SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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ANDRZEJ SZPILEWSKI,

Plaintiff,

- v -

31 EAST 37TH STREET CORP., RENOVATION BY MY HOME NY INC., AND, RENOVATION BY MY HOME, INC.,

Defendants.

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INDEX NO. 159790/2015

MOTION DATE

MOTION SEQ. NO. 003, 004, 005, 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 159-173, 220-240, 251, 252, 256, 267, 269

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 174-198, 241, 244, 247, 249, 253, 261-266, 270

were read on this motion to amend caption/pleadings.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 140-158, 242, 245, 250, 254, 268, 271, 273, 282

were read on this motion for partial summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 199-219, 243, 246, 248, 255, 257-260, 272, 274- 280

were read on this motion for summary judgment.

By notice of motion, defendant/second third-party plaintiff Renovation By My Home, Inc., moves pursuant to CPLR 3212 for an order summarily dismissing plaintiff's common law negligence and Labor Law §§ 200, 241(6), and 240(1) claims and all cross claims against it (mot. seq. three). Plaintiff, third-party defendant Carmen Bowser, and fourth-party defendant RDM Renovation Corp. oppose the motion; third-party plaintiff 31 East 37th Street Corp. partially supports the motion.

By notice of motion, Bowser moves pursuant to CPLR 3025(b) for an order granting her leave to amend her answer to assert an affirmative defense, and upon amendment, pursuant to CPLR 3212 for an order summarily dismissing 31 East's third-party complaint and any cross claims against her, and granting her summary judgment on her cross claims against Renovation (mot. seq. four). 31 East and Renovation oppose.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting him partial summary judgment against 31 East and Renovation on his Labor Law § 240(1) claim (mot. seq. five). 31 East and Renovation oppose.

By notice of motion, 31 East moves pursuant to CPLR 3212 for an order dismissing plaintiff's Labor Law § 200 and common law negligence claims against it, and granting it summary judgment against Bowser and Renovation for contractual indemnification (mot. seq. six). Bowser and Renovation oppose; plaintiff does not oppose dismissal of these claims.

At oral argument, plaintiff consented to the dismissal of his Labor Law §§ 200 and 241(6) and common law negligence claims against 31 East and Renovation. (NYSCEF 282). Thus, plaintiff's only remaining claim is pursuant to Labor Law § 240(1).

The motions are consolidated for disposition.

I. BACKGROUND

A. Pleadings

In his complaint, plaintiff alleges that on August 18, 2015, he was working on a construction project at 50 Park Avenue in Manhattan, when, while working in an apartment on the fourth floor of the building, he fell from a ladder. He asserts that 31 East owned and/or managed the premises and that it retained Renovation to act as the general contractor for the project, and plaintiff's employer, RDM Renovation Corp., to perform certain work on the

project. Plaintiff asserts claims for violations of Labor Law §§ 200, 240(1), and 241(6) and common law negligence. (NYSCEF 1).

By answer dated November 20, 2015, 31 East denies plaintiff's allegations and interposes cross claims against Renovation for failure to procure insurance and contractual and common law indemnity. (NYSCEF 8).

In November 2015, 31 East commenced a third-party action against Bowser, the proprietary lessee of apartment 4G at the premises, where the project was taking place, asserting claims for failure to procure insurance and indemnity. (NYSCEF 19).

In January 2016, Renovation answered the complaint and asserted cross claims against 31 East and Bowser for contribution and indemnification. (NYSCEF 26). Renovation also commenced a fourth-party complaint against RDM, setting forth claims for failure to procure insurance and indemnity. (NYSCEF 28).

Bowser answered the complaint and asserted cross claims against Renovation for common law and contractual indemnification, common law negligence, and failure to procure insurance, and counterclaims against 31 East for common law and contractual indemnification and common law negligence. (NYSCEF 32).

2. Pertinent documents

In 2015, Bowser purchased cooperative apartment 4G at the premises, and became party to the corporation's proprietary lease. As pertinent here, the lease provides, within a section of the lease entitled "Damage to Apartment of Building," that

> Lessor agrees to use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against the Lessee; and, to the extent that any loss or damage is covered by the Lessor by any insurance policies which contain such waiver of subrogation, the Lessor releases the Lessee from any liability with respect to such loss or damage. In the event that Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance

> policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage.

(NYSCEF 182).

