SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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WILLIAM POWERS, Index No.: 159844/2016

Plaintiff,

-against-

PLAZA TOWER, LLC,

Defendant.

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PLAZA TOWER, LLC,

Third-Party Plaintiff,

-against-

GLOBAL BMU, LLC,

Third-Party Defendant.

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ROBERT R. REED, J.:

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

This is an action to recover damages for personal injuries allegedly sustained by a mechanic on November 4, 2016, when, while installing a new permanent window washing scaffold at 1 Dag Hammarskjold Plaza, 885 Second Avenue, New York, New York (the Premises), the catwalk that he was walking on collapsed, causing him to fall 18-20 feet to the roof below.

In motion sequence number 001, third-party defendant Global BMU, LLC (Global) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it.

In motion sequence number 002, plaintiff William Powers moves, pursuant to CPLR 3212,

for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant/third-party plaintiff Plaza Tower, LLC (Plaza).

In motion sequence number 003, plaintiff moves, pursuant to CPLR 3126, for an Order precluding Plaza from offering into evidence the affidavit of witness Joseph Annese, as well certain photographs, which allegedly were not disclosed during discovery.

In motion sequence number 004, Plaza moves, pursuant to CPLR 3212, for dismissal of the complaint against it, as well as for summary judgment in its favor on the third-party claim for contractual indemnification as against Global.

BACKGROUND

On the day of the accident, Plaza owned the Premises where the accident occurred. Plaza retained Global to install a new permanent window washing scaffold at the Premises (the Project). Plaintiff, who was employed by Global as a mechanic on the day of the accident, was injured when a decommissioned catwalk that he was walking on collapsed.

Deposition Testimony of John McDermott (Global's President)

John McDermott testified that he was Global's president on the day of the accident. Global was in the business of servicing old and installing new permanent scaffolds on the exteriors of high-rise buildings in New York City. The scaffolds were used by window cleaners to service the buildings. Global employed plaintiff as a mechanic.

McDermott explained that Plaza retained Global for a large-scale scaffold replacement project at the Premises, which entailed the removal of the building's existing permanent scaffold and replacing it with a new one. McDermott testified that at the time of the accident, plaintiff and his partner, Justin Cordova, were dropping placement markers on the roof of the Premises, as part

of the overall work of installing the new scaffold. He heard about the accident from Cordova, who told him that plaintiff "had fallen through the grating of the catwalk and was seriously injured" (McDermott tr at 61). When McDermott visited plaintiff in the hospital, plaintiff told him that the accident occurred when "he was . . . plugging in the electric to move the scaffold" (*id.* at 64).

McDermott explained that the subject catwalk was being used to provide "emergency access to the equipment and for moving the electrical [equipment] (*id.* at 47). As it was a "replacement project," and "[i]n order to keep costs down" on the Project, Global utilized "the existing power supply, the existing tracks and rail gauge" (*id.* at 48). Global's employees were never told not to use the catwalk, and, in fact, they often did use it. McDermott was not aware that the catwalk was partially dismantled, as "[i]n that situation normally you would see some type of signage or there would be some type of warning" (*id.* at 49). McDermott also maintained that Global's workers were never advised as to which outlets they were permitted to use while performing their work.

McDermott also stated that Global workers were not required to wear, or expected to wear, harnesses while walking on the catwalk because "a catwalk is deemed safe because it's a preengineered system for supporting a human being and their weight" (*id.* at 53). In any event, there was no "lifeline horizontal system" set up in the accident area at the time of the accident, and there were no lifelines in the building at the time of the accident (*id.* at 54).

