanjh Construction on November 10, 2011" and "BQE, care of Chartis" was "[r]emoved and discharged" (November reply affirmation, exhibit AA [hearing tr at 26]).

PROCEDURAL HISTORY

Plaintiff commenced this action on May 17, 2012, asserting causes of action against the City and BQE for violations of Labor Law §§ 240 (1), 241 (6), and 200 and under principles of common-law negligence.

BQE subsequently impleaded Dosanjh and Xaren, seeking recovery for (1) contribution; (2) common-law indemnification; (3) contractual indemnification; and (4) damages for failure to procure insurance.

Thereafter, plaintiff served a supplemental summons and amended complaint adding Xaren as a direct defendant in the main action, asserting the same claims against Xaren as against the City and BQE.

BQE also brought a second third-party action against SSX, asserting the following two claims: (1) contribution; and (2) common-law indemnification.

DISCUSSION

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also* CPLR 3212 [b]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). "Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to 'produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . .'" (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). Where there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

I. Plaintiff's Motion for Summary Judgment

A. Labor Law § 240 (1)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1), arguing that he is entitled to judgment because he fell from a height when the roof collapsed, and because defendants did not give him any safety devices to prevent his fall.

The City argues, in opposition, that plaintiff's motion should be denied, since: (1) the collapse of the roof was not foreseeable; (2) plaintiff's work did not involve a gravity-related risk, as contemplated by section 240 (1); and (3) plaintiff was not engaged in a covered activity at the time of his injury, but was instead performing routine maintenance.

In opposing plaintiff's motion, BQE also contends that: (1) plaintiff was not performing an enumerated activity at the time of his accident; and (2) there are triable issues of fact as to whether the collapse of the bulkhead roof was reasonably foreseeable.

Dosanjh also joins in BQE's opposition to plaintiff's motion, and requests that the court not make any conclusive determination as to whether Dosanjh was plaintiff's employer.

In reply, plaintiff argues that his task of covering the bulkhead roof was in furtherance of the demolition and alteration work and was, therefore, a covered activity under the statute. In addition, plaintiff maintains that he need not show that the failure of the bulkhead roof was reasonably foreseeable, because his work site collapsed. According to plaintiff, even if he were required to show foreseeability of the roof's collapse, the collapse was foreseeable. Further, plaintiff contends that his accident involved a gravity-related risk, given that he fell through the roof that collapsed underneath him. Finally, plaintiff contends that Dosanjh is collaterally estopped from asserting that it was not plaintiff's employer, since this issue was litigated and determined at a hearing before the Workers' Compensation Board.

As set forth below, there are questions of fact as to whether there was a foreseeable need for a protective device of the kind enumerated in Labor Law § 240 (1).

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

> "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 . . . gravity to an object or person" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [1st Dept 2017] [internal quotation marks and citation omitted]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices),

and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Limauro v City of N.Y. Dept. of Envtl. Protection*, 202 AD2d 170, 171 [1st Dept 1994]).

Whether Plaintiff Was Engaged in a Covered Activity

Labor Law § 240 (1) applies to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240 [1]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]). "'[A]ltering' within the meaning of Labor Law § 240 (1) requires making a *significant* physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]). In determining whether a particular project constitutes "alteration," the court must examine the totality of the work (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 126 [2015]).

In *Prats*, an assistant mechanic, whose job typically entailed cleaning, repairing and rehabilitating air handling units, was injured while ascending a ladder in order to hand a wrench to a coworker who was inspecting an air handling unit (*Prats*, 100 NY2d at 880). In holding that the plaintiff was engaged in a covered activity under section 240 (1), the Court of Appeals stated that:

> "Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. *The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts*"

(*id.* at 882 [emphasis added]). The Court further explained that:

> "the question whether a particular inspection falls within section 240 (1) must be determined on a case-by-case basis, depending on the context of the work. Here, a confluence of factors brings plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred"

(*id.* at 883; *see also* NY PJI 2:217 ["Whether plaintiff was involved in a protected activity under the statute depends on several factors, including whether plaintiff was employed by a company that was carrying out a construction or alteration project, whether plaintiff's work was ongoing and contemporaneous with that work, whether plaintiff was involved in performing alteration or construction work and whether plaintiff's work was part of a separate phase easily distinguishable from the construction and alteration work"]).

