Wojtasiewicz v Chehebar
2019 NY Slip Op 32381(U)
August 7, 2019
Supreme Court, Kings County
Docket Number: 503298/14
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of August, 2019.

PRESENT:

HON. DEBRA SILBER,
Justice.

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JAROSLAW WOJTASIEWICZ and ANETTA WOJTASIEWICZ,

Plaintiffs,

- against -

GABRIEL Y. CHEHEBAR and M.N.C. GENERAL CONTRACTORS CORPORATION,

Defendants.

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M.N.C. GENERAL CONTRACTORS CORP. d/b/a MNC+SONS CONTRACTORS,

Third-Party Plaintiff,

- against -

OLD FASHION WOODWORKING, INC.,

Third-Party Defendant.

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DECISION/ORDER

Index No. 503298/14

Motion Sequence Nos. 11, 12

The following papers number 1 to 8 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6
Reply Affidavits (Affirmations)	7, 8

Upon the foregoing papers, plaintiffs[1] Jaroslaw Wojtasiewicz and Anetta Wojtasiewicz move for an order, pursuant to CPLR 3212, granting them partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against defendant/third-party plaintiff M.N.C. General Contractors Corp. d/b/a MNC+Sons Contractors (MNC). MNC also moves for an order, pursuant to CPLR 3212, granting it summary judgment in the third-party action on its claims for contribution and indemnification against third-party defendant Old Fashion Woodworking, Inc. (OFW).

Background

Plaintiff commenced the instant action on April 16, 2014 by electronically filing a summons and verified complaint against defendant/third-party plaintiff Gabriel Y. Chehebar. Plaintiff claimed therein that Chehebar owns the premises located at 2008 East 4th Street in Brooklyn, and also hired OFW,[2] plaintiff's employer, to perform construction work therein. Plaintiff alleges that on January 8, 2014, he had an accident and was injured while performing construction work in the course of his employment.

The original verified complaint asserts causes of action alleging that Chehebar, a property owner, is vicariously responsible for violations of sections 240 (1), 241 (6) and 200 of the Labor Law. The complaint also alleges that Chehebar violated the common-law duty

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[1] This court will hereinafter use singular references to plaintiff Jaroslaw Wojtasiewicz, the physically injured plaintiff, in this decision and order. Plaintiff Anetta Wojtasiewicz , his wife, asserts a cause of action for loss of services; that derivative claim is immaterial to the instant motions.

[2] Described as a "millwork subcontractor."

to keep his premises reasonably safe. Plaintiff argued that these violations of the Labor Law and breaches of the common-law duty of care proximately caused his injuries, and plaintiff sought damages as a consequence.

Chehebar interposed an answer and subsequently impleaded both MNC and OFW. MNC is the general contractor that was hired by Chehebar to construct a three-story single family house on the premises and who hired OFW to construct a large oak staircase therein. Chehebar's third-party complaint asserted causes of action against MNC and OFW sounding in contribution, indemnity (both contractual and common-law), and breach of the contract which required MNC to maintain a commercial general liability policy that insured Chehebar.

Shortly thereafter, plaintiff filed and served an amended complaint naming MNC as a direct defendant. Plaintiff claimed therein that MNC, a general contractor, is vicariously responsible for violations of sections 240 (1), 241 (6) and 200 of the Labor Law. The complaint also alleges that MNC violated the common-law duty to keep the work site reasonably safe. Plaintiff argues that these violations of the Labor Law and breaches of the common-law duty of care proximately caused his injuries, and plaintiff seeks damages as a consequence.

Subsequently, Chehebar amended his answer in response. Also, MNC interposed an answer in the first-party (main) action. Further, both OFW and MNC answered the third-party complaint; MNC also asserted counterclaims against Chehebar and cross claims against OFW.

Extensive motion practice and discovery ensued. On May 22, 2018, plaintiff filed a note of issue with a trial by jury demand, certifying that discovery is complete and that this matter is ready for trial. More motion practice ensued.[3] Among these motions was Chehebar's motion for summary judgment[4] dismissing all claims asserted against him on the ground that he is an "exempt" owner of a one- or two-family residence who contracted for but did not direct or control the construction/renovation services. By order dated March 6, 2019, this court granted the unopposed motion and dismissed all claims asserted against Chehebar. Also, this court then dismissed Chehebar's third-party complaint (for contribution and indemnity) as moot. The order also endeavored to reorganize the third-party claims among MNC, RVM and OFW.