Deposition Testimony of Justin Cordova (Plaintiff's Work Partner)

Cordova testified that he was working as a scaffold mechanic for Global on the day of the accident. He explained that the Project involved "[a]n old [window washing rig] . . . being taken

out and a new machine . . . being installed" (Cordova tr at 19). At the time of the accident, he and plaintiff "were painting or marking drop locations for the [new] window washing unit or scaffold" (*id.* at 28). The work required the men to operate a machine on an elevated track above the roof floor. Just prior to the accident, they "were moving the machine from the parking area towards the south side of the building and [they] were marking drop locations" (*id.* at 40). In order to run the machine, the men had to plug a power cord into an electrical outlet located on the south side of the Premises. This outlet was the closest one to where the machine was parked.

In order to access the outlet to plug in the machine, plaintiff had to use a catwalk, which was located about 18-20 feet above the roof floor. Plaintiff asserted that "[their] only knowledge was that [the outlet] was the only outlet that was there and that [they] had to use that one" (*id.* at 53).

Cordova explained that the accident occurred after plaintiff had already "unplugged the power cord [and] . . . was walking back towards [him]" (*id.* at 71). Plaintiff "was walking [on the catwalk] . . . the grating came out from under him. So he went down with the grating" (*id.*).

Cardova also testified that, prior to the day of the accident, he had observed other workers using the catwalk in order to access the subject outlet. In order to reach the outlet, people climbed over a little wall to get onto the catwalk where it was located. He maintained that no one ever told them not to use the catwalk, nor did he ever observe any warning signs forbidding its use. The men also were never instructed to use a harness while on the catwalk. Indeed, even had there been a harness available to them, there was no place to tie off to on the catwalk. It was only after the accident that a safety system with "a safety line" was installed between the tracks, so that the workers could "walk around the tracks harnessed" (*id.* at 60).

Plaintiff's Deposition Testimony

Plaintiff testified that he was employed by Global as a lead mechanic on the day of the accident. He explained that the Project involved the installation of two permanent scaffolds at the Premises. At the time of the accident, he and his partner, Cordova, were marking elevated tracks at the roof level, in order to identify drop locations for the installation of one of the "permanently-installed–newly installed window washing scaffold[s]" (plaintiff's tr at 57). This required the men to drive a machine around a track. Cordova operated the machine while plaintiff marked the track. In order to operate the machine, it was necessary for the machine's power cord to be plugged into an outlet on the south side of the building.

Plaintiff explained that there were three outlets that he knew of: one was on the east side; one was on the west side; and one was on the south side of the Premises, at the same level as the catwalk. Plaintiff asserted that it was necessary for him to use the outlet on the catwalk level because that was the one that the power cord could reach. The outlet was located just above the catwalk's top railing.

Plaintiff further explained that the accident happened at about the time that the men were finishing up for the day. After the men had parked the machine on the south side of the building, plaintiff "left the parking area . . . to unplug [the power cord]" (*id.* at 94). In order to reach the outlet on the catwalk, he had to climb over a "small wall," which was about waist-high (*id.*). Plaintiff's accident occurred after he had unplugged the cord and was walking back while on the catwalk. Plaintiff did not remember what happened next, only that he woke up lying on the roof floor, about 18 feet below the catwalk. He does not know what caused his accident, and he did not feel the catwalk "shift" prior to it (*id.* at 108). Plaintiff described the catwalk as having a 4-

foot high railing around it. A section of the railing was bent as a result of various workers climbing over it in order to access the catwalk.

Plaintiff testified that he had utilized the catwalk approximately 50 times prior to the day of the accident. While he had noticed that the catwalk had some missing grating, he could not say whether or not the catwalk was intentionally built that way. Plaintiff also maintained that he was never instructed to use a safety device while on the catwalk, nor was he ever instructed to tie off. Plaintiff testified that there were no tie-off locations in the accident area.

Deposition Testimony of Michael Chidichimo (Chief Engineer of the Premises)

Michael Chidichimo testified that he was employed by Plaza as the building's chief engineer on the day of the accident, and, as such, he was responsible for maintaining the heating and air conditioning systems there. He was also in charge of a staff at the Premises, which included engineer, Joseph Annese. When he was shown a photograph of Annese, Chidichimo identified him as "Joseph Annese" (Chidichimo tr at 58).

