Garcia v SMJ 210 W. 18 LLC
2018 NY Slip Op 33007(U)
November 16, 2018
Supreme Court, New York County
Docket Number: 162400/14
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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JUAN GARCIA,

Plaintiff,

-against- Index No. 162400/14

SMJ 210 WEST 18 LLC, PROPERTY MARKETS GROUP, INC., JDS DEVELOPMENT LLC, 210 WEST 18TH LLC, BAY BRIDGE ENTERPRISES LT, TISHMAN INTERIORS CORPORATION and JM3 CONSTRUCTION LLC, Motion Sequence Nos. 001, 002, 003 & 004

Defendants.

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SMJ 210 WEST 18 LLC, PROPERTY MARKETS GROUP, INC., JDS DEVELOPMENT LLC and 210 West 18th LLC,

Third-Party Plaintiffs,

-against- Third-Party Index No. 595335/15

S&E BRIDGE & SCAFFOLD LLC,

Third-Party Defendant.

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S&E BRIDGE & SCAFFOLD LLC,

Second Third-Party Plaintiff,

-against- Second Third-Party Index No. 595215/17

JM3 CONSTRUCTION LLC,

Second Third-Party Defendant.

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Shapiro Law Offices PLLC, New York City (*Jason S. Shapiro* of counsel), for plaintiff.

Cascone & Kluepfel, LLP (*Richard J. Calabrese* of counsel), for third-party defendant S&E Bridge & Scaffold LLC.

Nicoletti Gonson Spinner LLP (*Laura M. Mattera* of counsel, on the brief, and *Marina A. Spinner* of counsel, at oral argument), for defendants/third-party plaintiffs SMJ 210 West 18 LLC, Property Markets Group, Inc., JDS Development LLC, and 210 West 18th LLC.

Wood Smith Henning & Berman, LLP (*William E. Daks* of counsel), for defendant/second third-party defendant JM3 Construction LLC.

ROBERT D. KALISH, J.:

Motion sequence numbers 001, 002, 003, and 004 are consolidated for disposition.

In this action arising out of a construction site accident, plaintiff Juan Garcia moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants SMJ 210 West 18 LLC and 210 West 18th LLC (motion sequence number 001).

Third-party defendant/second third-party plaintiff S&E Bridge & Scaffold LLC (S&E) moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action; (2) summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action; (3) summary judgment dismissing any and all indemnification claims against it; and (4) summary judgment dismissing any and all breach of contract claims against it. Alternatively, S&E seeks conditional indemnification against "any and all" negligent parties, including defendant/second third-party defendant JM3 Construction LLC (JM3) (motion sequence number 002).

Defendants/third-party plaintiffs SMJ 210 West 18 LLC, Property Markets Group, Inc., JDS Development LLC, and 210 West 18th LLC (collectively, the SMJ 210 West 18 defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims and all cross claims against them (motion sequence number 003).

Defendant/second third-party defendant JM3 moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims and any cross claims and third-party claims against it (motion sequence number 004).

BACKGROUND

On July 10, 2013, plaintiff was injured on a construction project at the Walker Tower located at 210 West 18th Street in Manhattan (hereinafter, the premises). It is undisputed that SMJ 210 West 18 LLC was the owner of the premises on the date of the accident. Pursuant to a development agreement dated August 16, 2011, SMJ 210 West 18 LLC hired 210 West 18th LLC as a developer on a condominium construction project. 210 West 18th LLC also served as a general contractor on the project. On April 12, 2011, 210 West 18th LLC hired S&E to provide hoists, sidewalk sheds, scaffolding, and overhead protection. On May 7, 2012, SMJ 210 West 18 LLC retained JM3 to perform drywall work. Plaintiff was employed as a hoist foreman by S&E on the date of the accident.

Plaintiff testified at his deposition that he was dismantling the elevator hoist on the day of his accident (plaintiff tr at 19). Plaintiff believed that the building was being converted from a 20-story building to a 24-story building (*id.* at 17). S&E placed the temporary elevator and scaffold around the building (*id.*). The dismantling began on the 24th floor two or three days before the accident (*id.* at 22). Plaintiff was working on the 21st floor near a window (*id.* at 27, 32). According to plaintiff, he was picking up pieces of plywood boards that formed the floor decking of the temporary hoist platform just before the accident (*id.* at 32-33). No one was working on the exterior sheetrock on the date of the accident (*id.* at 38). As plaintiff was bent over to pick up a plank, he felt a "strong impact" on his neck and head that threw him to the ground (*id.* at 39). Afterwards, he saw that it was a piece of sheetrock that was about three feet

by eight feet (*id.*). When asked where the sheetrock came from, plaintiff stated that "[a]fter everything happened, [they] went to the platform and you could see a piece of sheetrock that wasn't there" (*id.*). Plaintiff testified that it was part of the exterior wall one floor above where plaintiff was working; it was a "very exact cut" piece (*id.* at 41, 79). He did not know what caused it to fall (*id.* at 41). However, plaintiff also stated that it could have been sheetrock in a pile that had not yet been installed (*id.* at 112-113). He further stated that the exterior wall above him was not completed at the time (*id.* at 35). Plaintiff explained that "[w]hen [they] dismantle an elevator, [they] have to dismantle the entire elevator, the platform, and that area stays incomplete. Then a temporary scaffold is built . . ." (*id.* at 36).

In an affidavit, plaintiff states that he was injured while dismantling a hoist platform on the 21st floor of the building (plaintiff aff, ¶ 3). While he was on his knees, bending over to pick up planking, he was struck on the back of his neck and head by a three-foot by eight-foot piece of sheetrock that fell from one story above (*id.*, ¶ 4). Plaintiff indicates that the sheetrock fell from approximately 12 to 14 feet above the floor where he was working (*id.*).

Michael Jones (Jones) testified that he was 210 West 18th LLC's Director of Site Supervision on the project (Jones tr at 9, 14). 210 West 18th LLC was the developer and also served as the general contractor (*id.* at 15). Jones stated that plaintiff was S&E's hoist foreman (*id.* at 26). The hoist went all the way to the top of the building (*id.* at 27). Plaintiff told Jones that a piece of DensGlass or sheetrock or something of that nature "had come down and hit him on the back, back of the neck area" (*id.* at 30). Jones testified that DensGlass is an exterior grade sheeting product that is similar to sheetrock (*id.*). JM3 was the only contractor that installed DensGlass and sheetrock on the site (*id.* at 30-31). There was no overhead netting above where plaintiff was working (*id.* at 37). Jones testified that he did not learn what caused the sheetrock

to fall (*id.*). According to Jones, the hoist's tiebacks secure the hoist to the building, and tiebacks are not secured to DensGlass or sheetrock because these materials are not strong enough (*id.* at 46).

Gregg Luchese (Luchese) stated that he was S&E's general superintendent on the 210 West 18th Street project (Luchese tr at 8-9). Luchese's duties included coordinating S&E's labor on the site and instructing the workers as to what their tasks were (*id.* at 9). S&E's exterior hoist was secured to the building by metal supports called "turnbuckles" that were about three inches in diameter (*id.* at 43-44). Luchese stated that the turnbuckles were welded or bolted to the structural steel of the building (*id.* at 44, 78). After the hoist tie-ins were removed, a contractor would perform patchwork to restore the façade "to whatever was the design" (*id.* at 18).

Andrew Falgiano (Falgiano) testified that he was JM3's job foreman on the project (Falgiano tr at 9, 15). JM3 was the only sheetrock contractor (*id.* at 26-27, 135). The exterior walls of the project consisted of metal stud framing with DensGlass applied to the metal studs (*id.* at 65-67). JM3 did the exterior of the building first, and then did the interior of the building to protect the interior work from the elements (*id.* at 144). Falgiano testified that once the hoist was removed, JM3 or one of its subcontractors patched the holes (*id.* at 133).

Robert DeMarco (DeMarco), S&E's Director of Safety, testified that he did not learn the source of the sheetrock that hit plaintiff (DeMarco tr at 9, 28).

An accident report dated July 10, 2013 states that "[a] piece of sheet rock 2 ft x 8 ft long peeled of [sic] wall 5 ft above Mr. Garcia and struck him on back of his neck as he leaned over" (Calabrese affirmation in support, exhibit M at 1).

A C-2 report dated July 11, 2013 states that a "piece of sheet rock struck Juan on the back of his neck as he leant over to pick up planking. It caused pain and some swelling" (Shapiro affirmation in support, exhibit N at 2).

An Alliant incident reporting form dated July 10, 2013 states that "Juan was struck by a piece of sheetrock which became dislodge[d] from the floor above him (23rd floor)" (Shapiro affirmation in opposition to the SMJ 210 West 18 defendants' and S&E's motions, exhibit I at 1).

JM3's daily trade report dated July 10, 2013 states that its employees "assisted with scaffold removal with patches at tie back locations" and "[d]rywall[ed] on 21 & 22" (Shapiro affirmation in opposition to JM3's motion, exhibit E at 19).

Plaintiff's brother, Jesus Garcia, states that he was also employed as a laborer by S&E on the date of the accident (Jesus Garcia aff, ¶ 2). He avers that "[u]nfortunately, there was no netting or other overhead protection provided to prevent the accident" (*id.*, ¶ 11). Jesus Garcia further states that:

> "[t]he only place where netting had been installed was in the hole which had been previously used as an entrance to the building (via the hoist). On the date and time of [the] accident, the floor above my brother (i.e., the floor from which the DensGlass fell off of the building) had netting installed, but not along the entire wall. Rather, only a limited amount of netting was provided"

(*id.*).

Michael Stern (Stern), a member of JDS Development, LLC, states that JDS Development, LLC did not have any direct involvement in the Walker Tower project (Stern aff, ¶¶ 1, 6). According to Stern, the name has been associated with the project because a member of JDS Development, LLC has ownership interests in both SMJ 210 West 18 LLC and 210 West 18th LLC (*id.*, ¶ 7).

Franklin R. Kaiman (Kaiman), the general counsel of Property Markets Group, Inc., states that it also was not involved in the project at issue (Kaiman affirmation, ¶¶ 1, 3). The principals of Property Markets Group, Inc. have an ownership interest in SMJ 210 West 18 LLC and 210 West 18th LLC (*id.*, ¶ 4).