In response to that decision and order, MNC moved[5] for an order modifying the order, since the second third-party action had been severed from the main action. This court, by order dated May 16, 2019, further reorganized the various third-party claims.

The remaining outstanding motions are plaintiff's motion[6] for partial summary judgment against MNC and MNC's motion[7] for summary judgment against OFW. The court

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[3] MNC subsequently commenced a second third-party action against RVM, a subcontractor hired by MNC, responsible for installing the subflooring at the subject project. This second third-party action was later severed by order of this court and was subsequently dismissed.

[4] Motion sequence number 13 in this action, the "main action."

[5] Motion sequence 14.

[6] Motion sequence 11.

[7] Motion sequence 12.

took these two motions on submission and reserved decision. The court now decides these two motions.

Plaintiff's Arguments Supporting His Motion for Partial Summary Judgment (MS # 11)

In support of his motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against MNC, plaintiff first points out that this statute imposes on (among others) contractors, such as MNC, a non-delegable duty to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection against falls is breached, a contractor and its agents are vicariously liable, without regard to fault, for injuries that are proximately caused by the breach. Plaintiff next notes that New York's appellate courts have repeatedly stated that Labor Law § 240 (1) is to be interpreted as liberally as possible to afford protection to workers. At a minimum, plaintiff continues, the statute requires property owners and contractors to furnish workers with adequate safety devices that provide proper protection against elevation-related risks.

Here, plaintiff argues, there is no serious dispute that MNC was the general contractor for the subject construction project. Next, plaintiff asserts that he was subjected to an elevation-related risk; namely, he was suffered to work and to walk near a large (approximately ten feet by ten feet as indicated on the drawings in E-File Doc. # 274) opening in the floor at a home under construction. Plaintiff further alleges that this opening was temporarily covered by plywood. He claims that the opening existed "at the end of

permanent flooring where there was no actual floor," and that the plywood was "placed" over the opening for workers to walk on.

Plaintiff notes his testimony that the plywood collapsed when he stepped on it, causing him to fall to the floor below and sustain injuries. Therefore, plaintiff argues, he has demonstrated that the safety device put in place to protect workers against falls failed, thus establishing his prima facie entitlement to judgment as a matter of law with respect to Labor Law § 240 (1).

Plaintiff claims that there are no applicable defenses to the contrary. Plaintiff acknowledges that the record contains suggestions[8] that there was no temporary plywood on the site, but he argues that if that is true, he was nevertheless suffered to work near an opening in the floor which was unprotected, and without receiving safety devices to protect him from the risk of falling. Thus, plaintiff reasons, the Labor Law § 240 (1) violation is nonetheless established. Moreover, plaintiff contends that the record contains no suggestion that he was either recalcitrant or the sole proximate cause of his injuries. As there is no applicable defense against his prima facie showing of MNC's liability pursuant to Labor Law § 240 (1), plaintiff concludes that his motion should be granted.

MNC's Arguments Opposing Plaintiff's Motion (MS # 11)

In opposition to plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), MNC contends that several questions of fact exist, as indicated by documents and testimony in the record, which precludes summary judgment.

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[8] Plaintiff also argues that any deposition witness who testified contrary to his statements is merely relaying inadmissible hearsay.

More specifically, MNC notes that several of plaintiff's present assertions are contradicted by the record—and in some instances, the plaintiff's present assertions are contradicted by plaintiff's prior statements.

First, MNC notes that plaintiff's recitation of how the accident occurred describes him as falling from the first floor to the basement through a piece of temporary plywood, which collapsed under his weight, which had been covering the opening for the staircase. However, MNC continues, two deposition witnesses—Aviran Nachum from MNC, and Sebastian Roginski from OFW—both testified that there was no plywood completely covering the opening on the first floor. Indeed, MNC adds, the record (other than plaintiff's account) indicates that there was an opening in the floor, intentionally left open, to allow access to construct and install the staircase.