Although the City and BQE attempt to isolate the moment of plaintiff's injury, "a confluence of factors" brings plaintiff's activity within the statute. Plaintiff was "permitted or suffered to work" at the site (Labor Law § 2 [7]). Even if plaintiff was employed BQE, and not

Dosanjh, he was employed by a company that was performing construction or alteration work at the site (*see Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] [worker's employer was hired to perform "alteration" work, where employer was hired to replace loose and broken slate roof tiles, clean gutters, install new flashing cement, install new copper flashing, and repair roof leak]). Plaintiff was on the bulkhead roof in order to protect the demolished roof (plaintiff tr at 23, 52). There is no evidence that plaintiff's work was a separate phase easily distinguishable from the construction and alteration work.

Statutory Violation and Proximate Cause

"[T]he determination of the type of protective device required for a particular job [and thus whether § 240(1) is implicated] turns on the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). "[T]o prevail on a Labor Law § 240 (1) claim based on an injury resulting from the failure of a completed and permanent building structure, the plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 10 [1st Dept 2011], quoting *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 [1st Dept 2008] [internal quotation marks and citation omitted]). Significantly, "[t]he issue of foreseeability in this context is relevant only with respect to whether the plaintiff was exposed to an elevation-related risk ..." (*Jones v 414 Equities, LLC*, 57 AD3d 65, 80 [1st Dept 2008]).

In *Mendoza*, the plaintiff was directed onto a leaky roof to perform an inspection of necessary repairs (*Mendoza*, 83 AD3d at 1). The First Department held that evidence "that the roof was in a state of disrepair due to the long-term, chronically uncorrected, water seepage through the roof that had destabilized its surface" "raise[d] an issue of fact as to whether it was foreseeable that the roof would buckle (*id.* at 12).

In *Espinosa*, the Court similarly found "a triable issue as to whether the failure of the cellar vault beneath the sidewalk – a completed, permanent building structure – was reasonably foreseeable" (*Espinosa*, 58 AD3d at 289). There, the Court held that the building's advanced state of disrepair did not establish foreseeability as a matter of law (*id.*).

Contrary to plaintiff's contention, he is required to establish that the collapse of the permanent roof was foreseeable. Although plaintiff relies on *Mihelis v i.park Lake Success, LLC* (56 AD3d 355 [1st Dept 2008]), the court finds this case to be distinguishable. In *Mihelis*, the plaintiff was injured while demolishing defective concrete panels on the roof of the building, when the roof snapped in half and collapsed (*id.*). On appeal, the First Department distinguished *Jones* on the basis that:

> "[t]hat case involved the collapse of an interior permanent floor which was not part of the demolition and renovation work being performed, and there was no evidence showing that the condition of the floor placed the workers at an elevation-related risk. Here, in contrast, the assigned task by its very nature created an elevation-related risk, in that it involved replacing substandard precast concrete panels on the roof of a building"

(*id.* at 356). In this case, however, it cannot be said that plaintiff's task of placing temporary protection on the roof, by its very nature, exposed plaintiff to an elevation-related risk.

Here, there are triable issues of fact as to whether it was reasonably foreseeable that the bulkhead roof would collapse (*see Mendoza*, 83 AD3d at 12; *Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587, 589 [2d Dept 2002] ["issues of fact as to whether the building was in such an advanced state of disrepair and decay from neglect, vandalism, and the elements that the plaintiff's work on the third floor exposed him to a foreseeable risk of injury from an elevation-related hazard, and whether the absence of a type of protective device enumerated under Labor Law § 240 (1) was a proximate cause of his injuries"] *cf. Restrepo v Yonkers Racing Corp., Inc.*, 105 AD3d 540, 540 [1st Dept 2013] ["it was foreseeable that the door, which was not intended for use as a floor, but instead intended only to enable one to reach up from the floor below, would fail when traversed upon by plaintiff"]). There is conflicting evidence as to the condition of the roof. Kataru stated that the roof had deteriorated into small stones, and that the roof membrane was no longer visible (Kataru tr at 69). However, Azer testified that there was no sign of failure in any part of the ceiling below the terra cotta tiles (Azer tr at 168-169). In addition, evidence of the roof's "advanced state of disrepair raises a triable issue as to whether the structural failure that caused the [roof] to collapse was foreseeable but does not establish the foreseeability of the collapse as a matter of law" (*Espinosa*, 58 AD3d at 293).