PROCEDURAL HISTORY

Plaintiff commenced this action on December 16, 2014 against, among others, SMJ 210 West 18 LLC, Property Markets Group, Inc., JDS Development LLC, and 210 West 18th LLC, seeking recovery for violations of Labor Law §§ 200, 240, and 241 and under principles of common-law negligence.

The SMJ 210 West 18 defendants subsequently commenced a third-party action against S&E, asserting the following four claims: (1) contribution; (2) failure to procure insurance; (3) common-law indemnification; and (4) contractual indemnification.

Plaintiff subsequently amended the complaint to add JM3 as a direct defendant, also seeking recovery for violations of Labor Law §§ 200, 240, and 241 and for common-law negligence.

In their answers, the SMJ 210 West 18 defendants and JM3 assert cross claims for common-law indemnification and contribution against each other.

Thereafter, S&E brought a second third-party action against JM3, seeking common-law indemnification and contribution.

At oral argument, plaintiff conceded that the SMJ 210 West 18 defendants were not liable under Labor Law § 200 and in common-law negligence (oral argument tr at 42). In addition, plaintiff agreed to discontinue his claims against Property Markets Group, Inc. and JDS

Development LLC (*id.*). Plaintiff also withdrew his Labor Law §§ 240 (1) and 241 (6) claims against JM3 (*id.* at 44).

DISCUSSION

Standard of Review

It is well settled that "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 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 denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

A. Plaintiff's Motion for Partial Summary Judgment as to Liability Under Labor Law § 240 (1) (Motion Sequence No. 001)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1) as against SMJ 210 West 18 LLC and 210 West 18th LLC. Plaintiff argues, relying on his affidavit and the C-2 report, that he is entitled to judgment because he was struck by a large piece of sheetrock that fell from one story above where he was working.

S&E contends, in opposition, that Labor Law § 240 (1) does not apply because the DensGlass that fell on plaintiff was not a material being hoisted or a load that required securing at the time it fell. In addition, S&E maintains that overhead protection could not have been placed in the area where plaintiff was working, because it would have defeated the purpose of the work. S&E also asserts that plaintiff has failed to establish prima facie entitlement to

summary judgment, since plaintiff has not demonstrated that the DensGlass fell because of the absence or inadequacy of a safety device enumerated in the statute.

Similarly, the SMJ 210 West 18 defendants argue, in opposition, that section 240 (1) is inapplicable, since the piece of sheetrock was not being hoisted or secured and was not required to be secured. The SMJ 210 West 18 defendants point out that there was no work being performed on the exterior of the building directly above plaintiff, and that the piece of sheetrock was part of the previously-installed permanent exterior wall. In addition, according to the SMJ 210 West 18 defendants, plaintiff has failed to demonstrate that any of the enumerated safety devices would have prevented the accident.

For its part, JM3 argues, in response to plaintiff's motion, that it cannot be held liable under Labor Law § 240 (1) because it was not an owner, contractor or agent. Additionally, JM3 maintains that the statute does not apply because the sheetrock was not being hoisted or secured and did not require securing for the work. JM3 argues that the object that struck plaintiff was part of the building's permanent structure.

In reply, plaintiff contends that the statute applies to workers demolishing hoists. Further, plaintiff argues that the DensGlass needed to be secured for the hoist removal, since the DensGlass fell from the same wall to which the hoist was attached. Plaintiff asserts that the DensGlass was not part of the permanent structure of the building because the work was still ongoing. Plaintiff also argues that defendants failed to provide adequate safety devices in the form of netting.

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

> "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."

It is well established that Labor Law § 240 (1) applies to "extraordinary elevation risks," and not the "usual and ordinary dangers of a construction site" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). To establish liability under Labor Law § 240 (1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280, 289 [2003]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protection of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay ladder or other protective device proved inadequate to shield the worker from harm directly flowing from the application of the force of gravity to an object or person'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]).

To establish liability based upon a falling object, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Moreover, "'[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute'" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014], quoting *Narducci*, 96 NY2d at 268 [emphasis in original]).

In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514 [1991]), the Court of Appeals reasoned that:

> "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured."

In *Narducci, supra*, the plaintiff was struck by falling glass from a window pane while renovating a building (*Narducci*, 96 NY2d at 266). The Court of Appeals held that Labor Law § 240 (1) did not apply, explaining that:

> "[T]he glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purpose of the undertaking at the time it fell . . . No one was working on the window from which the glass fell, nor was there any evidence that anyone worked on that window during the renovation. The glass that fell was part of the pre-existing building structure as it appeared before the work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"

(*id.* at 268).

Subsequently, the Court of Appeals came to the opposite conclusion in *Outar v City of New York* (5 NY3d 731, 732 [2005]). There, the plaintiff, a railroad track worker, was injured when an unsecured dolly that was used in his work and that was stored on a bench wall adjacent to the work site fell and hit him (*id.*). The Court of Appeals ruled that the "the dolly was an object that required securing for the purposes of the undertaking" (*id.*).

In *Roberts v General Elec. Co.* (97 NY2d 737, 738 [2002]), the Court of Appeals held that section 240 (1) did not apply in a case where a worker was injured by a piece of asbestos, which had been cut and deliberately dropped from a chemical tank 12 feet above the ground. The Court held, citing *Narducci,* that:

> "the asbestos 'that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus

> Labor Law § 240 (1) does not apply. * * * This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"

(*id.*, quoting *Narducci*, 96 NY2d at 268).

Here, plaintiff has failed to establish prima facie entitlement to partial summary judgment under Labor Law § 240 (1). While plaintiff argues that he was injured as the result of a "falling object," the Court of Appeals has made clear that not every falling object that strikes a worker constitutes a violation of Labor Law § 240 (1) (*see Narducci*, 96 NY2d at 267; *see also Fabrizi*, 22 NY3d at 662-663 ["section 240 (1) does not automatically apply simply because an object fell and injured a worker"]). It is undisputed that the object that struck plaintiff was not being hoisted or secured. Although plaintiff argues, in reply, that the object required securing, he has not made a showing in his moving papers that the object required securing for the purposes of dismantling the hoist elevator (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"]). Moreover, plaintiff has not established that "a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*Narducci*, 96 NY2d at 268; *see also Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016] ["it (was not) expected, under the circumstances of this case, that the sheetrock would require securing for the purposes of the undertaking at the time it fell"]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 [2d Dept 2013] [small pieces of sheetrock that struck the plaintiff "were not in the process of being hoisted or secured and did not require hoisting or securing"]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2d Dept 2009] [metal bracket that had been installed prior to the accident was part of the building's permanent

structure and a hoisting and securing device was not necessary or expected]). Thus, plaintiff's motion must be denied, regardless of the sufficiency of defendants' opposition papers (*see Winegrad*, 64 NY2d at 853).

Even if the court were to consider plaintiff's arguments submitted in reply, plaintiff has still not demonstrated entitlement to partial summary judgment under Labor Law § 240 (1). Plaintiff points out that that the exterior wall had not been completed at the time of the accident. However, this fact fails to establish that the DensGlass was not a part of the building's permanent structure (*see Narducci*, 96 NY2d at 268; *Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]). Additionally, plaintiff has not shown that the DensGlass "was an object that required securing for the purposes of the undertaking" (*Outar*, 5 NY3d at 732). "What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" (*Jordan v City of New York*, 126 AD3d 619, 620 [1st Dept 2015] [internal quotation marks and citation omitted]).

Essentially, plaintiff has failed to establish that it was foreseeable that a piece of DensGlass would fall and strike him while dismantling the hoist elevator. Plaintiff testified that he was dismantling the hoist elevator on the date of his accident (plaintiff tr at 19). In order to disassemble the hoist, the workers were taking down the poles and the plywood boards (*id.* at 30). There was no one working on the exterior sheetrock that day (*id.* at 37-38). Plaintiff testified that the sheetrock had already been installed prior to the accident (plaintiff tr at 49-50). The hoist was not secured to DensGlass; the hoist's tiebacks or turnbuckles were welded or bolted to the structural elements of the building (Jones tr at 46; Luchese tr at 44, 78). While plaintiff relies, in his reply, on Jones's vague testimony that "anytime you're doing work in an area, the materials around it may be affected" and that "in a general sense . . . things can happen"

(Jones tr at 56), and a conclusory affidavit from his brother (Jesus Garcia aff, ¶ 6), this evidence is insufficient to demonstrate that a hoisting or securing device was necessary in light of the work being performed.

Although plaintiff relies on *Czajkowski v City of New York* (126 AD3d 543, 543 [1st Dept 2015]), *Gonzalez v City of New York* (151 AD3d 492, 492-493 [1st Dept 2017]), *Rutkowski v New York Convention Ctr. Dev. Corp.* (146 AD3d 686, 686 [1st Dept 2017]), *Mercado v Caithness Long Is. LLC* (104 AD3d 576, 577 [1st Dept 2013]), and *Arnaud v 140 Edgecomb LLC* (83 AD3d 507, 508 [1st Dept 2011]), the court finds these cases to be distinguishable. In those cases, there was a foreseeable elevation-related risk in light of the plaintiff's or other trades' work being done at the time of accident.

Plaintiff also cites to *Boyle v 42nd St. Dev. Project, Inc.* (38 AD3d 404, 405-406 [1st Dept 2007]), a case in which the worker was injured when he was struck by a threaded rod that fell down an elevator shaft while he was working in the elevator shaft. There, two of plaintiff's coworkers were in the process of securing the rods adjacent to the elevator shaft (*id.*). The First Department held that the rods were in the process of being secured and, therefore, "a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" (*id.* at 407, quoting *Roberts*, 97 NY2d at 738 and *Narducci*, 96 NY2d at 268). The Court also held that the rod was an integral part of the construction work in progress, and that the nuts securing the rod were inadequately secured within the meaning of the statute (*id.*).

The First Department subsequently distinguished *Boyle* in *Buckley v Columbia Grammar & Preparatory* (44 AD3d 263, 270 [1st Dept 2007], *lv denied* 10 NY3d 810 [2007]), explaining that "the hazard of a rod, part of an assembly being worked on at a site adjacent to the elevator shaft, falling down the shaft was a foreseeable and inherent elevation-related risk of the work

involved." In *Buckley*, the plaintiff was struck by counterweights in the course of installing a new elevator (*id.*). In finding Labor Law § 240 (1) inapplicable, the First Department held that "it was not foreseeable that the counterweights that fell on the injured plaintiff posed an elevation-related hazard inherent in testing the functioning of the elevator platform on the day of the accident" (*id.*). In this case, as in *Buckley*, it cannot be concluded that the DensGlass posed a foreseeable elevation risk, given that no one was working on the exterior façade on the day of the accident (plaintiff tr at 37-38).

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

B. S&E's Motion for Summary Judgment (Motion Sequence No. 002)

1. Plaintiff's Labor Law § 240 (1) Claim

S&E moves for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim for the same reasons it submitted in opposition to plaintiff's motion.[1]

Here, S&E has demonstrated that the object was not being hoisted or secured at the time of the accident. Furthermore, S&E has shown that the object did not require securing for the hoist removal, since plaintiff was struck by an object that was part of the building's permanent structure (*see Moncayo*, 106 AD3d at 965; *Marin*, 60 AD3d at 826). Plaintiff testified that that no one was working on the exterior sheetrock that day (plaintiff tr at 30, 37-38). The sheetrock had already been installed on the outside of the building when S&E was dismantling the hoist (*id.* at 49-50). In response to S&E's motion, plaintiff has failed to raise an issue of fact as to whether the object required securing in light of his work on the day of the accident.

[1] In this connection, the court notes that S&E has standing to seek dismissal of the main complaint (*see* CPLR 1008; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009]).

Accordingly, the branch of S&E motion's seeking dismissal of plaintiff's Labor Law § 240 (1) claim is granted.

2. Plaintiff's Labor Law § 241 (6) Claim

Labor Law § 241 (6) provides:

> "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, 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) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. The statute requires that all areas in which construction, excavation or demolition work is being performed be made reasonably safe (*see Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012]). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct" rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Gasques v State of New York*, 15 NY3d 869, 870 [2010]). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley*, 44 AD3d at 271). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

Plaintiff's verified bills of particulars allege violations of the following Industrial Code provisions: 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.18; 12 NYCRR 23-1.19; 12 NYCRR 23-1.32; 12 NYCRR 23-1.33; 12 NYCRR 23-2.4; 12 NYCRR 23-2.5; 12 NYCRR 23-2.6; 12 NYCRR 23-2.7; 12 NYCRR 23-6.1; 12 NYCRR 23-6.2; 12 NYCRR 23-6.3; 12 NYCRR 23-7; and 12 NYCRR 23-8 (verified bill of particulars, ¶ 17; verified bill of particulars, ¶ 26; verified bill of particulars, ¶ 25).

In opposition to S&E's motion, plaintiff only relies on 12 NYCRR 23-1.7 (a) (1) (Shapiro affirmation in opposition to SMJ 210 West 18 defendants' motion and S&E's motion, ¶¶ 55-61). Accordingly, plaintiff has abandoned reliance on the remaining Industrial Code provisions (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them . . . in the motion court . . ."]). Therefore, the court shall only consider Industrial Code § 23-1.7 (a) (1).

12 NYCRR 23-1.7 (a) (1)

Section 23-1.7, entitled "Protection from general hazards," provides, in relevant part, as follows:

"(a) Overhead hazards.

> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot"

(12 NYCRR 23-1.7 [a] [1] [emphasis supplied]).

S&E argues that section 23-1.7 (a) (1) does not apply, because plaintiff's accident did not occur in an area "normally exposed to falling material or objects." In opposing S&E's motion, plaintiff argues that Jones testified that plaintiff was clearly exposed to falling material or objects while performing his ongoing hoist removal work, and that there was no suitable overhead protection to protect plaintiff.

Section 23-1.7 (a) (1) has been held to be sufficiently specific to support a plaintiff's Labor Law § 241 (6) claim (*Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998]). In order to be applicable, the provision requires a showing that the work site is "normally exposed to falling material or objects" so as to require "suitable overhead protection" (*id.*, n 2). The First Department has held that "where an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply" (*Buckley*, 44 AD3d at 271).

S&E has made a prima facie showing that section 23-1.7 (a) (1) does not apply. Plaintiff testified that no one was working on the exterior wall at the time of his accident (plaintiff tr at 37-38). This evidence is sufficient to establish, prima facie, that the area where plaintiff was injured was not "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]; *see also Marin*, 60 AD3d at 825; *Mercado v TPT Brooklyn Assocs., LLC*, 38 AD3d 732, 733 [2d Dept 2007]).

Although plaintiff points to Jones's vague testimony that "anytime you're doing work in an area, the materials around it may be affected" (Jones tr at 56), this evidence is too speculative to raise an issue of fact as to whether the area where plaintiff was injured was "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]; *see also Moncayo*, 106 AD3d at 965; *Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997], *lv denied* 91 NY2d 805 [1998];

cf. Clarke v Morgan Contr. Corp., 60 AD3d 523, 524 [1st Dept 2009]). Therefore, plaintiff has failed to raise an issue of fact as to whether section 23-1.7 (a) (1) applies in this case.

Since plaintiff has failed to identify an applicable Industrial Code provision, his Labor Law § 241 (6) claim is dismissed (*see Kowalik*, 81 AD3d at 783).

3. Third-Party Claims and Cross Claims for Indemnification and Contribution Against S&E

S&E moves for summary judgment dismissing the contractual indemnification claims against it, arguing that it was not negligent.

In opposition, the SMJ 210 West 18 defendants argue that there is a triable issue of fact as to whether S&E's crew caused the piece of exterior sheetrock to dislodge.

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is '*based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered*'"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005] [emphasis added]).

The indemnification provision in S&E's contract provides as follows:

> "7. INDEMNITY
>
> To the fullest extent permitted by law, *Contractor shall indemnify, defend, and hold harmless Developer and the other Indemnitees* as defined herein . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively 'Claims'), *arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, . . . in connection with the Contract Documents, the performance of, or failure to perform, the Work, or Contractor's operations, including the performance of the obligations set forth in this clause.* To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in whole or in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee"

(Mattera affirmation in opposition, exhibit A at 4 [emphasis added]).

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] [internal quotation marks and citation omitted]). "In 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]).

General Obligations Law § 5-322.1 (1) voids indemnification clauses in construction contracts that "purport[] 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 . . . ."

An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such 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]). Nonetheless, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent, for example, "to the fullest extent permitted by law," does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under statute]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014] [indemnification clause was enforceable by virtue of "to the fullest extent permitted by law" savings language]). Even if the indemnification clause does not contain the savings language, it may still be enforced where the party to be indemnified is found to be free of any negligence

(*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]).

Here, the indemnification provision requires S&E to indemnify and defend the SMJ 210 West 18 defendants "against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees . . . arising out of or resulting from the acts or omissions of [S&E]" (Mattera affirmation in opposition, exhibit A at 4). Despite S&E's arguments to the contrary, S&E is not entitled to dismissal of the SMJ 210 West 18 defendants' contractual indemnification claim. Even if S&E was not negligent, this indemnification provision is triggered because plaintiff, an employee of S&E, was injured while performing work under S&E's contract (*see Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 649 [1st Dept 2014] [subcontractor's indemnification provision requiring it to indemnify contractor for claims arising out of or resulting from the performance of the work and/or operations was triggered since subcontractor's employee was injured while performing subcontractor's work]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [roofing contractor was required to indemnify construction manager for personal injury claim by injured roofing contractor employee where indemnification clause required roofing contractor to indemnify construction manager for all personal injury claims "caused by, resulting from, arising out of, or occurring in connection with the execution of the [contract] Work"]). Moreover, even though the court is dismissing the main complaint against the SMJ 210 West 18 defendants, their contractual indemnification claim against S&E for attorneys' fees and costs in defending the action is not moot (*see generally Hennard v Boyce*, 6 AD3d 1132, 1133-1134 [4th Dept 2004]). Therefore, S&E is not entitled to dismissal of the third-party claim for contractual indemnification against it.

S&E, plaintiff's employer, also moves for summary judgment dismissing the common-law indemnification and contribution claims against it. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010], citing *Correia*, 259 AD2d at 65). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability" of the parties (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]). As discussed below, the court is dismissing plaintiff's complaint against the SMJ 210 West 18 defendants. In light of the dismissal of the main complaint against the SMJ 210 West 18 defendants, the SMJ 210 West 18 defendants' third-party claims for common-law indemnification and contribution against S&E are academic and are dismissed[2] (*see Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 959 [2d Dept 2012]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 538-539 [2d Dept 2005]).

4. Third-Party Claim for Failure to Procure Insurance Against S&E

S&E also moves for summary judgment dismissing the failure to procure insurance claims asserted against it. To support its position, S&E submits a copy of a blanket additional insured endorsement covering anyone with whom S&E contracted with and agreed to add as an additional insured (Calabrese affirmation in support, exhibit Q at 1) (*see Perez v Morse Diesel*

[2]The court notes that, in opposition to S&E's motion, JM3 does not argue that summary judgment should be denied as to any of its claims asserted against S&E. JM3 only argues that the third-party claims and cross claims for indemnification and contribution asserted against JM3 should be dismissed. JM3's pleadings do not assert any claims against S&E (NY St Cts Electronic Filing Doc Nos. 132, 140).

Intl., Inc., 10 AD3d 497, 498 [1st Dept 2004]). None of the parties, including the SMJ 210 West 18 defendants, has opposed this branch of S&E's motion. Therefore, the third-party claim for failure to procure insurance against S&E is dismissed.

5. Conditional Indemnification Against All Negligent Parties, Including JM3

S&E also requests a conditional order of indemnification against "all negligent parties," including JM3.

Although S&E seeks conditional indemnification from "all negligent parties," including JM3, S&E has failed to demonstrate that any of these parties were negligent as a matter of law or that they exclusively supervised the injury-producing work (*see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2d Dept 2017]; *Reilly v DiGiacomo & Son*, 261 AD2d 318, 318 [1st Dept 1999] ["owners' cross motion [on their cross claim for common-law indemnification] was properly denied because, although no issues of fact exist as to the purely vicarious nature of their liability, their evidence does not establish, as a matter of law, that the general contractor was either negligent or exclusively supervised and controlled plaintiff's work site"]). There are questions of fact as to whether JM3 negligently installed sheetrock or DensGlass on the project. Therefore, S&E's request for conditional common-law indemnification is denied.

C. SMJ 210 West 18 Defendants' Motion for Summary Judgment (Motion Sequence No. 003)

1. Plaintiff's Labor Law § 240 (1) Claim Against the SMJ 210 West 18 Defendants

The SMJ 210 West 18 defendants move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim for essentially the same reasons as S&E.

The SMJ 210 West 18 defendants have demonstrated that the object that struck plaintiff was not being hoisted or secured at the time of the accident. Furthermore, S&E has shown that the object did not require securing for the hoist removal (*see Seales*, 142 AD3d at 1156; *Flossos*

v Waterside Redevelopment Co., L.P., 108 AD3d 647, 650 [2d Dept 2013]; *Moncayo*, 106 AD3d at 965; *Garcia*, 101 AD3d at 416; *Novak v Del Savio*, 64 AD3d 636, 638 [2d Dept 2009]). Plaintiff testified that the sheetrock that struck him was part of the exterior wall (plaintiff tr at 41). He further stated that no one was working on the exterior sheetrock on the day of the accident (*id.* at 37-38). Jones testified that the workers could not work on the exterior of the building until the hoist had been removed (Jones tr at 51).

Plaintiff has failed to raise an issue of fact as to whether the object that struck plaintiff required securing in view of the work that he was performing that day.

Accordingly, plaintiff's Labor Law § 240 (1) claim is dismissed.

2. Plaintiff's Labor Law § 241 (6) Claim Against the SMJ 210 West 18 Defendants

In opposition to the SMJ 210 West 18 defendants motion, plaintiff only relies on Industrial Code § 23-1.7 (a) (1). Therefore, plaintiff has abandoned reliance on the remaining provisions cited in the bill of particulars (*see Cardenas*, 68 AD3d at 438).

The SMJ 210 West 18 defendants have demonstrated, prima facie, that the area where plaintiff was injured was not "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]). As noted above, plaintiff testified that there were no workers working on the exterior sheetrock on the date of the accident (plaintiff tr at 37-38). Plaintiff has failed to raise an issue of fact. Jones's vague and speculative testimony that "anytime that you're doing work in an area, the materials may be affected" (Jones tr at 56), does not raise a question of fact as to whether the area was "normally exposed to falling material or objects" (12 NYCRR 23-1.7 [a] [1]). Therefore, plaintiff's Labor Law § 241 (6) claim is dismissed as against the SMJ 210 West 18 defendants.

3. Plaintiff's Labor Law § 200 and Common-Law Negligence Claims Against the SMJ 210 West 18 Defendants

Plaintiff did not oppose dismissal of his Labor Law § 200 and common-law negligence claims against the SMJ 210 West 18 defendants. At oral argument, plaintiff conceded that there was no liability under section 200 and in negligence against the SMJ 210 West 18 defendants (oral argument tr at 42). In addition, plaintiff expressly notes that he did not oppose the portion of the motion brought on behalf of defendants Property Markets Group, Inc. and JDS Development LLC (Shapiro affirmation in opposition, ¶ 1). Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims against the SMJ 210 West 18 defendants are dismissed.

In light of the dismissal of the complaint against the SMJ 210 West 18 defendants, the SMJ 210 West 18 defendants are also entitled to dismissal of the cross claims brought against them.

D. JM3's Motion for Summary Judgment (Motion Sequence No. 004)

1. Plaintiff's Labor Law §§ 240 (1) and 241 (6) Claims Against JM3

Plaintiff did not oppose dismissal of his Labor Law §§ 240 (1) and 241 (6) claims against JM3. At oral argument, plaintiff withdrew his Labor Law §§ 240 (1) and 241 (6) claims against JM3 (oral argument tr at 44).

Accordingly, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against JM3 are dismissed. Therefore, the court need not reach whether JM3 is a proper defendant for purposes of liability under Labor Law §§ 240 (1) and 241 (6).

2. Plaintiff's Labor Law § 200 and Common-Law Negligence Claims Against JM3

JM3 argues that it cannot be held liable under the Labor Law because it was not an owner, general contractor or agent of either. In addition, JM3 contends that it did not actually exercise supervision or control over the work and did not have actual or constructive notice of

the unsafe conditions that caused plaintiff's accident. According to JM3, plaintiff's work was supervised by Luchese, and JM3 did not have authority over the work being done.

In response, plaintiff argues that JM3 may be held liable under Labor Law § 200 and in common-law negligence, because JM3 or one of its subcontractors installed all of the DensGlass on the site, and because JM3 or one of its subcontractors performed all of the patch work on the DensGlass at the site. Additionally, plaintiff contends that the doctrine of res ipsa loquitur applies under the circumstances.

Labor Law § 200 (1) provides as follows:

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

It is well settled that "section 200 [of the Labor Law] is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Rizzuto*, 91 NY2d at 352, quoting *Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). The statute applies to owners, contractors, and their agents (*see Lopez v Strober King Bldg. Supply Ctrs.*, 307 AD2d 681, 681 [3d Dept 2003]).

In this case, JM3 has failed to demonstrate that it did not "have the authority to control the activity bringing about the injury" (*Russin*, 54 NY2d at 317; *see also Fraser v Pace*

Plumbing Corp., 93 AD3d 616, 616 [1st Dept 2012] [triable issues of fact as to whether plumbing contractor created hole into which scaffold slipped, and whether its employees removed plywood coverings from holes precluded dismissal of plaintiffs' section 200 and negligence claims against plumbing contractor]; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156 [4th Dept 2007] [subcontractor that installed conduits was subject to liability under Labor Law § 200 where it had "the authority to control the activity bringing about the injury"] [citation omitted]; *Andrade v Triborough Bridge & Tunnel Auth.*, 35 AD3d 256, 257 [1st Dept 2006] [issue of material fact as to whether electrical subcontractor negligently left construction site hole uncovered precluded summary judgment on plaintiff's section 200 and common-law negligence claims]). JM3 was the only contractor that installed sheetrock on the project (Jones tr at 30-31, 145; Falgiano tr at 26-27, 29, 135). The exterior walls of the project consisted of metal studs and framing with DensGlass applied to the metal studs (Falgiano tr at 65-67). After the hoist's tie-ins were removed, JM3 or one of JM3's subcontractors patched the DensGlass (*id.* at 131-133). In light of the above evidence, there are issues of fact as to whether JM3 created the dangerous condition that resulted in plaintiff's injury.

Accordingly, the branch of JM3's motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is denied.

3. Third-Party Claims and Cross Claims for Common-Law Indemnification and Contribution Against JM3

JM3 moves for summary judgment dismissing the common-law indemnification and contribution claims asserted against it. The main action has been dismissed as against the SMJ 210 West 18 defendants. Consequently, the SMJ 210 West 18 defendants' cross claims for common-law indemnification and contribution against JM3 cannot survive and must be dismissed (*see Hoover*, 35 AD3d at 372).

However, with respect to S&E's third-party claims for common-law indemnification and contribution against JM3, JM3 has failed to demonstrate prima facie entitlement to summary judgment. JM3 has failed to show that it was not negligent as a matter of law in the installation of the sheetrock or DensGlass on the project (*see Martins*, 72 AD3d at 484). In any event, S&E has raised issues of fact as to whether JM3 was responsible for the work that caused plaintiff's injury (Jones tr at 30-31; Falgiano tr at 26-27, 29, 135). Therefore, the branch of JM3's motion seeking dismissal of the third-party claims for common-law indemnification and contribution is denied.

4. Third-Party Claims and Cross Claims for Contractual Indemnification Against JM3

JM3 moves for summary judgment dismissing the contractual indemnification claims against it. Specifically, JM3 contends that: (1) the indemnification provision requires JM3 to indemnify the SMJ 210 West 18 defendants for any claim caused by the sole negligence of JM3; and (2) there is no evidence that the accident was caused by any actions or negligence of JM3 at the work site.[3]

In opposing JM3's motion, the SMJ 210 West 18 defendants argue that there is a triable issue of fact as to whether JM3 or one of its subcontractors negligently installed the sheetrock.

Like S&E's contract, the indemnification provision in JM3's contract provides:

> "7. INDEMNITY
>
> To the fullest extent permitted by law, *Contractor shall indemnify, defendant, and hold harmless Developer and the other Indemnitees* as defined herein . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively 'Claims'), *arising out of or resulting from the acts or*

[3]JM3 argued, for the first time at oral argument, that the court should dismiss S&E's contractual indemnification claim because there is no privity between S&E and JM3 (oral argument tr at 55). Accordingly, the court has not considered this argument (*see Hopper v Lockey*, 241 AD2d 892, 893 [3d Dept 1997]).

> *omissions of Contractor, or anyone for whose acts Contractor may be liable, . . . in connection with the Contract Documents, the performance of, or failure to perform, the Work, or Contractor's operations, including the performance of the obligations set forth in this clause.* To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in whole or in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee"

(Daks affirmation in support, exhibit R at 4 [emphasis supplied]).

Contrary to JM3's contention, the indemnification provision at issue does not require the SMJ 210 West 18 defendants to establish that the claim arose out of JM3's sole negligence; it only requires that the claim arose out of or resulted from the acts or omissions of JM3 in the performance of its work. In addition, as previously discussed, there are issues of fact as to whether plaintiff's accident arose out of or resulted from JM3's installation of the sheetrock or DensGlass on the project (Jones tr at 30-31, 145; Falgiano tr at 26-27, 135). Therefore, the branch of JM3's motion seeking dismissal of the contractual indemnification claims against it is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of plaintiff Juan Garcia for partial summary judgment on the issue of liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that the motion (sequence number 002) of third-party defendant/second third-party plaintiff S&E Bridge & Scaffold LLC for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and the third-party claims for common-law indemnification, contribution, and failure to procure insurance against it, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of defendants/third-party plaintiffs SMJ 210 West 18 LLC, Property Markets Group, Inc., JDS Development LLC, and 210 West 18th LLC for summary judgment is granted and the amended complaint and all cross claims against said defendants are dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence number 004) of defendant/second third-party defendant JM3 Construction LLC is granted to the extent of dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and the cross claims by defendants/third-party plaintiffs SMJ 210 West 18 LLC, Property Markets Group, Inc., JDS Development LLC, and 210 West 18th LLC for common-law indemnification and contribution against it, and is otherwise denied; and it is further

ORDERED that the main action is severed as to the defendants for whom summary judgment was granted in seq. 003 and continued as against JM3 Construction LLC.

Dated: November 16, 2018

ENTER:

J.S.C.
HON. ROBERT D. KALISH
J.S.C.