Additionally, MNC claims that its workers erected guardrails around the subject opening. MNC further claims that OFW workers had removed the guardrails to construct the staircase and to facilitate moving materials from the first floor to the basement. MNC asserts that the guard rails, had they been in place, would have prevented anyone from falling through the subject opening. MNC concludes that there are too many statements in the record that either contradict or undermine plaintiff's proffered version of the accident, and, therefore, this court should deny plaintiff's motion for summary judgment.

Lastly, MNC reiterates that if plaintiff's motion is granted, MNC's liability to plaintiff is merely vicarious. MNC points out that the record lacks any indication that it is responsible for any act or omission that led to plaintiff's accident. Indeed, MNC avers, the accident

occurred while plaintiff was performing OFW's work, with his OFW coworkers, supervisors, materials and methods. For this reason, MNC asserts that if it is liable to plaintiff pursuant to Labor Law § 240 (1), the court should require OFW to indemnify MNC.

MNC's Arguments Supporting Its Summary Judgment Motion (MS # 12)

In support of its motion for summary judgment on its claim for contractual indemnification against third-party defendant OFW, MNC first points out that the accident allegedly occurred while plaintiff was installing a section of a staircase.[9] MNC notes that, pursuant to its written trade subcontract agreement with OFW, OFW was to fabricate and install the subject staircase. MNC further points out that the written agreement contains a broad indemnity provision in which OFW agreed to indemnify MNC against all claims arising from the contracted-for work. MNC claims that this indemnity provision is unambiguous, enforceable, applicable and was in effect at all relevant times. MNC reasons that plaintiff's installation of the staircase and his accident constitutes a claim that arose out of the contracted-for work. Therefore, MNC argues, the indemnity provision has been triggered, and OFW is thus contractually responsible to defend and to hold MNC harmless in this action.

MNC acknowledges that the record indicates that plaintiff has provided several versions of the facts of the accident. Nevertheless, MNC argues, every account proffered by plaintiff has one thing in common: he was allegedly injured while installing the subject

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[9]It is noted that the drawings in E-File Doc. #274 indicate the staircase was a large spiral staircase, made of oak treads. The contract with MNC (E-file Doc. # 346) describes "circular staircase with white oak treads risers and stringers - Contractor to furnish and install cast and fabricated glass and bronze railing of approximately 131 linear feet from basement to attic."

staircase, pursuant to his employment with OFW. In sum, MNC contends that the differing accounts of the accident do not remove plaintiff's work from the scope of the subject trade subcontract agreement and its indemnity provision.

Lastly, MNC acknowledges that no finding of fault has been made with respect to the subject accident and summary judgment on the issue of indemnification may be premature. However, MNC continues, given the facts surrounding the accident and the plain language of the indemnity provision contained in the written trade subcontract agreement between MNC and OFW, MNC asserts that it is entitled to a defense and a conditional judgment on the issue of contractual indemnity. For these reasons, MNC concludes that its motion should be granted.

MNC also asserts that it is entitled to summary judgment dismissing the "cross claim" made by OFW against it in its answer.

OFW's Arguments Opposing MNC's Motion (MS # 12)

In opposition to MNC's arguments, OFW first states that questions of fact preclude summary judgment with respect to contractual indemnification. Specifically, OFW argues that MNC assumed duties of directing/controlling the subject project. OFW claims that since MNC agents were present on-site daily, MNC thus became responsible for site safety.

OFW points out that a party to an indemnity agreement may not be indemnified for its own negligence. OFW claims that the record suggests that MNC's agents were likely responsible for either the placement of temporary plywood or the removal of the guard rails around the subject opening. Therefore, OFW argues, a trier of fact could properly conclude

that MNC violated the common-law duty to safely maintain the subject worksite, and that this negligence led to plaintiff's injuries. Accordingly, OFW continues, MNC is seeking indemnification for what could be its own negligent acts and/or omissions, and the same would be prohibited by the laws of this State. For this reason, OFW concludes that MNC's motion should be denied.

Discussion

Summary Judgment Standards

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material, triable factual issue is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense

and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a motion for summary judgment are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting

inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Labor Law § 240 (1)

The court first considers Labor Law § 240 (1), which states, in relevant part, that:

> "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 Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28

AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall 's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer,* 65 NY2d at 524). Lastly, this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

Here, plaintiff has demonstrated prima facie entitlement to judgment as a matter of law with respect to MNC's Labor Law § 240 (1) liability. Plaintiff's deposition testimony establishes that he was a protected worker engaged in protected activities while being subjected to an elevation-related risk (working at or near the subject opening). Plaintiff's

description of the accident—he walked on plywood which collapsed, causing him to fall one floor down—establishes the violation (*see e. g. Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646 [2d Dept 2013] [plaintiff demonstrated entitlement to judgment as a matter of law with evidence both that the collapsed floor was unstable and that no safety devices were provided], citing *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 669-670 [2d Dept 2007]; *Robertti v Powers Chang*, 227 AD2d 542, 543 [2d Dept 1996]). Also, plaintiff correctly states that prima facie entitlement is established even if he was the sole witness with exclusive knowledge of the facts as to how the accident happened (*Rauschenbach v Pegasystems, Inc.*, 273 AD2d 90, 91 [1st Dept 2000]; *see also Acosta v 888 7th Ave. Assocs.*, 248 AD2d 284 [1st Dept 1998]). Since MNC is vicariously liable for violations of Labor Law § 240 (1) as a "contractor" even if without fault, plaintiff's prima facie case is established.

However, even though plaintiff established prima facie entitlement to judgment as a matter of law with respect to Labor Law § 240 (1), MNC's opposition raises issues of fact and overcomes plaintiff's prima facie case. Specifically, other deposition witnesses stated under oath that plaintiff could not have walked on a temporary piece of plywood that collapsed because there was no temporary plywood on the floor at the site, over the opening for the staircase or elsewhere on the day of plaintiff's accident.

Plaintiff testified that "when we returned from lunch, one sheet of plywood had already been removed in order to allow us to transfer everything downstairs. . . . when we returned, I open [sic] the door and I made the first step inside the hallway, I stepped on the

first sheet of plywood, it collapsed under me, and I went all the way down." (Plaintiff's EBT at 126-127).

In contrast the co-owner of MNC, Aviran Nachum, was asked:

Q: When Arthur (Rogniski) told you that a worker had fallen through the platform that was not secure, did he in any way describe to you or show you or identify what unsecured platform he was referring to?

A: Yes. The one that you see in Exhibit A.

Q: Okay. So looking at Defendant's Exhibit A from February 13, 2018, can you show us what platform he was referring to?

A: They were constructing a platform over there, which, if you look at Exhibit 10, that is the leg that was holding these two stringers and it wasn't fully secured and he had fallen through there.

* * *

Q: Okay. Prior to the accident, had you seen the platform?

A: No.

Q: Okay, to your knowledge, when was the platform erected?

A: That morning .

Q: By whom?

A: Old Fashion Woodworking.

* * *

Q: Okay. And the platform that was unsecured that collapsed, what was the platform made

of? In other words, was it –

A: It was plywood.

(Aviran Nachum EBT 76-80)

These statements demonstrate that there is an issue of fact as to how the accident occurred. The court rejects plaintiff's contention that these other sworn statements in the record should be disregarded as inadmissible; deposition transcripts are sufficient to oppose a motion for summary judgment (*see e.g. LaGrega v Farrell Lines*, 156 AD2d 205, 205 [1st Dept 1989] ["To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact by submission of such proof in admissible form . . . [s]worn deposition testimony will suffice" (citations omitted)]). Since the record contains sworn testimony contradicting plaintiff's description of the area around his unwitnessed accident, issues of fact exist, and plaintiff's motion for partial summary judgment is denied.

Contractual Indemnification

"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., Inc.*, 70 NY2d 774, 777 [1987]). Here, it is undisputed that a written indemnity provision exists in the trade subcontract agreement between MNC and OFW, in which OFW agrees to indemnify MNC for claims arising out of OFW's work (*cf. Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [promise to indemnify must be clearly implied in agreement]).

Moreover, since the indemnity provision is limited "[t]o the fullest extent permitted by applicable law," the provision is enforceable (*cf.* General Obligations Law § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]). Also, there is no serious dispute that the provision was in effect at all applicable times and that the subject accident arose from OFW's obligation to construct the spiral staircase. Therefore, OFW is required to defend and indemnify MNC with regard to plaintiff's claims.

The court rejects OFW's arguments in opposition. First, nothing in the record suggests that MNC committed a negligent act or omission that led to the accident. Plaintiff's testimony indicates that he received instructions only from employees of OFW. Moreover, and contrary to OFW's arguments, the fact that MNC had agents present on the site who supervised safety generally does not establish that MNC was actively negligent. Rather, such supervisory authority is considered general and not tantamount to assumption of any oversight duties (*see e.g. Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010]). To the extent that workplace conditions maybe considered to have contributed to the accident, such conditions could reasonably be attributed to OFW and its employees, but not to MNC. Indeed, OFW's contention that MNC may have been involved in the placing of temporary plywood or removing safety rails around the subject opening are merely speculative and not based on any sworn testimony. As the record contains no indication that MNC breached any duty, through any act or omission, the court cannot conclude that MNC is an "actual tortfeasor" as a matter of law. Accordingly, there is no indication that MNC is seeking indemnification for its own negligent acts or omissions (*Cava Constr. Co., Inc. v Gealtec*

Remodeling Corp., 58 AD3d 660, 662 [2d Dept 2009]).

Lastly, given the fact that MNC is subject to merely vicarious liability, and that OFW agreed to indemnify MNC for all claims arising from the construction of the staircase, the obligation to defend and indemnify does not depend on whether OFW was actually negligent in this matter (*see e.g. Velez v Tishman Foley Partners*, 245 AD2d 155, 156-157 [1st Dept 1997] [indemnity provision applicable to accident allows owner indemnitee to recover from contractor indemnitor irrespective of whether or not indemnitor was negligent], citing *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178-179 [1990]; *Walsh v Morse Diesel,* 143 AD2d 653, 655-656 [2d Dept 1988]).

While it is generally premature for a court to award summary judgment on the issue of indemnification before a finding of fault is made (*Fritz v Sports Auth.*, 91 AD3d 712, 713-714 [2d Dept 2012] ["as there are triable issues of fact as to whose negligence, if anyone's, caused the plaintiff's accident . . . [u]nder these circumstances, it is premature to reach the issue of contractual indemnification"]), there are no longer any other parties who remain in this action. MNC is the only defendant and OFW is the only Third-Party defendant. MNC has made a prima facie case that if its liability is determined to be solely vicarious, it is entitled to be defended and indemnified by OFW. Therefore, "[a] court may render a conditional judgment on the issue of contractual indemnity, pending determination of the facts in the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. To obtain conditional relief on a claim for contractual indemnification, 'the one seeking indemnity need

only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability'" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also George v Marshalls of MA, Inc.*, 61 AD3d 931 [2d Dept 2009]; *Tranchina v Sisters of Charity Health Care Sys. Nursing Home*, 294 AD2d 491, 493 [2d Dept 2002]; *O'Brien v Key Bank*, 223 AD2d 830, 831 [3d Dept 1996]). Accordingly, OFW must defend and conditionally indemnify MNC if MNC is held to be solely vicariously liable (and thus found to be without fault) for plaintiff's accident (*see e.g. Jamindar*, 90 AD3d at 616). Thus, MNC's motion is granted to that extent. While MNC has advanced no arguments with respect to OFW's "cross claim" for contribution, which should have been identified as a counterclaim, the court grants this branch of the motion, as MNC is not a co-defendant as OFW describes MNC therein, and because the contract bars a claim for contribution from MNC to OFW if it is found to bear no fault for the accident. The parties' remaining contentions are without merit. Accordingly, it is

ORDERED that the motion of plaintiffs Jaroslaw Wojtasiewicz and Anetta Wojtasiewicz for an order granting them partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against defendant/third-party plaintiff M.N.C. General Contractors Corp. d/b/a MNC+Sons Contractors is denied; and it is further

ORDERED that MNC's summary judgment motion on the issue of defense and indemnification against third-party defendant Old Fashion Woodworking, Inc. is granted solely to the extent that it is ordered that MNC General Contractors Corp. d/b/a MNC+Sons Contractors is entitled to be defended in this action and is awarded a judgment of conditional

indemnification as indicated above, and is otherwise denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.
Hon. Debra Silber
Justice Supreme Court