| **Lopez v LMA Group Inc.** |
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| 2019 NY Slip Op 30259(U) |
| February 1, 2019 |
| Supreme Court, New York County |
| Docket Number: 153373/15 |
| Judge: Sherry Klein Heitler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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CUAUHTEMOC LOPEZ,

Plaintiff,

-against-

LMA GROUP INC., JOHN D. LAMB, and DAVID E. STUTZMAN,

Defendants.

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LMA GROUP INC., JOHN D. LAMB, and DAVID E. STUTZMAN,

Third-Party Plaintiffs

-against-

J&J FLOORMASTERS, INC.

Third-Party Defendant.

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Index No. 153373/15
Motion Sequence 002-003

**DECISION AND ORDER**

**SHERRY KLEIN HEITLER, J.S.C.**

Motion Sequence 02 (MS 02) and 03 (MS 03) are consolidated for disposition.

In MS 02, third-party defendant J&J Floormasters, Inc. (J&J) moves pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint in its entirety. In MS 03, defendants LMA Group, Inc. (LMA), John D. Lamb, and David E. Stutzman (collectively, Defendants) move to dismiss Plaintiff's Labor Law claims and for an order of conditional contractual indemnity against J&J.[1] Plaintiff Cuauhtemoc Lopez cross-moves for leave to amend his bill of particulars to allege violations of additional Industrial Code provisions and for summary judgment against LMA

[1] While the notice of motion only references Messrs. Lamb and Stutzman, it is clear from the papers and from court conferences that Defendants are seeking to dismiss the complaint in its entirety.

Group, Inc. on his Labor Law 240 and Labor Law 241(6) claims. The motions and cross-motion are decided as set forth below.

## BACKGROUND

Plaintiff was injured when he fell through an unprotected floor opening at a construction site at 397 Bleecker Street in Manhattan. He timely commenced this action against the Defendants on April 7, 2015. In turn Defendants filed the third-party complaint against J&J on July 6, 2016. In his complaint Plaintiff alleges that his injuries were the result of Defendants' Labor Law violations. The third-party complaint asserts a common law claim for contribution and a contractual indemnification claim.

It is undisputed that the alleged subcontract between LMA and J&J was not signed by either party.[2] Notwithstanding, LMA argues that both sides were operating under the terms of the subcontract when Plaintiff was injured and that they are bound by its terms. In relevant part, the subcontract provides:

> Subcontractor will furnish all labor, materials, supervision, and items required for the proper and complete performance of the Work . . .
>
> Subcontractor shall be liable for any damages incurred by LMA as a consequence of the failure by Subcontractor to comply with the Subcontract.
>
> To the fullest extent permitted by law, Subcontractor shall indemnify and hold harmless the Owner and LMA Group and their agents and employees from and against all claims . . . arising out of or resulting from the performance of the Work, provided that any such claims, damages, losses or expenses are . . . caused in whole or in part by any negligent act or omission of the Subcontractor . . . .

In support of its position LMA submits the deposition testimony of Russell Bukharin[3], who was LMA's manager for the Bleecker Street renovation project, as well as a number of emails between LMA and J&J representatives in the days leading up the accident. Mr. Bukharin testified that he had dealt with J&J many times prior to this project and that they always operated under the

[2] Defendants' exhibit E.

[3] Defendants' exhibit H (Bukharin Deposition).

same basic agreement. With respect to the Bleecker Street project, a June 5, 2013 email from Mr. Bukharin to LMA's foreman (Exhibit F, p. 5) indicates his belief that the subcontract price had been set and that a draft of the subcontract had been sent to J&J for approval. Two days later, on June 5, 2013, Mr. Bukharin received an invoice from J&J seeking a 50% deposit of $17,272.75 for their work (*id.* p. 7). This is precisely 50% of the contract price set forth in the subcontract.

J&J owner Jose Santiago was deposed on February 2, 2017.[4] He confirmed that LMA hired J&J between five and ten times prior to the Bleecker Street project. If LMA decided to use J&J for a project and the contract price was agreed upon in principal, LMA forwarded J&J a standard two-page agreement for signature. J&J would then send a deposit demand for 50% of the contract price (Santiago Deposition, pp. 12-14, 20-22). An email chain was marked as evidence at Mr. Santiago's deposition (exhibit F). LMA argues that a June 5, 2013 email in the chain from J&J to LMA is proof that the parties were operating under a contract: "Attached is a deposit invoice for 397 Beeker st [sic] that we will be starting tomorrow. Deposit is for 50% of contract. We should be at the jobsite tomorrow between 10:30-11am. Please let us know when a check will be available for us to pick up. Thanks and looking forward to working with you guys on this project. . . ."

Mr. Santiago confirmed that the custom and practice between LMA and J&J would be for LMA to issue a draft contract and for JJ then to issue a deposit invoice for 50% of the contract price. He testified that it was his intention to sign the agreement and that he was paid by LMA after the work was completed (Santiago Deposition pp. 24-25, 32). Consistent with the subcontract, J&J also obtained Workers Compensation and General Liability Insurance (*id.* pp. 33-38). The certificates list LMA as an additional insured.[5]

[4] Defendants' exhibit I (Santiago Deposition).

[5] Defendants' exhibit J.

Mr. Santiago visited the construction site before his company started there. He observed openings in the floor and barriers around certain areas which he believed were installed by LMA employees (Santiago Deposition pp. 50, 66-68):

Q. When you say that you had to patch the holes, they're literally on the floor? At that project there was already an existing hole there.

A. Yes. . . . Basically, you see beams exposed and there is space between the beams.

Q. Got it. So do you have to remove the actual flooring to do this or no?

A. At that particular project there was already an existing hole there.

Q. What was the existing hole from?

A. That's from the GC. They had done some demo. I'm not exactly sure what was there before.

* * * *

Q. Does your company have any safety devices on the job site, netting, walls, toeboards, things of that nature, to make and block off any openings on the floor?

A. That was supposed to be provided by the GC.

Q. Did they, in fact, provide any of that stuff? Would you not know or was it not there?

A. It was there before we started the job. I'm not sure if after we started the job it was taken out.

Q. How do you know it was there before you started?

A. Because I looked at it myself.

Q. When you went there before you started the job, did you see any openings in the floor?

A. I saw some openings in the floor.

Q. Can you describe what you saw?

A. Rectangular shaped holes in various locations . . . One of them I just remember off the top of my head was a rectangular shape. It could be maybe like 2 feet by 6, 7 feet long.

Q. Where was that located?

A. Right up the stairs. Second floor by the – between the living room and I don't even know what the next room is called. It's coming out of the living room to the other room.

Q. Do you know if that's the hole that Mr. Lopez fell in?

A. I'm not sure.

Q. When you saw that hole, was it protected in any fashion?

A. It was protected by 2-by-4's that was bracing it. . . .

Q. Was it laid down over the floor or over the hole on the floor vertically surrounding the hole.

A. Around. . . .

Q. Do you know who created it?

A. I would assume the GC.

Plaintiff was deposed on February 17, 2016.[6] He testified that he had worked for J&J for some time, but the day of his accident was his first day on the jobsite at 397 Bleecker Street. Plaintiff was assigned to assist in the demolition process by removing nails from the wooden floor beams. As he moved from beam to beam his left leg would be on a beam that had yet to be removed and his right leg would be on a portion of the floor where the beam had already been removed and there was nothing beneath him but insulation. At one point he lost his balance, fell into the hole, and hit his head. Fortunately, only part of his body went into the opening and he did not fall to the floor below him. Instead his feet dangled beneath the beams until a colleague was able to assist him (Lopez Deposition pp. 78-83). The Plaintiff described his accident as follows (*id.* pp. 78, 81-83):

Q. Tell me how your accident happened.

A. I was squat [sic] down pulling out nails. Moved in a very peculiar way my right leg, and I ended up in a zone where it was not floor anymore, it was kind of an insulation. I fell down, down inside that area, and I was – ended up hanging or dangling from my left leg to the degree that my both arms [sic] were stuck between the two beams. At that -- in the heat of the moment, I hit my head.