Accordingly, plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is denied.

B. Labor Law § 241 (6)

In pertinent part, Labor Law § 241 (6) states that "[a]ll 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, equipped, guarded, arranged, operated and conducted 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 shall comply therewith."

Labor Law § 241 (6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). To recover under Labor Law § 241 (6), a plaintiff must: (1) plead and prove the violation of an Industrial Code provision containing a "specific, positive command" (*Gasques v State of New York*, 15 NY3d 869, 870 [2010] [internal quotation marks and citation omitted]); and (2) show that the violation was a proximate cause of the accident (*Buckley*, 44 AD3d at 271). "A violation of an explicit and concrete provision of the Industrial Code by a participant in a construction project constitutes some evidence of negligence, for which the owner or general contractor may be held vicariously liable" (*Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]). A defendant may raise the plaintiff's comparative negligence as a valid defense to a claim pursuant to this statute (*Rizzuto*, 91 NY2d at 350).

Plaintiff's Request to Supplement his Bill of Particulars

Plaintiff moves for leave to supplement his bill of particulars to add an alleged violation of 12 NYCRR 23-3.3(c), which concerns inspections during hand demolition operations. In opposition, the City and BQE argue that plaintiff is not entitled to supplement his bill of particulars because they would be unfairly prejudiced. As pointed out by defendants, plaintiff filed the note of issue six days after making his motion on October 2, 2017 (NY St Cts Electronic Filing [NYSCEF] Doc No. 387), preventing them from conducting discovery as to the alleged Industrial Code violation.

"'It is well settled that leave to amend or supplement pleadings should be freely granted . . . unless prejudice and surprise directly result from the delay in seeking the amendment'" (*Spiegel v Gingrich*, 74 AD3d 425, 426 [1st Dept 2010], quoting *Adams v Jamaica Hosp.*, 258 AD2d 604, 605 [2d Dept 1999]; *see also* CPLR 3025 [b]). Moreover, "[t]he failure to identify a Code provision in the complaint or bill of particulars is not fatal to such a claim" (*Kelleir v Supreme Industrial Park, LLC*, 293 AD2d 513, 514 [2d Dept 2002]). The First Department has held that a plaintiff is entitled to amend the bill of particulars to allege additional Industrial Code violations where they "'entail [ ] no new factual allegations, raise[ ] no new theories of liability, and has caused no prejudice" (*Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [1st Dept 2000]), "even where a note of issue has been filed" (*Walker v Metro–North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]). Prejudice requires "some indication that the [party] has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [internal quotation marks and citation omitted]).

Plaintiff's request to supplement his bill of particulars to include an alleged violation of section 23-3.3 (c) is granted. Plaintiff's bill of particulars alleges that defendants "failed to make the proper and necessary inspections" at the premises (verified bill of particulars, ¶ 4). In addition, plaintiff's counsel asked defendants whether inspections were performed at their depositions (Kataru tr at 255; Azer tr at 481). Therefore, even though plaintiff filed the note of issue on October 10, 2017 (NYSCEF Doc No. 387), defendants cannot reasonably claim any prejudice (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 545 [1st Dept 2011] [allowing amendment to include an alleged violation of section 23-3.3(c) where "the theory that the accident would not have occurred had the shed been properly inspected and shored was consistent with plaintiff's testimony and the allegations in the bill of particulars"]; *see also Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463, 464-465 [1st Dept 2017] [leave to amend bill of particulars was properly granted, even though worker failed to present any reasonable justification for the timing of the amendment, given rule that leave to amend should be freely given and defendant's failure to show any prejudice]).

Plaintiff's Request for Summary Judgment as to the Alleged Violation of 12 NYCRR 23-3.3 (c)

Section 23-3.3(c) provides as follows:

> "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means"

(12 NYCRR 23-3.3 [c]).

Section 23-3.3 (c) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009]).

Plaintiff argues that defendants had a nondelegable duty to conduct "continuing inspections by designated persons" to "detect any hazards to any person resulting from weakened or deteriorated floors" (12 NYCRR 23-3.3 [c]). According to plaintiff, the evidence establishes that defendants failed to designate anyone to conduct inspections, and that they failed to conduct any continuing inspections, even though the roof's terra cotta tiles were disintegrating and required replacement.

The City and BQE counter that plaintiff was not engaged in demolition work. Specifically, the City and BQE contend that mending temporary waterproofing does not affect the structural integrity of a building.

"Demolition work" is defined in the Industrial Code as "work incidental to or associated with the total or partial dismantling or razing of a . . . structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23–1.4 [b] [16]). Here, plaintiff's work in placing temporary waterproofing over the terra cotta tiles was "incidental to or associated with" the dismantling of the roof (*see generally Donnelly v City of Niagara Falls*, 5 AD3d 1103, 1104 [4th Dept 2004] ["removal of the roof containing asbestos material constitutes 'demolition by hand' inasmuch as it is 'work incidental to or associated with the ... partial dismantling or razing of a building'"], quoting 12 NYCRR 23–1.4 [b] [16]).

Courts have held that section 23-3.3 (c) "requires inspections during demolition of a structure to detect any hazards . . . resulting from weakened or deteriorated floors or walls or from loosened material, which refers to structural instability caused by the progress of demolition" (*Quishpi v 80 WEA Owner, LLC*, 145 AD3d 521, 522 [1st Dept 2016], *lv denied* 29 NY3d 914 [2017] [internal quotation marks and citation omitted]). Furthermore, case law indicates that section 23-3.3 (c) does not apply where the hazard arose from the plaintiff's actual performance of demolition work (*see Garcia v Market Assoc.*, 123 AD3d 661, 663 [2d Dept 2014]; *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2d Dept 2013]).

Here, defendants have not disputed that the required inspections were not performed. Indeed, Kataru testified that no inspections were performed between the time that Xaren removed the asbestos and the time of plaintiff's accident (Kataru tr at 255). He also stated that he did not inspect the stairwell beneath bulkhead number eight (*id.* at 298). Azer stated that he

did not recall whether bulkhead roof number eight was inspected after the asbestos abatement was completed, but it would have been documented in reports (Azer tr at 481). Additionally, there is no evidence that plaintiff's accident was caused by the performance of his own work or that plaintiff was comparatively negligent. Accordingly, plaintiff's motion for partial summary judgment under Labor Law § 241 (6) based upon a violation of section 23-3.3 (c) is granted (*see Vasquez v Urbahn Assoc., Inc.*, 79 AD3d 493, 494 [1st Dept 2010] [granting plaintiff partial summary judgment under Labor Law § 241 (6) based upon section 23-3.3 (c) where "(d)efendants failed to demonstrate that the mandated inspections were conducted"]).

II. The City's Cross Motion for Contractual Indemnification Against BQE

The City moves for contractual indemnification from BQE pursuant to the indemnification provision in the contract between the City and BQE, which provides as follows:

> "7.4. *To the fullest extent permitted by law, the Contractor [BQE] shall indemnify, defend and hold the City*, its employees and agents (the 'Indemnitees') harmless *against any and all claims (including but not limited to claims asserted by any employee of the Contractor [BQE] and/or its Subcontractors) and costs and expenses of whatever kind (including but not limited to payment or reimbursement of attorneys' fees and disbursements) allegedly arising out of or in any way related to the operations of the Contractor [BQE] and/or its Subcontractors in the performance of this Contract or from Contractor's and/or its Subcontractor's failure to comply with any provisions of this Contract or of the Law*. Such costs and expenses shall include all those incurred in defending the underlying claim and those incurred in connection with the enforcement of this Article 7.4 by way of cross-claim, third-party claim, declaratory action or otherwise. *The parties expressly agree that the indemnification obligation hereunder contemplates* (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) *partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim* (in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, by operation of law, or otherwise). Where partial indemnity is provided hereunder, all costs and expenses shall be provided on a pro rata basis"

(Locke affirmation in support, exhibit O, ¶ 7.4 [emphasis supplied]).

The City argues that its liability would be purely statutory, since it did not supervise or direct plaintiff's work. Further, the City maintains that plaintiff's accident was necessarily related to BQE's performance of work as the general contractor on the site.

In opposition, BQE contends that the City has failed to meet its prima facie burden on its contractual indemnification claim against it. According to BQE, the City and BQE shared responsibility for site safety on the project. In addition, BQE maintains that there is a question of fact as to which entity was responsible for testing the strength of the terra cotta tiles.

"[A] party's right to contractual indemnification depends upon the specific language of the relevant contract" (*Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 796 [2d Dept 2018]

[internal quotation marks and citation omitted]). The intention to indemnify must 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] [internal quotation marks omitted]).

To establish entitlement to full contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

In this connection, General Obligations Law § 5-322.1 (1) provides that:

> "A covenant, promise, agreement or understanding in, or in connection with . . . a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

Consequently, an indemnification provision in connection with a construction contract is void and unenforceable to the extent that the agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification provision that provides for partial indemnification by including recognized "savings" language (i.e., "to the fullest extent permitted by applicable law") does not violate the General Obligations Law (*see Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]).

Moreover, the First Department has held that, even where there are issues of fact as to the indemnitee's active negligence, an award of conditional indemnification is warranted where the indemnification provision does not violate the General Obligations Law (*see Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013] ["Although, as third-party plaintiffs concede, there are issues of fact as to Plaza's active negligence, Plaza is entitled to conditional summary judgment on its claim for contractual indemnification; the extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident"]; *see also Rodriguez v Heritage Hills Socy., Ltd.*, 141 AD3d 482, 482 [1st Dept 2016]; *Burton v CW Equities, LLC*, 97 AD3d 462, 463 [1st Dept 2012]; *Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]).

Here, BQE is obligated to defend and indemnify the City against claims "allegedly arising out of or in any way related to the operations of the Contractor [BQE] and/or its Subcontractors in the performance of this Contract or from Contractor's [BQE's] and/or its Subcontractor's failure to comply with any provisions of this Contract or of the Law" (Locke affirmation in support, exhibit O, ¶ 7.4). The indemnification provision does not violate the General Obligations Law, since it provides for partial indemnification (*see Dutton*, 296 AD2d at 321). BQE has not disputed that it was the general contractor, and that it hired Dosanjh and Xaren on the site. But the City is not entitled to full contractual indemnification from BQE because the City has not established its freedom from negligence. Even though the City argues

that it did not supervise or control the work being performed, there are issues of fact as to whether the City knew about the roof's defective condition (*see Mendoza*, 83 AD3d at 9-10). However, the court grants the City conditional indemnification from BQE, to the extent that the City is found free of any negligence for plaintiff's accident.

III. SSX's Motion for Summary Judgment (Motion Sequence No. 011)

SSX moves for summary judgment, arguing that BQE's second third-party claims and all cross claims must be dismissed because: (1) it did not cause or contribute to the condition that caused plaintiff's accident; (2) it did not control the means or methods in which the contractors performed their work; (3) all Labor Law and Industrial Code claim asserted against it fail as a matter of law; and (4) no party has provided expert proof indicating that SSX deviated from any standard of care.

BQE and the City contend, in opposing SSX's motion, that expert evidence is not required, and that there is a triable issue of fact as to whether SSX breached its contract by failing to perform inspections. According to BQE and the City, SSX assumed responsibility for the roof's structural integrity, and BQE reasonably relied upon its opinions. Specifically, BQE and the City point out that, in a request for information dated March 25, 2010, after "[t]he existing asbestos [was] removed on the flat roof," BQE requested information from SSX as to whether "[t]he terracotta block [was] structurally sound for the new roofing system" (Knipe affirmation in opposition, exhibit A). SSX responded in a Bulletin No. 6A dated June 15, 2010, indicating that it had "observed the fill to be saturated with water and could in no case be roofed over ..." (*id.*, exhibit B). SSX advised BQE to "[r]emove the following additional layers o[f] roofing, top layer of quarry tile, 3" all-weather crete fill and asphaltic membrane, down to the bottom layer of quarry tile," and to "[p]roceed with installing the SBS roofing described in Contract Documents" (*id.*).

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). "'Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]).

Here, SSX has demonstrated that it did not create the condition that caused plaintiff's accident, and that it did not supervise, direct or control the means and methods in which the contractors performed their work (*see Zolotar v Ben Krupinski, Gen. Contr., Inc.*, 36 AD3d 802, 803 [2d Dept 2007] [trial court correctly dismissed common-law indemnification and contribution claims against architect where it supervised workers and independent contractors to ensure compliance with his specifications, but there was no evidence that he directed workers as to how to perform injury-producing work]). Van Riel testified that SSX made visual

observations of the roof (Van Riel tr at 17). SSX's contractor performed probes on the façade, but not on the roof (*id.* at 18). She did not observe anything on bulkhead number eight (*id.* at 29). Van Riel also testified that it had no control over the means and methods in which the contractors performed their work (*id.* at 61-62). SSX was not required to perform load-bearing reports or testing (*id.* at 44, 45; Azer tr at 472). Pursuant to BQE's contract, "the Means and Method of Construction shall be such as the Contractor [BQE] may choose; subject, however, to the Engineer's right to reject the Means and Methods of Construction proposed by the Contractor [BQE] which in the opinion of the Engineer . . . [w]ill constitute or create a hazard to the Work, or to persons or property . . . [w]ill not produce finished work in accordance with the terms of the Contract . . . or [w]ill be detrimental to the overall progress of the Project" (McKee affirmation in support, exhibit 13, art. 4.1).

BQE relies on article 6.2.1 of SSX's contract, which provides as follows:

> "6.2.1 Services Included in Inspection Services: The inspection services provided by the Consultant shall include all necessary and usual components and/or services in connection with an architectural and structural inspection of the entire building envelope. The building envelope shall include all exterior facades (street and court), roofs, and appurtenances including, but not limited to, parapets, bulkheads, and water tank structures. If directed, the Consultant shall also provide cost estimating and hazmat services in connection with the inspection"

(*id.*, exhibit 11, art. 6.2.1).

Nevertheless, BQE cannot seek contribution from SSX for a "purely economic loss resulting from a breach of contract" (*Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009]).

Moreover, although BQE and the City rely on SSX's Bulletin No. 6A, Bulletin No. 6A only concerned the flat roof, and not the bulkhead roof, where plaintiff's accident occurred. Therefore, BQE and the City have failed to raise an issue of fact as to whether SSX caused or contributed to the accident. SSX is, therefore, entitled to summary judgment dismissing the second third-party complaint and all claims against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 010) of plaintiff William Castilla for partial summary judgment and for leave to supplement his bill of particulars is granted to the extent of granting leave to supplement the bill of particulars to include an alleged violation of 12 NYCRR 23-3.3 (c), and granting plaintiff partial summary judgment on the issue of liability under Labor Law § 241 (6) based upon 12 NYCRR 23-3.3 (c), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 011) of second third-party defendant Superstructures Engineering + Architecture, PLLC for summary judgment is granted, and the second third-party complaint, cross claims, and counterclaims against said third-party defendant are dismissed with costs and disbursements to said second third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of defendants City of New York, New York City Department of Design & Construction, New York City Department of Education, New York City Department of Cultural Affairs, and New York City Department of Citywide Administrative Services for summary judgment on their contractual indemnification claim against defendant BQE Industries, Inc. is granted to the extent of granting said defendants conditional indemnification against defendant BQE Industries, Inc., and is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/6/18

ENTER:

HON. GERALD LEBOVITS
J.S.C.