Toro v 9 E. 97th St. Owners Corp.
2018 NY Slip Op 31300(U)
May 14, 2018
Supreme Court, Bronx County
Docket Number: 301425/16
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 301425/16**

Jose Toro,

Plaintiff,

-against- **DECISION and ORDER**

9 East 97th Street Owners Corp.,
PMA Construction LLC,
Atlantic Shores Builders & Developers, Inc., and
George Courtney,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's motion for summary judgment against all defendants, as to liability under Labor Law §§240, 241(6), 200 and common law negligence; defendant 9 E.97th St. Owners Corp.'s cross-motion for summary judgment for common law indemnification against defendant Atlantic Shores Builders & Developers, Inc., granting common law and contractual indemnification against defendant George Courtney, and dismissing plaintiff's Labor Law §200 and common law negligence claims; and defendant George Courtney's cross-motion for summary judgment, dismissing the complaint and all cross-claims.

Papers Submitted	Numbered
Pls. Notice of Motion, Affirmation & Exhibits	**1**
9 E.97th St. Affirmation in Opposition & Exhibits	**2**
Atlantic Shores Affirmation in Opposition & Exhibits	**3**
Reply Affirmation & Exhibit	**4**
9 E.97th St. Not. of Cross-Motion, Affirmation & Exhibits	**5**
Pls. Affirmation in Opposition & Exhibit	**6**
Atlantic Shores Affirmation in Opposition	**7**
Courtney's Affirmation in Partial Opposition	**8**
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This is an action for personal injuries allegedly sustained by Plaintiff on June 25, 2015 when he fell 8 to 15 feet to the ground after a metal platform on which he was standing collapsed while he was working at a building owned by 9 East 97th Street Owners Corp. ("9 East"). At the time of the accident, plaintiff was installing windows as part of a renovation project at a cooperative apartment owned by George Courtney. The 9 East co-op board reviewed and

approved Courtney's renovation plans before any work was performed. Courtney hired Atlantic Shores Builders & Developers, Inc. ("Atlantic") as the general contractor for the project. Atlantic hired plaintiff's employer M&R Windows to replace the apartment's windows. After the initial plans were approved, Courtney sought approval for the installation of a split HVAC system with an AC condenser outside the kitchen window on an existing metal platform mounted to the exterior wall of the building. The co-op board denied Courtney's request in March 2015, in part, because they were unsure whether the metal platform could support the weight of the AC condenser. The metal platform had been erected by the prior tenant/owner.

In the complaint, Plaintiff alleges causes of action against all defendants for common law negligence and violations of Labor Law §§ 200, 240 and 241(6).

Plaintiff now moves for summary judgment, as to liability, on his Labor Law §§ 200, 240 and 241(6), and common law negligence claims against all defendants. Plaintiff contends that: (1) defendants are liable pursuant to Labor Law §240(1) because he fell from a height and was not provided with proper safety equipment, and under §240(3) because the "scaffold" upon which he was standing was not properly constructed; (2) defendants are liable pursuant to Labor Law §241(6) because they violated the following Industrial Code provisions: 22 NYCRR §§ 23-1.7(b)(1) and (f); 23-3.3 (b)(5), (c) and (l); 23-5.1 (f), (h) and (j)(1); 23-5.2; and 23-5.3(e); and (3) defendants are liable pursuant to Labor Law §200 and under the theory of common law negligence because they supervised the job site and they had prior knowledge that the metal platform could not hold weight.

Defendant 9 East cross-moves for summary judgment in its favor on its cross-claims for common law indemnification against codefendant Atlantic and common law and contractual indemnification against codefendant Courtney, and dismissing plaintiff's labor law §200 and common law negligence claims. 9 East contends that it is entitled to be indemnified by Atlantic because it did not direct, control or supervise the work and Atlantic was negligent by directing plaintiff to use an improper safety device to perform work which caused his accident; and that it is entitled to be indemnified by Courtney under the terms of an Alteration Agreement wherein Courtney agreed to indemnify 9 East for any claims arising out of the work. 9 East contends that

it is entitled to dismissal of plaintiff's common law negligence and Labor Law §200 claims because it did not create or have actual or constructive notice of the alleged dangerous condition, and it did not direct or control plaintiff's work.