* * * *

Q. Now, at some point, did you lose your balance on the beams?

A. Yes.

Q. What, if anything, caused you to lose your balance? . . .

A. I do not know. . . .

Q. Now, when you fell to the right, were there beams to the right of you also?

A. Yes, also.

Q. Did your body then go in between two beams?

A. Correct.

Q. Which part of your body went between the beams first?

A. My -- the right side of my body alongside with my right knee fell down first. . . .

[6] Plaintiff's exhibit 1 (Lopez Deposition).

Q. Did your left leg go fully through the two beams?

A. No, because I was managing to hold myself with my two arms. Meanwhile my left leg was twisted over there.

Lee Manners was also deposed on behalf of LMA.[7] He testified that the renovation project involved a town house owned by defendants Lamb and Stutzman. LMA was hired as the general contractor, which then hired subcontractors to perform the actual work. According to Mr. Manners LMA had no control or input over the manner in which the subcontractors performed their tasks and did not manage site safety issues. He conceded that there was no signed copy of the subcontract with J&J (Manners Deposition pp. 11, 21-23, 80).

**DISCUSSION**

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

[7] Defendants' exhibit D (Manners Deposition).

**I. Plaintiff's Labor Law Claims**

Procedurally, the court rejects both Plaintiff's and Defendants' contentions that their adversaries' motion papers are untimely and/or procedurally defective. The court met with the parties numerous times to discuss these motions and gave each party a full opportunity to put in papers. As such the court has searched the record in its entirety in deciding these summary judgment motions and will consider each claim on its merits.

**A. Homeowners' Exemption – Lamb and Stutzman**

Both Labor Law 240(1) and Labor Law 241(6) exempt owners of one or two-family dwellings from liability where they do not direct or control the injury-causing work. *Lombardi v Stout*, 80 NY2d 290, 296-97 (1992); *Cannon v Putnam*, 76 NY2d 644, 649 (1990). The exemption should apply where it is clear the dwelling is used solely as a one or two-family dwelling and the homeowner does not control the work. *Putnam v Karaco Indus. Corp.*, 253 A.D.2d 457, 458 (2d Dept 1998). Here, an affidavit sworn to jointly by Messrs. Lamb and Stutzman[8] establishes their *prima facie* entitlement to summary judgment. They aver that 397 Bleecker Street was their principal residence and that the upper floors where the Plaintiff worked were being renovated "solely for residential purposes." They did not direct, supervise, or control the contractors, provide them with any equipment or tools, and had no knowledge of the Plaintiff or his activities.

The issue is Plaintiff's claim that the building was partially used for commercial purposes, which Defendants partially concede: "While the first floor of the town house does have a commercial purpose, all floors above the first floor are strictly residential, no commercial activity of any kind occurs above the first floor." In this regard, it is settled New York law that owners cannot benefit from the homeowners' exemption if the property is used "entirely and solely for commercial purposes." *Van Amerogen v Donnini*, 78 NY2d 880, 882 (1991). But it is equally settled that a

[8] Defendants' exhibit K.

mixed-use home can qualify for the homeowner exemption. In *Bartoo v Buell*, 87 NY2d 362, 368 (1996), the Court of Appeals noted that "a residence that houses a business may nevertheless retain its character as a home" and thus still qualify for the homeowner exemption. The standard is whether the contracted for work "directly relates to the residential use of the home, even if the work also serves a commercial purpose". *Id.*; *see also Khela v Neiger*, 85 NY2d 333, 337 (1995) ("determination whether the exemption is available to an owner in a particular case turns on the site and purpose of the work."). For example, a homeowner who hires someone to paint a living room is protected by the exemption even though the homeowner also maintains a business on the property. *See Cannon v Putnam*, 76 NY2d 644, 649 (1990); *see also Umanzor v Charles Hofer Painting & Wallpapering, Inc.*, 48 AD3d 552, 553 (2d Dept 2008). The exemption has also been applied to shingling work being performed on the roof of a building that housed a business on the first floor because the homeowners occupied the second and third floor as their residence. *See Johnson v Fox*, 268 AD2d 782 (3d Dept 2000).

This case is virtually indistinguishable from the mixed-use cases cited above and as such the court finds that Messers. Lamb and Stutzman qualify for the homeowner exemption. Plaintiff's argument that the residential floor repair somehow might be related to the commercial space is not supported by the record.

Although the homeowner exemption is unavailable as a defense to liability under Labor Law 200 or for common-law negligence, the standard for liability on these two bases is the same as for the exemption. Inasmuch as the evidence points to Messers. Lamb and Stutzman having no supervisory control over the construction site and/or the specific activity that caused Plaintiff's injury, they are entitled to summary judgment dismissing all claims against them.

**B. Labor Law 241(6)**

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 [New York State Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a Labor Law 241(6) cause of action, Plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of his accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

The Industrial Code provisions in Plaintiff's original bill of particulars do not apply to this case (12 NYCRR 23-1.7(a), overhead hazards; 22 NYCRR 23-1.7(d)-(e), slipping and tripping hazards)[9]. Plaintiff now moves to amend his bill of particulars to allege violations of 12 NYCRR 23-1.4(b)(13)[10] (Construction Work) 12 NYCRR 23-1.5[11] (General Responsibility of Employers),

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[9] To the extent Plaintiff argues that these sections do apply, the court finds otherwise. The facts do not support a claim that Plaintiff was injured due to a falling object or because of a slipping or tripping hazard.

[10] "Construction work. All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

[11] 12 NYCRR 23-1.5, entitled "General responsibility of employers", provides in relevant part that "[a]ll places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity"

12 NYCRR 23-1.7(b)[12] (Protections from General Hazards), and 12 NYCRR 23-3.3(c), (j) and (l)[13] (Inspections and Floor Openings).

Of these, Industrial Codes 23-1.4 and 23-1.5 are not sufficiently specific to support a Labor Law 241(6) claim. *See Gray v Balling Constr. Co.*, 239 AD2d 913, 914 (4th Dept 1997); *see also Escurra v Liberty Contr. Corp.*, 2009 NY Misc. LEXIS 4495, *13 (Sup. Ct. NY Co. Dec. 21, 2009, Shafer, J.). And while Industrial Codes 23-1.7 and 23.3.3 are sufficiently specific to support a Labor Law 241(6) claim (*Amato v State of New York*, 241 AD2d 400, 402 [1st Dept 1997]; *Freitas v New York City Tr. Auth.*, 249 AD2d 184, 185 [1st Dept 1998]), neither apply to the facts of this case.

In *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 (1st Dept 2009), the First Department held that a 10-to-12-inch gap is not a "hazardous opening" for purposes of Industrial Code 23-1.7. *See also Brown v New York-Presbyterian HealthCare Sys., Inc.*, 123 AD3d 612, 613 (1st Dept 2014) (Industrial Code 23-1.7 applies to "openings that persons can fall through in their entirety."); *Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 (regulation applies to openings of "significant depth and size"). This case is indistinguishable from *Urban*. The Plaintiff testified that the width between the beams where he fell was between 10 and 12 inches and that he did not fall completely through

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[12] 12 NYCRR 23-1.7(b), entitled "Protection from general hazards", provides in relevant part that "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part."

[13] 12 NYCRR 23-3.3 provides:

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

(j) Floor openings . . . . During the demolition of any building or other structure by hand, the aggregate area of openings in the floor immediately beneath the floor being demolished shall not exceed 25 percent of the total area of such floor.

(l) Safe footing required. Any person working above the first floor or ground level in the demolition of any building or other structure shall not be suffered or permitted to use accumulated debris or piled materials as a footing in the performance of his work. Every person shall be provided with safe footing consisting of sound flooring, planking not less than two inches thick full size, adequately supported exterior grade plywood at least three-quarters inch thick or other material of equivalent strength.

the opening to the floor below him (Defendants' exhibit C, pp. 73, 78). In addition, the opening was transient in that the hole only came to exist as a result of Plaintiff's own work removing the floor planks.

A 12 NYCRR 23-3.3(c) violation occurs where the hazard arises from structural instabilities caused by the progress of demolition but not by the performance of the work itself. *See Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 92 (1st Dept 2012). For example, in *Medina v City of New York*, 87 AD3d 907 (1st Dept 2011), plaintiff was working in a subway tunnel as part of a five-year signal improvement contract. The First Department found a 12 NYCRR 23-3.3(c) violation had occurred where a section of subway rail that plaintiff was cutting sprang free and fell on him. Another example is *Ortega v Everest Realty LLC*, 84 AD3d 542 (1st Dept 2011) in which the plaintiff was injured when the wall of an aluminum shed fell on him as he was sawing through it. The court found that there was an issue of fact whether the wall fell as a result of structural instability caused by the vibrations. Here, unlike *Medina* and *Ortega*, it is evident that Plaintiff's injuries did not flow from any latent structural weaknesses in the building.[14]

Accordingly, Plaintiff's motion to amend his bill of particulars is denied, and Plaintiff's Labor Law 241(6) claims are dismissed, in their entirety.

**C. Labor Law 240(1)**

Like Labor Law 241(6), Labor Law 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and owners, general contractors, and their agents who breach that duty may be held liable regardless of whether they actually exercised supervision or control over the injury-causing work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Labor Law 240 provides:

[14] Defendants assert that the provisions of 12 NYCRR 23-3.3 regarding floor openings and safe footings do not apply to this case. Plaintiff does not point to any evidence to the contrary.

[11]

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, 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.

The "purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross*, 81 NY2d at 500. Labor Law 240(1) is limited to specific gravity-related accidents, such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501.

Defendants argue that Plaintiff's injuries cannot be deemed gravity-related because the hole was not big enough for him to fall through to the floor below. *See Keavey v NY State Dormitory Authority*, 6 NY3d 859 (2006); *Vitale v Astoria Energy II, LLC*, 138 AD3d 981 (2d Dept 2016); *Avila v Plaza Construction Corp.*, 73 AD3d 670 (2d Dept 2010). *Keavey* affirmed a Fourth Department ruling that a six-inch gap between insulation boards stacked eight-feet high was not covered by Labor Law 240(1). In *Vitale*, plaintiff was walking across the top of a rebar grid which had 12-inch by 12-inch square openings when he lost his balance and his left leg fell through one of the openings up to his groin. The court found that the incident did not involve an elevation-related hazard because the openings "were not of a dimension that would have permitted the plaintiff's body to completely fall through and land on the floor below." *Id.* at 983. Like the plaintiff in *Vitale*, the plaintiff in *Avila* was standing on top of a rebar grid when he was struck by an iron clamp and his leg fell into the opening. His Labor Law 240(1) claim was dismissed on the same grounds, i.e., that the opening was too small for his body to fall through the opening. *Id.* at 671.

In addition to the cases cited by Defendants above, this court is persuaded by *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421 (2d Dept 2001), in which a plaintiff who was carrying plywood slipped and his leg fell into a 12-inch by 16-inch hole in the floor. There was no covering over the hole, and no barricade around it. The Second Department dismissed plaintiff's lawsuit, finding that

"a hole of this dimension does not present an elevation-related hazard to which the protective devices enumerated in the statute are designed to apply." *Id.* at 422; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Piccullo v Bank of N. Y. Co.*, 277 AD2d 93 (1st Dept 2000). Rather, the hole presented "the type of peril a construction worker usually encounters on the job site." *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 (1995).

Notwithstanding this binding authority, Plaintiff submits that he is entitled to summary judgment on his Labor Law 240(1) claim because he was assigned to work without any safety measures to prevent him from falling. To be sure, there are many cases where Labor Law 240(1) was held to be violated when a worker fell through a floor or open planking. *See Gove v Pavarini McGovern, LLC*, 110 AD3d 601 (1st Dept 2013); *Ramirez v MTA*, 106 AD3d 799 (2d Dept 2013); *Matthews v Bank of America*, 107 AD3d 495 (1st Dept 2013); *Mouta v Essex Market Dev. LLC*, 106 AD3d 549 (1st Dept 2013); *Babiack v Ontario Exteriors, Inc.* 106 AD3d 1448 (4th Dept 2013); *Durando v City of New York*, 105 AD3d 692 (2d Dept 2013); *Burke v Hilton Resorts Corp.*, 85 AD3d 419 (1st Dept 2011); *Kielar v Metropolitan Museum of Art*, 55 AD3d 456 (1st Dept 2008). But none of these cases compare to the case at bar. They involved falls from ladders, unguarded platforms, catwalks, plywood platforms, skylight opening, and large covered holes, not a narrow opening created by the injured worker himself.

Even if this could be considered an elevation-related hazard contemplated by Labor Law 240(1), Plaintiff cannot demonstrate proximate causation since Plaintiff has not shown that any of the devices enumerated in the statute would have prevented his injuries. For example, requiring Defendants to install a catch platform below the open flooring as Plaintiff argues would not have made a difference since Plaintiff did not actually fall to the ground. So too would it would have been illogical to somehow barricade the area, since Plaintiff's work required him to deconstruct the floor. In sum, Plaintiff's misstep into the open area between the beams did not result from an

elevation-related hazard, but rather resulted from an "ordinary and usual peril" not covered by the Labor Law.

**D. Labor Law 200**

Labor Law 200 codifies the common law duty imposed upon owners and general contractors to provide a safe workplace.[15] *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law 200 claims are generally predicated upon a two-prong showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 (1st Dept 2006).

Plaintiff states that he received his assignments from his J&J supervisor, not LMA's foreman. There is also no evidence that any LMA knew or should have known of any dangerous condition at the construction site on the date of the accident. Accordingly, Plaintiff's Labor Law 200 claims and common-law negligence claims are without merit. J&J's assertion[16] that this issue should be decided by a jury because an LMA representative was on-site at all times is without merit. This is merely indicative of LMA's general supervisory role, and is not enough to raise a triable issue of fact. *See Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 (1st Dept 2014); *Fiorentino v Atlas Park LLC*, 95 AD3d 424 (1st Dept 2012); *Foley v Consolidated Edison Co. of*

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[15] Labor Law 200 provides in relevant part that "[a]ll 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."

[16] Plaintiff does not oppose this portion of Defendants' motion.

*N.Y., Inc.*, 84 AD3d 476, 477 (1st Dept 2011); *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 (1st Dept 2007).

**II. Third-Party Claims[17]**

"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]). The party seeking contractual indemnification need only establish that it was free from any active negligence and was held liable solely by virtue of its vicarious liability. *De La Rosa v Philip Morris Mgmt. Corp.*, 303 AD2d 190, 193 (1st Dept 2003). Here, this means that LMA must establish that its liability, if any, is solely vicarious arising from the non-delegable duty imposed by the Labor Law. *See Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 64 (1st Dept 1999).

J&J argues that the indemnification provision invoked by LMA is not applicable because there was no evidence that the contract was in effect on the day of the accident. According to J&J, negotiations were ongoing because this was a "rush job" and LMA wanted work to begin even though the subcontract was not fully executed. LMA concedes that there is no evidence the subcontract was ever executed but argues that J&J is nonetheless bound by its terms given the parties' respective actions. In support LMA cites to the Court of Appeals decision *Flores v The Lower East Side Service Center*, 4 NY3d 363 (2005). In *Flores* a building owner negotiated an agreement with a general contractor to perform renovation work. The proposed agreement contained a provision requiring the contractor to indemnify the owner for injuries arising out of the work. In accordance with the agreement, the contractor purchased liability insurance and obtained

[17] The third-party claims must be addressed despite the court's ruling on Plaintiff's Labor Law claims given Defendants request for attorneys' fees.

payment and performance bonds. One of the contractor's employees sustained an eye injury on the job and sued the building owner. The owner then filed a third-party action against the contractor. The trial court and Appellate Division found that the contractual indemnification clause in the contract was unenforceable because the contractor did not sign the document. The Court of Appeals reversed, finding that the contractor had admitted that it acted in conformity with the contractual requirements by purchasing bonds in the amounts required in the contract. In so doing the Court reiterated its long-standing position that a contract may be valid even if it is not signed so long as it does not implicate the statute of frauds or another statute that imposes a writing requirement. *Id.* at 368. The Court's analysis referenced its earlier decision in *Brown Bros. Elec. Contrs. v Beam Constrs. Corp.* 41 NY2d 397, 399-400 (1977), in which it held:

> "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds . . .
>
> And, while it is the responsibility of the court to interpret written instruments . . . , where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises"

Thus, under the analysis in *Brown*, "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound." *Flores*, 4 NY3d at 369.

In this case there is enough evidence of a meeting of the minds to give rise to an inference that there was a binding contract with an enforceable indemnification provision. The agreement sets forth the contract price as $34,545.50. After LMA allegedly sent it for approval, J&J appears to have immediately sent back an invoice for 50% of the contract price, or $17,272.75. This practice – a draft contract followed by a request for a 50% deposit – was confirmed by Mr. Santiago and Mr. Bukharin as being consistent with the prior dealings between the parties. Mr. Santiago testified, and J&J does not dispute, that J&J was paid the full contract price after the work was completed. As required by the subcontract, J&J obtained Workers' Compensation and General Liability insurance policies which named LMA as an additional insured. Finally, Mr. Santiago testified that he

intended to execute the agreement so long as the "numbers matched", which they did. *See Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 (2d Dept 2016); *Gallagher v Long Is. Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 (2d Dept 2014); *Ruane v. Allen-Stevenson School*, 82 AD3d 615, 616 (1st Dept 2011); *Dwyer v Central Park Studios, Inc.*, 2016 N.Y. Misc. LEXIS 4934, *6 (Sup. Ct. NY Co., Mar. 24, 2016, Silver, J.).

But just as there were enough facts to create a reasonable inference that there was a binding contract between LMA and J&J, so too can a reasonable inference be drawn that the parties were still negotiating the terms of their agreement when the Plaintiff was injured. In this regard, it bears repeating that LMA has never been able to produce a fully executed agreement, nor does it claim that one exists. The emails and other documents do not indicate when the parties intended for the terms of the subcontract to go into effect. Perhaps this is because, as J&J contends, the parties were still working out the terms in the days before Plaintiff's accident. This is borne out by a June 5, 2013 email from Mr. Bukharin to Mr. Manners in which he states that he was trying to negotiate J&J's deposit down to 30%.[18] While J&J does not dispute that it was paid the contract price, there is nothing to show when and how much J&J received as a deposit. If in fact it received its deposit after Plaintiff was injured, or an amount different from the 50% requested, this would call into question LMA's claim that the subcontract was in effect at the time of the accident.

Finally, there is no evidence to support Defendants' claims against J&J for contribution and common-law indemnification. An employer is entitled to the protections of WCL 11[19] if it provides

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[18] Defendants' exhibit F.

[19] WCL 11 provides that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

the injured employee with workers' compensation coverage pursuant to an insurance policy that was in effect at the time of the accident. *See Hyman v Agtuca Realty Corp.*, 79 AD3d 1100 (2d Dept 2010); *see also* WCL 10.[20] If an employer maintains a valid workers' compensation insurance policy, claims against the employer are generally barred unless a written contract was entered into prior to an accident by which the employer expressly agreed to contribution or indemnification or the employee sustained a "grave injury." WCL 11. The definition of what constitutes a grave injury is strict and limited. *See Fleming v Graham*, 10 NY3d 296, 300 (2008).

Nothing in Plaintiff's bill of particulars[21] can be considered a grave injury. This is not disputed by Plaintiff, Defendants, or anything else in the record. Accordingly, J&J's motion to dismiss Defendants' third-party claim for contractual indemnification is denied, LMA's motion for summary judgment on its contractual indemnification claim is denied, and Defendants' third-party claims for contribution and common-law indemnification are dismissed.

## CONCLUSION

In light of all of the foregoing, it is hereby

ORDERED that third-party defendant's motion to dismiss (MS 002) is granted in part and denied in part; and it is further

ORDERED that Defendants' third-party claims for contribution and common-law indemnification are severed and dismissed; and it is further

ORDERED that Defendants' third-party claim for contractual indemnification shall continue; and it is further

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[20] WCL 10 provides in relevant part that "[e]very employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . . ."

[21] See J&J's exhibit F.

ORDERED that Defendants' motion for a conditional order of summary judgment on their contractual indemnification claim against the third-party defendant is denied; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's claims against them is granted in its entirety; and it is further

ORDERED that Plaintiff's direct claims are hereby severed and dismissed; and it is further

ORDERED that counsel in the third-party action appear for a compliance conference in Part 30 on Monday, March 11, 2019 at 9:30AM.

This constitutes the decision and order of the court.

**ENTER:**

**DATED:** 2-1-19

**SHERRY KLEIN HEITLER, J.S.C.**