Chidichimo described the Premises as a commercial building with 50 floors, plus a roof with sublevels. The Project entailed the installation of an exterior scaffold that was to be used for window washing. Plaza hired Global to perform said installation, and Global was in charge of the means and methods of its own installation work.

Chidichimo explained that the catwalk had originally been installed to access a cooling tower that had since been removed in 2014, two years before the accident. He asserted that Plaza did not maintain the "decommissioned catwalk," which was no longer in use, nor did it retain anyone else to do so (Chidichimo tr at 31). In fact, there wasn't any "maintenance program in place for the decommissioned steel and catwalk" (*id.* at 44).

Chidichimo testified that, prior to the day of the accident, he had observed that some of the catwalk's grates were missing. He noted that they had been missing for about two years, or "[s]ince the demolition of the old cooling tower" (*id.* at 40). Specifically, when Chidichimo was asked, "Was any of the grating . . . missing before the accident?" he replied, "Yes" (*id.* at 39). While he was not sure as to what part of the grating was missing, he remembered observing that "there were spaces" (*id.*). Chidichimo explained that in order to gain access to the catwalk, the workers had to "climb over [a] parapet wall" (*id.* at 42). He also remember that the railing of the catwalk appeared to be "bent" (*id.* at 44).

Chidichimo testified that, after the old cooling towers were removed, the electrical outlet located near the catwalk on the southside of the Premises was no longer used. He maintained that, in any event, the workers did not have to use that outlet because "[t]he building had installed an outlet on the lower level in a safe location to be utilized" (*id.* at 59, 60-61).

After the accident, Chidichimo observed that the catwalk's grating had fallen from the catwalk to the lower level of the roof. Prior to the accident, Plaza never received any complaints regarding the condition of catwalk, nor had he ever seen anyone walking on it. In addition, at the time of the accident, there were no signs in place warning that the catwalk was unsafe for use, although signs were put up after the incident. Chidichimo acknowledged that no one was ever instructed "not to go on the catwalk," and that he never told the workers where the new outlet was located (*id.* at 76). In addition, he never observed any workers using the new outlet.

The Affidavit of Joseph Annese (the Building Engineer for the Premises)

In his affidavit, Annese stated that he served as one of the building engineers on the day of the accident, and that his duties included "maintaining the heating and cooling systems of the

building" (Annese aff). He explained that two years before the accident two of the building's cooling towers were removed from the roof and replaced with "a new cooling tower system" (*id.*). "As a result, the new cooling tower installation required a change in the configuration of the catwalk" (*id.*). In order for this to happen, "[t]he southeastern portion of the catwalk had to be lowered to accommodate the height of the new cooling tower system" (*id.*).

Annese explained that, "after the installation of the new cooling system tower, there was no need to replace the cooling towers on the southeast portion of the roof . . . [,][so] the contractor who installed the new cooling tower system disconnected the catwalk" and lowered the southeast section of it (*id.*). The catwalk was then left in this position because "it was not needed anymore" (*id.*). Once this section of the catwalk was taken out of service, or "abandoned," a ladder was attached to the rest of the catwalk, providing sole access to the new cooling tower.

Annese maintained that he was not aware of anyone ever using the abandoned catwalk once the new cooling system was installed. He also maintained that "[t]here was an outlet on the southwestern portion of the roof at the roof level below the unused catwalk," noting that it was also "no longer in use by the building" (*id.*).

In his affidavit, Annese identified photographs (attached to the affidavit) showing different views of the building's roof, as well "as the general condition of the catwalk on the date of [plaintiff's] accident" (*id.*). He stated that the photographs accurately depicted the appearance of the catwalk that day, "except that a section of the catwalk grating, where [plaintiff] allegedly fell through, [was] missing" (*id.*).[1]

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[1]It should be noted that some of these photographs depict warning signs on the catwalk, which, the uncontradicted testimony showed, were not present on the day of the accident.