Another provision requires the lessee to indemnify the lessor from all liability, loss, damage and expense arising from injury to person or property occasioned by the lessee's acts or omissions or those of his or her contractors. However, the section does not apply "to any loss or damage when the Lessor is covered by insurance which provides for waiver of subrogation against the Lessee." (*Id.*).

On March 5, 2015, Bowser signed an agreement with 31 East, by which Bowser receives permission to alter apartment 4G and is required to obtain from her contractors specific types of insurance, naming 31 East and Bowser as additional insureds. On her part, Bowser agrees to indemnify 31 East from any and all claims, loss, damage, bodily injury or liability arising out of or in connection with the planned work, and any related expenses or fees, including attorney fees. She also releases 31 East from all liability or loss resulting from performance of the work. The agreement is subordinate to the parties' lease. (NYSCEF 184).

On March 11, 2015, Bowser retained Renovation to perform work on her apartment, and as part of their agreement, Renovation agrees to indemnify 31 East from and against all claims, losses, costs and liabilities on account of injury to any person occurring or arising out of or in connection with the performance of the work, unless such injury was caused by the affirmative negligence of the person or party indemnified. (NYSCEF 198, 199, Exh. S). Renovation also provides Bowser with a certificate of insurance for certain insurance procured by it effective between 2014 and 2015 or 2016, listing as additional insureds 31 East's managing agent and Bowser. (*Id.*).

On August 3, 2015, Renovation hired RDM to work on the project. Their agreement

incorporates all of the terms and provisions of the agreement between Bowser and Renovation, to which RDM agrees to be bound. RDM also agrees to purchase and maintain insurance to protect it, all entities that Renovation is required to indemnify and hold harmless, and Bowser, from all claims which may arise out of or result from RDM's operations, work and responsibilities for the project, including claims for injuries sustained by RDM's employees. RDM is also required to indemnify Renovation and Bowser for any loss sustained by RDM's failure to comply with laws, rules, and regulations related to its performance under the agreement, including any claims, causes of action or lawsuits arising out of RDM's performance of work. Moreover, in any claim by an employee of RDM against any person or entity indemnified under the agreement, the indemnification obligation is not limited to an amount or type of damages, compensation or benefits payable by or to RDM under the workers' compensation act, disability benefit acts, or other employee benefit acts. The parties dispute the date on which the subcontractor's agreement was signed by RDM. (NYSCEF 168; 220; 234)

31 East maintained its own insurance policy, and in the section related to general liability insurance, it is provided that if the insured has rights to recover all or part of any payment made under the insurance policy, those rights are transferred to the insurer, and the insured must do nothing after the loss to impair them. (NYSCEF 266). In other words, the insurer does not waive its right to subrogation.

None of the documents submitted by any of the parties reflects the name of or refers to defendant Renovation.

II. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of

fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

A. Plaintiff's Labor Law § 240(1) claim

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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, hoist, stay, ladder 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute imposes absolute liability on building owners and their agents for workplace injuries. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). Its purpose "is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49

[1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Here, it is undisputed that the ladder, even if not defective, was unsecured at the time of plaintiff's accident and that no other safety device was provided to him to prevent his fall, which constitutes a violation of Labor Law § 240(1). (*See Nieto v CLDN NY LLC*, 170 AD3d 431 [1st Dept 2019] [when plaintiff injured by fall from ladder after he lost balance, it "does not avail defendants that the ladder was not defective, since it is undisputed that the ladder was unsecured"]; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1st Dept 2018] [well-settled that failure to secure ladder to ensure it stays steady and erect while used constitutes violation of Labor Law § 240(1)]; *Hill v City of New York*, 140 AD3d 568 [1st Dept 2016] [liability established by plaintiff's testimony that unsecured ladder wobbled, causing him to fall; irrelevant whether plaintiff fell because wrench he held had fallen, causing him to lose his balance]; *Caceres v Standard Realty Assocs., Inc.*, 131 AD3d 433 [1st Dept 2015], *app dismissed* 26 NY3d 1021 [plaintiff established *prima facie* violation of section 240(1) as "no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill, and [] plaintiff's coworker was not stabilizing the ladder at the time of the fall."]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004] [worker injured when ladder fell not required to show that ladder was defective]).