Defendant Courtney cross-moves for summary judgment, dismissing the complaint and all cross-claims against him. Courtney contends that he cannot be held liable to plaintiff under Labor Law §240(1) because he is the owner of a one-family dwelling who contracted for but did not direct or control the work.[1]

In support of summary judgment, Plaintiff, 9 East and Courtney each submitted, *inter alia,* plaintiff's deposition testimony and the deposition testimony of Courtney. Plaintiff and 9 East also submitted the deposition testimony of Paul DeWitt, Thomas Peck and Paul Parente. The parties also submitted photos, shareholder and alteration agreements, correspondence, and the respective renovation plans/proposals of Courtney and the prior tenant/owner.

At his deposition, Plaintiff testified as follows: When he arrived at the apartment on the date of the accident, an Atlantic employee opened the door and told him "where to go." They worked on the two bedroom windows first. They replaced the bedroom windows from inside the apartment but he stood on the concrete ledge/windowsill outside of the building to finish the caulking for those windows. That is how he normally did the caulking work. Parente had also stood on the ledge while capping and caulking the windows. Those windows overlooked the courtyard. Next, they installed a small frosted window in the bathroom. An Atlantic employee told him that he was to install the bathroom window from outside because work inside the bathroom had just been finished and he did not want plaintiff to damage anything inside the bathroom. The Atlantic employee instructed plaintiff to stand on a metal platform outside the kitchen window to work on the bathroom window which was near the kitchen window. There was an A-frame ladder and two empty pots on the metal platform when he stood on it. He had no reason to believe it was not safe because it looked like a fire escape and he had observed the

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[1]In reply papers, plaintiff addresses his claims pursuant to Labor Law §§ 200, 241(6) and common law negligence, which were omitted from his moving papers, and requests that the Court consider his arguments for summary judgment as to liability with respect to those claims.

Atlantic employee standing on the metal platform without a safety harness prior to his accident. He was not provided with any safety belts, ropes, harnesses, lanyards or life lines. No one warned him that the metal platform might not be safe to stand on. He worked while standing on the platform for about 25 minutes. As he "finished installing the window [he] had a drill in [his] hand, as [he] turned [he] just heard the . . . platform fall and [he] went down" about fifteen feet.

At his deposition, Paul DeWitt, testified as follows: At the time of the accident, he was President of 7 East's co-op board. He is an architect and he reviewed and approved the renovation plans for Courtney's apartment. He first noticed the metal platform in January of 2015. It was attached to the bricks and mortar of the building but he didn't think that the building was responsible for its maintenance because "the building didn't put it there." It was installed by the prior tenant to support potted herbs but was not included in that tenant's renovation plans. Prior to the accident, no one complained about the platform and it was not discussed at any co-op board meetings. While he approved the "scope" of Courtney's renovation plans, he never went to the apartment to check or supervise the work while the apartment was being renovated. He objected to a proposal of Courtney's to build an HVAC system that involved the placement of an AC condenser on the metal platform because of the noise and because he did not know whether the platform could support the weight of the condenser. He did not know whether anyone had inspected the metal platform prior to the date of plaintiff's accident. He did not know if anyone supervised its construction when the prior tenant had it constructed. No other apartments in the building had an exterior platform but there were fire escapes. He had not been inside Courtney's apartment since late 2014.

At his deposition, George Courtney testified as follows: He purchased the apartment in late 2014. He is a California resident and purchased the apartment for his wife who visited New York a few times every year. The apartment is on the first floor on the west side of the building. Prior to the accident, he was at the building four times. He was referred to Tom Peck of Atlantic as an established general contractor in New York City. He and his wife decided on the details of what they wanted done but the means, methods, supervision, direction and control of the job were left completely to the contractor. Atlantic hired and was in charge of all the

subcontractors. He was not involved in the actual construction process. Atlantic prepared a "Scope of the Work" detailing the renovation work to be done and submitted the paperwork to the co-op Board. He did not know who the window subcontractor was, never discussed the window installation, never directed anyone as to the methods for the installation of the windows, and never told anyone that the windows had to be installed from the outside.

At his deposition, Thomas Peck testified as follows: At the time of the accident, he was a carpenter employed by Atlantic. Atlantic was in the business of home remodeling and repair. He was only involved in renovations in Manhattan. Atlantic had its own equipment, including scaffolds, ladders and tools. He reviewed the scope of work for the project a month before the project started and met with George Courtney in 2014 at the apartment to discuss the kind of work Courtney wanted done, which was "mostly design work." Courtney wanted new windows, plaster work, flooring work, electrical changes, lighting, tiles in the bathroom; they also talked about custom cabinetry in the bedroom. The apartment had one bedroom, an alcove area, a living room and a galley kitchen, and was approximately 600 square feet of space. At that meeting, he observed the metal platform outside of the apartment. He took photos and made notes at the meeting. Thereafter, he prepared a proposal which he submitted to Courtney and Courtney's wife, Maria, for approval. He saw Maria once "towards the end of the project." He spoke with Peter DeWitt, an architect, on the phone before he went to the building and they spoke about "board approval of the contract." He asked DeWitt about "window placement or replacement" and DeWitt referred him to M&R Windows. Atlantic paid M&R for the work. He discussed the window work with M&R's president, Mike Rosenberg, who came to take measurements. They talked about access to the building and if Peck had anything available to Rosenberg because Rosenberg "talked about bringing an extension ladder through the apartment." Peck said "If it's really necessary, do so." Rosenberg told Peck that "he shouldn't need it because everything was going to be done from inside the building." All of the renovation work was to be performed from inside the apartment. He was at the job several days a week. He had the power to stop subcontractors from doing anything he deemed unsafe, but he did not enforce safety standards at the job site. The demolition work was performed when the job first started and took 4 to 5 days.

Atlantic employees performed the demolition work. He never had any safety meetings with Atlantic employees. 9 East did not direct or supervise any of the work or workers at the job site. 9 East did not provide any equipment to Atlantic. The windows were replaced and installed towards the "final stage" of the project. He decided when to install the windows. Interior painting work was also being done during that stage. The tile was installed prior to the windows being replaced. The windows were delivered the day before the accident. Peck and a co-worker Edwin were present at that time. At that time, there were two sections of Baker Scaffold and "a couple of A-frame ladders, four foot, six foot in the apartment." There were also fire escapes outside of the windows, including the kitchen. Atlantic did not provide safety harnesses, ropes, lanyards or safety nets at the job site but there were several points inside the apartment where a safety harness and lanyard could be tied-off. They were not contracted "for anything outside of the building." He had a conversation with the owner of the window company as to how the windows were to be installed. The "old windows would be removed off of what is our finishes and the new windows would be installed exactly on what they were and that all work would be done from inside the building" [sic]. On the first day that the windows were installed, he supervised and inspected the work but he was not present on the second day, when the accident occurred. An M&R employee named Paul was working on the windows on the first day with a helper. On the second day, Edwin was the only Atlantic employee present at the job site. At that time, the bathroom tile had been installed but "eight to ten inches away from the window was not grouted yet so they can replace and what not, and then [they] can grout up to the new window." He never told Edwin that no one could stand on the bathroom tile. He never observed anyone standing on the metal platform. After the accident, he received a call from Edwin who told him that "a guy working on a window fell and the platform collapsed." He asked Edwin if an ambulance was necessary but did not ask Edwin why the guy was working outside the window. He returned to the building the next day and saw the platform "flat against the wall of the building." It looked like the brackets that held it to the wall "let loose and the platform went flat to the wall."

At his deposition, Paul Parente testified as follows: He has been employed by M&R as a window installer for 28 years. He was "like a foreman" and plaintiff was his assistant. Tom Peck, who "seemed like the owner of the company or supervisor" hired M&R to install windows at the job site. The work was performed on a first-floor apartment. Peck told him that he had been performing work at the apartment for approximately a year and asked Parente not to damage anything inside the apartment. Peck told him that the windows had to be installed from the outside because the inside was finished. Peck left "a guy" to watch them. Windows are commonly installed from the inside but, in this case, that would have required breaking some walls inside that had just been finished. There were safety harnesses in the van but they were never used at this job site. He did not use a safety harness at this job site because the apartment was on the first floor, there was nowhere to tie off, and because the building had fire escapes. A safety harness would have been "more hazardous than it would be good because you trip over it." Edwin Santos stood on the metal platform on the day of the accident while he was attempting to remove a light next to the kitchen window so that the window could be replaced. Santos stood on the platform for about 25 minutes. The platform was "heavy metal, pretty much replicating fire escape material." It had some clay pots on it. Before plaintiff began to install the bathroom window, he saw and heard Santos speaking to plaintiff in Spanish, which Parente does not speak, and it appeared that Santos was pointing to the metal platform. Plaintiff stepped out onto the platform about twenty minutes after Santos had come inside after working on the light next to the kitchen. Within an hour thereafter, while Parente was working in the bedroom, Parente heard clay pots hit the ground and a "bunch of noise." Then he saw plaintiff on the ground underneath the metal platform.

A workers' compensation injury report, signed by Parente, states that the metal platform "came off the building [and] fell down around 8 feet" and that the "level was 1st floor."

Photos depict the metal platform extending across the width of a single window with a courtyard below.

Documentation submitted by the parties indicates that the metal platform was not included in the initial renovation plans submitted to the co-op Board by either plaintiff or the prior tenant/owner.

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I. Labor Law § 200 and Common Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to provide construction site workers with a safe place to work. *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. As such, liability under this section may be imposed only against parties that have the authority to control the activity bringing about the injury. *See Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311, 317 (1981). Thus, where an alleged defect or dangerous condition arises from a contractor's methods and the owner exercises no supervisory control over the work, no liability attaches under section 200. *See Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350, 819 N.Y.S.2d 732 (1st Dept. 2006). Nor will liability attach if the owner or contractor lack actual or constructive notice of the dangerous condition that caused the plaintiff's injury. *Id.* Where a plaintiff's injury is alleged to have arisen from a dangerous condition at the worksite rather than the method used to perform his work, he need not show that an owner or contractor controlled or directed the manner of his work. *See Urban v. No. 5 Times Sq. Dev., LLC,* 62 A.D.3d 553, 879 N.Y.S.2d 122 (1st Dept. 2009). In that instance, a plaintiff must demonstrate that the owner or contractor had actual or constructive knowledge of the dangerous condition. Here, it appears that only Atlantic directed or controlled the manner of the work. However, based upon the deposition testimony of DeWitt, Peck and Courtney, triable issues of fact exist as to whether 9 East, Atlantic and/or Courtney had notice, either actual or constructive, of the alleged dangerous condition, i.e., the metal platform, and whether it was foreseeable that someone would stand on the metal platform. A triable issue of fact also exists as to whether Courtney was responsible for maintaining the metal platform.

II. Labor Law §240

Section 240(1) provides that "[a]ll contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work,* in the erection, demolition, repairing, altering, painting . . . 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." [Emphasis added].

Section 240(1) provides for extra safety protection to the laborer engaged in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993). The occupational hazards entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *See Toeffer v. Long Island Rail Road,* 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site. *See Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509 (1991).

The record evidence establishes that the window plaintiff was installing was at a height of between 8 and 15 feet from the ground and, therefore, section 240(1) is implicated. However, based upon Peck's testimony that there were Baker Scaffolds and a six-foot A-frame ladder at the apartment, plaintiff's testimony that there was an A-frame ladder on the platform at the time he was standing on the platform, and Parente's statement in the workers' compensation injury report that the platform fell eight feet to the ground, a triable issue of fact exists, at a minimum, as to whether plaintiff was provided with adequate safety equipment and whether plaintiff was the sole proximate cause of the accident. However, it is uncontroverted that Courtney was not involved in the day-to-day operations of the renovation project and only visited the apartment on four occasions prior to the accident. As such, Courtney did not direct or control the work and, therefore, he cannot be held liable for plaintiff's injuries under section 240(1).

Labor Law §240(3) provides that "[a]ll scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use. As the metal platform was installed by the prior tenant/owner to support potted plants, not as a safety device for the performance of plaintiff's work, this section is not applicable. *See Bellring v. Sicoli & Massaro, Inc.,* 108 A.D.3d 1027, 969 N.Y.S.2d 629 (4th Dept. 2013); *Caruana v. Lexington Village Condominiums at Bay Shore,* 23 A.D.3d 509, 806 N.Y.S.2d 634 (2nd Dept. 2005); *Olson v. Pyramid Crossgates Co.,* 291 A.D.2d 706, 738 N.Y.S.2d 430 (3rd Dept. 2002).

III. Labor Law § 241(6)

Labor Law §241(6) provides that all areas in which construction 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. Like Labor Law §240(1), section 241(6) applies to contractors and owners and their agents but not to owners of one and two-family dwellings who contract for but do not direct or control the work. Also, in order to support a claim under this section, a plaintiff must allege a violation of a specific "concrete" provision of the Industrial Code. *See Ross v. Curtis-Palmer Hydro-Elec. Co., supra* at 505. Plaintiff contends that defendants violated Industrial Code §§ 23-1.7(b)(1) and (f); 23-3.3 (b)(5), (c) and (l); 23-5.1 (f), (h) and (j)(1); 23-5.2; 23-5.3(e), and certain OSHA standards. At the outset, the Court notes that violations of OSHA standards do not provide a basis for liability under Labor Law § 241(6). *See Rizzuto v. L.A. Wenger Contracting Co., Inc.,* 91 N.Y.2d 343, 693 N.E.2d 1068 (1998); *Schiulaz v. Arnell Construction Corp.,* 261 A.D.2d 247, 248, 690 N.Y.S.2d 226 (1st Dept. 1999). *Vernieri v. Empire Realty Co.,* 219 A.D.2d 593, 598, 631 N.Y.S.2d 378 (2nd Dept. 1995). And, as the premises is a one-family dwelling owned by Courtney who contracted for but did not direct or control the work, Courtney cannot be held liable for plaintiff's injuries pursuant to this provision.

Industrial Code § 23-1.7(b)(1) applies to falling hazards related to hazardous openings. "The safety measures required–planking installed below the opening, safety nets, harnesses and guard rails–all bespeak of protection against falls from an elevated area to a lower area through

openings large enough for a person to fit. *See Messina v. City of New York,* 300 A.D.2d 121, 123, 752 N.Y.S.2d 608, 610 (1st Dept. 2002). Here, plaintiff does not allege that he fell through a hole but rather that he fell when a platform upon which he was standing collapsed to the ground. As such, this section is not applicable to the facts of this case. Section 23-1.7(f), entitled "Vertical Passage," requires that stairways, ramps or runways be provided as the means of access to working levels above or below the ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access must be provided. In his affirmation, plaintiff's attorney states that this section is applicable because defendants "failed to ensure Plaintiff safe vertical access to his working level that was above the ground." However, the apartment where plaintiff was working was on the first floor and there is no evidence that he was not provided with a safe means to access the apartment or its windows. As such, this section is not applicable.

Industrial Code § 23-3.3, entitled "Demolition by hand," applies to the demolition of buildings and other structures. At the time that plaintiff was performing his work, the demolition work had already been completed by Atlantic employees. Plaintiff's work involved removing old windows and replacing them with new windows, not the demolition of the building or structure. Notably, the only reference to windows in this section pertains to the boarding up of "windows and other exterior wall openings in buildings or structures being demolished [that] are more than 25 feet in height from the ground or grade level and . . . within 20 feet of any floor opening used for the removal of debris from floors above." As the building/structure was not being demolished when plaintiff was performing work at the premises, this section is not applicable.

Industrial Code §§ 23-5.1, 23-5.2 and 23-5.3 set forth requirements for scaffolds that are used in construction. Plaintiff contends that the metal platform constitutes a scaffold within the meaning of the Industrial Code. However, this platform was erected by the prior tenant/owner for his personal use, i.e., to support his potted plants, and was not designed or intended to support workers or their materials. Therefore, these sections are inapplicable. *See Olson v. Pyramid Crossgates Co.,* 291 A.D.2d 706, 738 N.Y.S.2d 430 (3rd Dept. 2002).

For the foregoing reasons, plaintiff has not established his *prima facie* entitlement to judgment as a matter of law on his claims pursuant to Labor Law § 241(6) and that branch of his motion seeking summary judgment as to liability pursuant to that section is **denied** without regard to the sufficiency of the opposition.

IV. Indemnification

In its cross-motion, 9 East seeks, *inter alia,* summary judgment in its favor on its cross-claims for common law indemnification against codefendant Atlantic and common law and contractual indemnification against codefendant Courtney on the grounds it did not direct, control or supervise the work; Atlantic was negligent by directing plaintiff to use an improper safety device to perform work which caused his accident; and under the terms of the Apartment Alteration Agreement, Courtney is obligated to indemnify 9 East for any claims arising out of the work. As issues of fact exist as to whether 9 East had actual or constructive notice of a dangerous condition on its premises, i.e., the metal platform, and Atlantic's negligence has not been determined, 9 East is not entitled to summary judgment on its common law indemnification claim against Atlantic or Courtney.

However, the Apartment Alteration Agreement (the "Agreement") between 9 East and Courtney provides that Courtney "agree[s] to indemnify and hold harmless [9 East] . . . from any claims, liabilities or costs which may arise or be incurred as a result of any matter arising out of the proposed alteration, including but not limited to legal fee and costs." The Agreement also requires Courtney to "abide by all the terms and conditions set forth in the attached Guidelines for Renovations." The "Guidelines For Renovations" provides that Courtney agree in writing to indemnify 9 East from "any personal injury, liability or damage to any personal property . . . which may arise out of the work being done." Courtney contends that the work performed from outside of the apartment was work outside of his obligation to indemnify 9 East based upon language in the Agreement stating that "[a]ll work shall be conducted within the individually demised premises from 8:00 a.m. to no later than 6:00 p.m." Courtney also contends that, since his request to place an AC condenser on the metal platform was denied, he had no reason to believe that any of the work would be performed from outside the apartment. However, at his

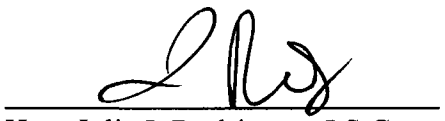
deposition, Courtney stated that he had no involvement with the work and left all issues related to the means, methods and performance of the work to his general contractor. As such, he cannot now claim that he only agreed to indemnify 9 East for work performed from inside the apartment. Accordingly, 9 East is entitled to be indemnified by Courtney to the extent that 9 East is not found negligent.

Based upon the foregoing, plaintiff's motion for summary judgment is **denied in its entirety**.

Courtney's cross-motion for summary judgment is **granted solely to the extent that** plaintiff's claims pursuant to Labor Law §§ 240 and 241(6) are dismissed as to him.

9 East's cross-motion for summary judgment is **granted solely to the extent that** it is entitled to contractual indemnification by Courtney to the extent that 9 East is not found negligent.

Dated: Bronx, New York
May 14, 2018



Hon. Julia I. Rodriguez, J.S.C.