DISCUSSION

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

The Labor Law § 240 (1) Claim Against Plaza (motion sequence number 002 and 004)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Plaza. Plaza moves for dismissal of said claim against it. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm

directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

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

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Plaintiff argues that he is entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because he was injured when the catwalk he was walking on collapsed, causing him to fall from an elevated height and become injured. "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011] [where the plaintiff was

injured when the top of the ladder that he was working on slid away from the house, Court held that "[t]he defect in the ladder, and the fact that it was not secured, were substantial factors in causing plaintiff to fall"]).

Initially, it should be noted that it is not necessary for plaintiff to show that the catwalk was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

In opposition, Plaza argues that Labor Law § 240 (1) does not apply to this case because the catwalk was part of the building's permanent structure, rather than a safety device, and courts have found that the statute does not apply to objects that are part of a building's permanent structure. To that effect, as parts of a building's permanent structure are not expected to fail, such objects would not be expected to require a safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001] [where the plaintiff was injured when he was struck by falling glass from a window at a building where a renovation project was underway, the Court determined that the subject glass "was not [the kind of] situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"]; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825-826 [2d Dept 2009] [Labor Law § 240 (1) not applicable where the plaintiff was injured when a metal bracket used to

affix piping to a building's exterior came loose and struck him on his head, because the bracket "had been installed prior to the plaintiff's accident . . . and thus became part of the building's permanent structure"]; *Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 416 [1st Dept 2012]; *Handley v White Assoc.*, 288 AD2d 855, 855 [4th Dept 2001] [Labor Law § 240 (1) did not apply where, after placing a new section of heating duct, the duct fell and struck the plaintiff on his wrist]).

It is not uncommon for Labor Law § 240 (1) to apply in situations where a permanent part of a building was also being used as a safety device at the time of the accident (see *Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept 2009] [fire escape that the plaintiff was working on when he fell was the functional equivalent of a scaffold]; *Beard v State of New York*, 25 AD3d 989, 991 [3d Dept 2006] [bridge on which the plaintiff was working as it was being taken apart was a "functional equivalent of a scaffold"]). That said, in the instant case, at the time of the accident, plaintiff was merely walking on the catwalk, rather than utilizing it as a safety device while performing a work task.

In any event, plaintiff is entitled to judgment in his favor because, even though the catwalk was a permanent structure, its permanency is not a defense due to its hazardous condition, which made its collapse foreseeable. As such, defendants were required to provide a safety device to protect plaintiff from falling in the event that the scaffold failed. "[T]o establish a prima facie case pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged" (*Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587, 588 [2002]).

The crucial consideration is whether a particular task creates an elevation-related risk of the kind that the enumerated safety devices protect against, regardless of the permanency of the structure involved (*see Carillo v Circle Manor Apts.*, 131 AD3d 662, 662 [2d Dept 2015][where it is foreseeable that a safety device might be needed,"the collapse or partial collapse of a permanent floor may give rise to liability under Labor Law § 240 (1)"]; *Cavanaugh v Mega Contr., Inc.*, 34 AD3d 411, 412 [2d Dept 2006] [plaintiffs granted summary judgment on the Labor Law § 240 (1) claim where "the plaintiffs submitted evidence establishing that the injured plaintiff fell from the first floor to the basement of a building undergoing renovation, after a portion of the first floor subfloor collapsed, and that the first floor subfloor was not properly braced and no safety devices were provided to help prevent or break his fall"]; *McDonald v UICC Holding, LLC*, 79 AD3d 1220, 1221 [3d Dept 2010] [although a staircase normally "constitutes a 'permanent passageway between two parts of the building'" and therefore "cannot form the basis of a Labor Law § 240 (1) claim," the staircase that collapsed "could no longer be considered a permanent passageway" because "at the time of the accident, [it] was being dismantled"]).