Defendants' allegation that plaintiff's accident was caused by his own loss of balance or when he leaned too far to one side does not constitute a defense to a violation of section 240(1). (*See White v 31-01 Steinway, LLC*, 165 AD3d 449 [1st Dept 2019] [even if there was dispute as

to how accident occurred, no issue raised as to whether plaintiff was proximate cause of his fall from ladder, as it was undisputed that plaintiff fell off ladder, that ladder was unsecured, and that no other safety device was provided to prevent him from falling]; *Fletcher v Brookfield Props.*, 145 AD3d 434 [1st Dept 2016] [as it was undisputed that ladder kicked out because it was unsecured, whether plaintiff descended dangerously by carrying equipment in his arms irrelevant]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504 [1st Dept 2013] [as no adequate safety device provided to prevent plaintiff's fall from ladder, irrelevant whether he stood on top of ladder]). As in *Lipari v AT Spring, LLC*, "[t]his is not a case where [the] plaintiff simply lost his balance and fell from a secured ladder." (92 AD3d 502 [1st Dept 2012]).

Plaintiff is thus entitled to summary judgment on liability on his Labor Law § 240(1) claim against defendants 31 East and Renovation.

B. Renovation's third-party claim against RDM (mot. seq. three)

At oral argument, Renovation conceded that there exists a triable issue as to whether it is entitled to contractual indemnity from RDM. (NYSCEF 282).

C. Bowser's motion (mot. seq. four)

1. Motion to amend

Bowser seeks leave to amend her answer to assert as an affirmative defense that 31 East waived its subrogation claim against her pursuant to language in the parties' proprietary lease and as 31 East's insurance covers plaintiff's claim.

31 East denies subrogation, observing that the contractual provision relating to personal injury requires that 31 East release Bowser from liability to the extent that its insurance provides for a waiver of subrogation against her, but that its insurance policy does not permit it to waive subrogation for personal injury claims. In any event, 31 East observes that the parties' alteration

agreement contains a separate indemnity provision, which has not been and may not be waived. (NYSCEF 261).

While parties to an agreement may waive the right of subrogation, a waiver of subrogation clause may not be enforced beyond the scope of the context in which it appears. (*Travelers Indemn. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812 [2d Dept 2013]; *Continental Ins. Co. v Faron Engraving Co., Inc.*, 179 AD2d 360 [1st Dept 1992]). As the general liability insurance policy does not permit 31 East to waive subrogation against Bowser, the waiver of subrogation provision in the proprietary lease is inapplicable. (*See Viacom Intern., Inc. v Midtown Realty Co.*, 193 AD2d 45 [1st Dept 1993] [finding that subrogation provision in lease applied only to tort liability, not contractual claims at issue]; *Continental Ins. Co.*, 179 AD2d at 361 [waiver of subrogation did not apply as clause containing waiver language applied only to claims related to destruction of demised premises, which was not claim made]).

Bowser's motion to amend to assert an affirmative defense of the waiver of subrogation is thus denied. (*See Reyes v BSP Realty Corp.*, AD3d , 2019 WL 1522620, *1 [1st Dept 2019] [denying leave where plaintiff's allegations "could not be established as a matter of law"]).

2. Motion for summary judgment

Bowser contends that Renovation is contractually obligated to indemnify it for plaintiff's accident, and as her liability, if any, is vicarious, she is also entitled to common law indemnity from Renovation. Renovation argues that its obligation to indemnify Bowser must be conditioned on whether plaintiff recovers against Renovation in the main action.

As plaintiff is entitled to judgment on his Labor Law § 240(1) claim against Renovation (*see supra*, II.A.), Renovation must indemnify Bowser (*see Lamela v Verticon, Ltd.*, 162 AD3d 1268 [3d Dept 2018] [owner entitled to contractual indemnification from contractor as court had

granted plaintiff judgment on his Labor Law § 240(1) against owner, thus establishing that owner's liability to plaintiff arose from contractor's work on premises and that indemnification provision applied]).

As 31 East did not waive its right to subrogation against Bowser, there is no basis for dismissing its third-complaint against her.

D. Plaintiff's motion for summary judgment (mot. seq. five)

Although it has been determined that plaintiff is entitled to judgment on his Labor Law § 240(1) claim against defendants 31 East and Renovation (*supra*, II.A), absent evidence connecting Renovation to plaintiff's accident, plaintiff is not entitled to judgment against it.