Here, regardless of whether the catwalk was a permanent structure, because its deteriorated condition caused it to collapse, "'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Gory v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 550, 551 [1st Dept 2014] [Labor Law § 240 (1) liability where the stairway, which was elevated, provided to the plaintiff was the "sole means of access to the floors of the building," and where the plaintiff's injuries were caused by defendant's failure to provide guard rails], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Accordingly, additional safety devices, such as a harness or a safety device with railings were necessary to prevent him from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

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

In *Jones v 414 Equities LLC* (57 AD3d 65, 66 [1st Dept 2008]), the plaintiff worked as a demolition laborer on a renovation project underway at a five-story apartment building. He "was dragging across the second floor a 50- to 60- pound piece of demolished wall to place it with other debris when the portion of the floor he was walking across collapsed, causing him to fall approximately 10 to 12 feet to the floor below" (*id.* at 67). In analyzing whether the collapse of the permanent floor fell within the purview of Labor Law § 240 (1), the Court observed that "[t]he Second Department has concluded that the collapse of a permanent floor can, under certain circumstances, pose an elevation-related risk and give rise to liability under § 240 (1)," noting that at least some of those cases turned on whether the collapse of the area in issue was foreseeable (*id.*

at 74).

In *Jones*, the Court ultimately ruled that the plaintiff was not entitled to judgment in his favor because he had not adequately demonstrated that the collapse was foreseeable. The Court reasoned that the plaintiff's "deposition testimony shed[] little light on the condition of the floor prior to its collapse; he only testified that he 'was walking on a clean straight floor' in which there were no holes" (*id.* at 80). In addition, in his affidavit, the plaintiff in *Jones* "merely averred that '[p]ortions of the second floor were old, rotted and decayed'" (*id.*).

In contrast, here, plaintiff has established through photographs and testimonies demonstrating that grating was missing from the catwalk, and that its railings were bent. Therefore, due to its deteriorated condition, it was foreseeable that the catwalk might be in danger of collapsing. Moreover, as it was common for the men to use the subject electrical outlet, it was foreseeable that plaintiff might traverse the catwalk to reach it (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]).

In opposition to plaintiff's motion and in support of their motion, defendants also argue that they are entitled to dismissal of the Labor Law § 240 (1) claim against them because plaintiff's decision to use the abandoned catwalk made him the sole proximate cause of his accident. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer

in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

However, under the circumstances of this case, any alleged negligence on plaintiff's part in utilizing the catwalk goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Vail v 1333 Broadway Assoc., L.L.C.*, 105 AD3d 636, 637 [1st Dept 2013] ["[g]iven that the scaffold was inadequate in the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries"]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] ["even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] ["even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-

related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

By demonstrating that his accident was caused by the collapse of a scaffold, which was in such a deteriorated condition that it's failure was foreseeable, plaintiff "established his prima facie entitlement to judgment as a matter of law by showing that he was not provided with a proper safety device with which he could perform his job, and that the defendants' failure to provide such protection was a proximate cause of his injuries" (*Laconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]).

Moreover, defendants have not demonstrated that plaintiff was recalcitrant in that he was specifically instructed to use a safety device and refused to do so (*see Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"]). Plaintiff was under no duty to fetch an alternate safety device himself, because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). To that effect, "workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed"

(*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, and Plaza is not entitled to dismissal of said claim against it.

The Labor Law § 241 (6) Claim Against Defendants (motion sequence number 004)

Plaza moves for dismissal of the Labor Law § 241 (6) claim against it. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). Labor Law § 241 (6), however, is not self-executing, and, in order to show a violation of this statute and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

While plaintiffs assert multiple alleged Industrial Code violations in their bill of particulars, with the exception of section 23-1.7(f), plaintiff does not oppose their dismissal. Therefore, the unopposed Industrial Code provisions are deemed abandoned (*see Genovese v*

Gambino, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, Plaza is entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (f)

Initially, section 23-1.7 (f) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]; *Atkins v Baker*, 247 AD2d 562, 562 [2d Dept 1998]).

Section 23-1.7 (f), which refers to vertical passages, states, in pertinent part:

> "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Here, section 23-1.7 (f) applies to the facts of this case because "a safe means of access" to and from the electrical outlet was not provided, proximately causing the accident.

Thus, Plaza is not entitled to dismissal of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.7 (f).

The Common-Law Negligence and Labor Law § 200 Claim Against Defendants (motion sequence number 004)

Plaza moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see*

also Russin v Louis N. Picciano & Son, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

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

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

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

control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

As discussed previously, plaintiff was injured when the permanent catwalk collapsed. Therefore, as the accident was caused due to a defect inherent in the Premises, an unsafe condition analysis will be applied to the facts of this case.

Here, a review of the record reveals that Plaza had notice of the catwalk's unsafe condition prior to the time of the accident. Chidichimo testified that the "decommissioned catwalk" had not been inspected or maintained in at least two years (Chidichimo tr at 31). He also specifically testified that he had observed some of the catwalk's grates to be missing prior to the day of the accident, and that the catwalk's railing was bent. Moreover, he testified that there were no warning signs stating not to use the catwalk.

Finally, as the owner of the Premises where the accident occurred, Plaza had a "'duty . . . to provide a safe place to work [which] encompasse[d] the duty to make reasonable inspections to detect unsafe conditions'" (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009], quoting *DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 73 [1983]).

Thus, Plaza is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

Plaza's Third-Party Contribution and Common-Law Indemnification Claims Against Global (motion sequence numbers 001 and 004)

Global moves for dismissal of the third-party claims for contribution and common-law negligence against it. "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

[internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Here, there is no indication in the record that Global was guilty of any negligence that contributed to or caused the accident. As Global argues, Global did not own the Premises or install the catwalk. In addition, Global did have any obligations in regard to the inspection and maintenance of the catwalk, a permanent part of the Premises. Further, there is nothing in the record to indicate that Global had any reason to know that the catwalk was in danger of collapsing. In fact, prior to the accident, plaintiff had walked over the catwalk numerous times with no problems. Further, Global's workers were never instructed by any Plaza personnel not to use the catwalk, and there were no barriers or warning signs indicating that it was unsafe.

Thus, Global is entitled to dismissal of the third-party claims against it for contribution and common-law negligence.

Plaza's Third-Party Contractual Indemnification Claim Against Global (motion sequence number 001 and 004)

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

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

Additional Facts Relevant To This Issue:

Section 22.06 of the contract between Plaza and Global (the Contract) contains an indemnification provision (the Indemnification Provision) which states, in part, as follows:

> "To the fullest extent permitted by law, Contractor shall indemnify, defend, and hold harmless Owner . . . from and against all losses, claims, costs, damages, and expenses . . . arising out of or resulting from the performance of the Work, Contractor's breach of this Agreement, or arising from or attributable to Contractor or any Subcontractor's negligence or willful acts or misconduct, and regardless of whether or not the negligence of any Indemnitees here may also have contributed to or caused any such loss, claim or damage except to the extent caused by the sole negligence of any such Indemnitees"

(Global's motion, exhibit M, the Contract, the Indemnification Provision, at 18).

In support of its motion to dismiss Plaza's third-party claim for contractual indemnification against it, Global argues that the accident was caused due to Plaza's sole negligence, and that, accordingly, pursuant to the Indemnification Provision, Global does not owe Plaza contractual indemnification.

As discussed previously, there is no indication in the record that Global was guilty of any negligence that contributed to or caused the accident. It did not own the Premises where the accident occurred, and it did not create the unsafe hazard that caused plaintiff to fall. In addition, as there were no warnings in the accident location, there was no apparent reason for plaintiff to question the safety of the catwalk. Finally, while Plaza argues that plaintiff should have been wearing a safety harness, plaintiff testified, without contradiction, that no adequate tie-off anchors were available.

In contrast, as the owner of the Premises, Plaza had a duty to keep it safe for workers. As discussed previously, the building's engineer was aware that the catwalk, which was decommissioned two years prior to the date of the accident, had not been inspected or maintained. He also testified that he had observed panels missing from the catwalk and the railing bent, reflecting that it had fallen into disrepair. As such, warning signs and/or barricades were necessary to keep workers from using the catwalk, yet none existed.

Thus, as the record before this court shows Plaza's negligence to have been a proximate cause of the accident and Global to have been free from any negligence, Global is entitled to dismissal of the third-party claim for contractual indemnification against it.

Plaintiff's Motion To Preclude (motion sequence number 003)

Plaintiff moves to preclude Plaza from offering into evidence Annese's affidavit, as well as certain photographs, which were attached to said affidavit, because they allegedly were not disclosed during discovery and prior to the filing of the note of issue.

It is within the motion court's discretion to refuse to consider evidence that was not disclosed during discovery when determining a motion for summary judgment, especially where "[n]o explanation was offered for this failure to comply with disclosure obligations" (*Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]; *see also Dunson v Riverbay Corp.*, 103 AD3d 578, 579 [1st Dept 2013]).

While plaintiff argues that Plaza's alleged failure in disclosing Annese as a possible witness during discovery should result in the preclusion of his affidavit, in fact, plaintiff was well aware, prior to the filing of the note of issue, that Annese was identified as the building's engineer who was present at the scene immediately after the accident. This fact had been testified to by Chidichimo in his January 9, 2018 deposition. Notably, during that deposition, Chidichimo even identified Annese in a photograph. Nevertheless, plaintiff never sought a deposition from Annese. Therefore, the court will consider Annese's affidavit.

With respect to the subject photographs, the photograph time-stamped "AM 11:16 17/NOV/2016" was exchanged in discovery on January 8, 2018. Therefore, the court will consider said photograph.

However, the court will not consider the balance of the other photographs, which were taken on July 5, 2018. These photographs are prejudicial to plaintiff's case, in that they were taken approximately 20 months after the accident, and they depict warning signs by the catwalk

that were undisputedly not present on the day of the accident.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that third-party defendant Global BMU, LLC (Global)'s motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it in its entirety is granted, and the third-party complaint is dismissed as against Global, and the Clerk is directed to enter judgment in favor of Global, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff William Powers's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant/third-party plaintiff Plaza Tower, LLC (Plaza) is granted; and it is further

ORDERED that the part of plaintiff's motion (motion sequence number 003), pursuant to CPLR 3126, for an Order precluding Plaza from offering into evidence the photographs attached to the affidavit of witness Joseph Annese is granted, with the exception of the photograph time-stamped AD 11:16/NOV/2016, and the motion is otherwise denied; and it is further

ORDERED that the part of Plaza's motion (motion sequence number 004), pursuant to CPLR 3212, for dismissal of that part of the Labor Law § 241 (6) claim predicated on the alleged Industrial Code violations that were abandoned is granted, and said parts of the Labor Law § 241

(6) claim are dismissed as against Plaza, and the motion is otherwise denied.

Dated: January 14, 2019

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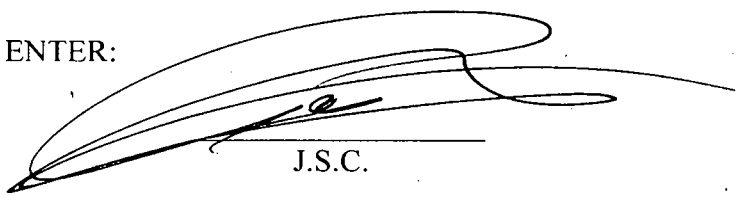

J.S.C.