E. 31 East's motion for summary judgment (mot. seq. six)

Plaintiff's claims against 31 East for violations of Labor Law § 200 and common law negligence are dismissed on consent.

1. 31 East's contractual indemnification claims

a. Against Bowser

31 East contends that pursuant to the proprietary lease and alteration agreement, and as 31 East's liability for plaintiff's claim pursuant to Labor Law § 240(1) is purely vicarious and it is free from fault, Bowser must indemnify it from any liability for plaintiff's claim. (NYSCEF 160).

As it has been determined that 31 East did not waive its right to seek indemnity from Bowser for plaintiff's claim against it (*supra*., II.C.2.), Bowser argues that the indemnification clause in the alteration agreement is unenforceable pursuant to General Obligations Law (GOL) § 5-321 as it releases 31 East from liability for its own negligence, and that, in any event, as 31 East has its own insurance, it is not entitled to additional insurance coverage under Bowser's

policy.

In reply, 31 East denies that it is limited to its own insurance policy.

As the proprietary lease requires Bowser to indemnify 31 East, it is irrelevant whether the alteration agreement also requires such indemnity and thus whether the indemnification provision is unenforceable pursuant to GOL § 5-321. In any event, as 31 East's liability is vicarious, enforcement of the provision would not violate the GOL. (*Guzman v 170 W. End Ave. Assocs.*, 115 AD3d 462 [1st Dept 2014]).

As the relevant indemnity provisions do not limit Bowser's liability to costs and expenses for which 31 East may not be reimbursed by insurance, *Diaz v Lexington Exclusive Corp.*, 59 AD3d 341 (1st Dept 2009) and *Arteaga v 231/249 W. 39th St. Corp.*, 45 AD3d 320 (1st Dept 2007), cited by Bowser, are inapposite.

b. Against Renovation

31 East also maintains that Renovation's indemnity agreement with Bowser requires Renovation to indemnify it for plaintiff's injury. Renovation contends that any award of indemnity must be conditional upon a finding of liability against it.

As plaintiff is entitled to judgment on his Labor Law § 240(1) claim against Renovation (*see supra*, II.A.), Renovation must indemnify 31 East (*see Lamela v Verticon, Ltd.*, 162 AD3d 1268 [3d Dept 2018] [owner entitled to contractual indemnification from contractor as court had granted plaintiff judgment on his Labor Law § 240(1) against owner, thus establishing that owner's liability to plaintiff arose from contractor's work on premises and that indemnification provision applied]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that motion sequence three is decided as follows:

(1) Defendant Renovation By My Home, Inc.'s motion for summary judgment is granted as to dismissal of plaintiff's Labor Law §§ 241(6) and 200 and common law negligence claims, and denied as to plaintiff's Labor Law § 240(1) claim;

(2) Defendant's motion for summary dismissal of all cross claims against it is denied; and

(2) Defendant's motion for summary judgment on its third-party claim for contractual indemnification against third-party defendant is denied;

It is further

ORDERED, that motion sequence four is decided as follows:

(1) Third-party defendant Carmen M. Bowser's motion for leave to amend her answer is denied;

(2) Bowser's motion for summary judgment dismissing the third-party complaint and all cross claims against her is denied; and

(3) Bowser's motion for summary judgment on its cross claim for contractual indemnification against defendant Renovation By My Home, Inc. is granted, and Renovation By My Home, Inc. is directed to indemnify Bowser;

It is further

ORDERED, that motion sequence five is granted to the extent of granting plaintiff partial summary judgment on his Labor Law § 240(1) claim against defendants Renovation By My Home, Inc. and 31 East 37th Street Corp., with damages to be determined at trial, and is denied as against defendant Renovation By My Home NY, Inc.; and it is further

ORDERED, that motion sequence number six is decided as follows:

(1) Defendant 31 East 37th Street Corp.'s motion for summary dismissal of plaintiff's Labor Law § 200 and common law negligence claims is granted, and those claims are dismissed as against it;

(2) Defendant 31 East 37th Street Corp.'s motion for summary judgment on its contractual indemnification claim against Bowser is granted, and Carmen M. Bowser must indemnify 31 East 37th Street Corp.; and

(3) Defendant 31 East 37th Street Corp.'s motion for summary judgment on its contractual indemnification claim against Renovation By My Home, Inc. is granted, and Renovation By My Home, Inc. must indemnify 31 East 37th Street Corp.

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5/13/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE