**SHORT FORM ORDER**

**INDEX No. 16-2337**
CAL. No. 18-00347OT

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 38 - SUFFOLK COUNTY**

***PRESENT:***

**Hon. WILLIAM G. FORD**

**Justice of the Supreme Court**

MOTION DATE 5-17-18 (002)
MOTION DATE 8-2-18 (003x & 004)
MOTION DATE 9-6-18 (005x)
MOTION DATE 10-11-18 (006x)
ADJ. DATE 11-13-18 (004)
ADJ. DATE 11-15-18 (002, 003, 005 & 006)
Mot. Seq. # 002 - MotD # 005 - MD
# 003 - MD # 006 - MG
# 004 - WDN

---X

**RUSSELL MURRAY,**

**Plaintiff,**

**- against -**

**CONSTRUCTION CONSULTANTS/L.I. INC. and WAVERLY IRON CORP.,**

**Defendants.**

---X

**CONSTRUCTION CONSULTANTS/L.I. INC.,**

**Third-Party Plaintiff,**

**- against -**

**WAVERLY IRON CORP.,**

**Third-Party Defendant.**

---X

**Attorney for Plaintiff:**
**TALISMAN & DELORENZ, P.C.**
362 Knickerbocker Avenue
Brooklyn, New York 11237

**Attorney for Defendant:** *Construction Consultants*
**FABIANI COHEN & HALL, LLP**
570 Lexington Avenue 4th Floor
New York, New York 10022

**Attorney for Defendant:** *Waverly Iron Corp.*
**O'CONNOR, O'CONNOR, HINTZ & DEVENEY, LLP**
One Huntington Quadrangle, Suite 1C10
Melville, New York 11747

Upon the following papers numbered 1 to 43 read on these motions for summary judgment : Notices of Motion and supporting papers 1 - 4; ; Notices of Cross Motion and supporting papers 14 - 17; 26 - 29; 30 - 33; 34 - 37 ; Answering Affidavits and supporting papers 5 - 9; 18 - 22; 38 - 40 ; Replying Affidavits and supporting papers 10 - 13; 23 - 25; 41 - 43; Other Stipulation - 30 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** pending motions 002 through 006 are combined herein for disposition; and it is

***ORDERED*** that the motion (002) by plaintiff for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action is decided as set forth herein; and it is

***ORDERED*** that the cross motion (003) by defendant/third-party defendant Waverly Iron Corp. for summary judgment dismissing plaintiff's complaint as barred by Worker's Compensation Law § 11 is denied; and it is further

***ORDERED*** that the motion (004) by defendant/third-party defendant Waverly Iron Corp. to dismiss the third-party complaint and cross-claims is withdrawn pursuant to the stipulation dated November 2, 2018 ("Stipulation"); and it is further

***ORDERED*** that the cross motion (005) by defendant/third-party plaintiff Construction Consultants/L.I. Inc. for summary judgment on its contractual indemnification claim against defendant/third-party defendant Waverly Iron Corp. is denied as moot, since pursuant to the Stipulation, it has been substituted by cross motion 006; and it is further

***ORDERED*** that the cross motion (006) by defendant/third-party plaintiff Construction Consultants/L.I. Inc. for summary judgment on its contractual indemnification claim against defendant/third-party defendant Waverly Iron Corp. is granted.

Plaintiff commenced this action seeking to recover damages for personal injuries he sustained on December 22, 2014, at approximately 1:15 p.m., when he fell 11 feet to the ground while working on a construction site at 100 Greene Avenue in Sayville, New York. The Sayville Union Free School District (the "School District") (not a party herein) owns the property and retained defendant Construction Consultants/L.I., Inc. ("CCLI") as the general contractor to construct an extension on to the existing building known as the BOCES Center (the "Project"). CCLI entered into a written subcontractor agreement with defendant/third-party defendant Waverly Iron Corp. ("Waverly") to perform the steel work which included fabrication and installation. Waverly subcontracted the steel installation to non-party Medsteel Construction, LLC ("Medsteel"). On the day of the accident, plaintiff was working for Medsteel as an ironworker installing bar joists and roof decking.

In his verified complaint, as amplified by his bill of particulars, plaintiff alleges that CCLI was negligent in failing to provide him with safety devices to protect him from falling in violation of, among other rules and regulations pertaining to construction, Labor Law §§ 240, 241 (6) and 200. He also alleges that CCLI is liable for common-law negligence. In its answer, CCLI denies liability and interposes several affirmative defenses, including that plaintiff's conduct was the sole proximate cause of the accident. CCLI has also impleaded Waverly, alleging causes of action for contractual and common law indemnification, contribution, and breach of contract for failing to procure insurance. Thereafter, plaintiff moved and was granted leave to amend his complaint to add Waverly as a defendant

and assert the Labor Law and common negligence causes of action against it. In its answer, Waverly denies liability and interposes several affirmative defenses, including that plaintiff's action is barred by the Workers' Compensation Law, and asserts a cross claim against CCLI for indemnification and contribution.

Discovery has been completed and the note of issue filed. The instant motions ensued. The following has been gleaned from the pleadings, deposition transcripts, sworn statements and documents submitted by the movants.

On the morning of the accident, plaintiff met co-ironworkers David Hochberg ("Hochberg") and Keith Striplin ("Striplin") at his employer's shop, and together they traveled to the Project in the work truck arriving at approximately 7:00 a.m. It was their first day on the Project and no other trades were scheduled to be at the site. The masons had previously constructed the block walls of the extension and embedded steel plates flush with the top of the walls. The ironworkers' job was to install bar joists and decking on top of the block walls to create a roof on the extension. The process entailed placing the bar joists across the top of the block walls, welding the joists to the steel plates embedded in the walls and then welding steel corrugated decking to the bar joists.

Throughout the morning, plaintiff and Striplin, standing on top of the block walls, guided the crane operator as the bar joists and bundles of corrugated decking were unloaded from the tractor trailer and placed over the steel plates. After the bar joists and decking were laid out, in preparation to weld, plaintiff began measuring the spacing between the bar joists. He used the 24-foot extension ladder he had used earlier to access the top of the 11-foot block wall, and proceeded to walk on the wall to take the measurements. As he stepped on one of the unsecured bar joists it shifted, causing him to lose his balance and fall to the ground. It is not disputed that there were no anchorage or tie off points to which the ironworkers on top of the block walls could affix harnesses or lanyards, no railings or other barriers around the walls and no netting erected or other protective device under the open steel areas to prevent a worker from falling to the ground.

Plaintiff and each representative deposed on behalf of CCLI and Waverly testified that it was permissible for ironworkers to walk on top of the block walls to perform the work. The deponents testified that OSHA Subpart R rules were to be followed by the ironworkers and that under such rules, tie off anchors or fall protection is not required for ironworkers working, as here, at an elevation of less than 15 feet. The testimony also revealed that plaintiff received all instructions regarding the work he was to perform from Hochberg.

Plaintiff, who had been an ironworker for 30 years, also asserts in his affidavit that he was never advised by anyone at the subject Project not to walk on top of the block walls, or informed to use a ladder, scaffold or other device. He also asserts that the use of the 8-foot A-frame ladder or 24-foot extension ladder at the site to take the measurements was not feasible as the upper portion of the block wall was obstructed by the bar joists and steel decking.

Hochberg testified that he had performed the same task plaintiff was performing by walking on top of block walls. Hochberg testified he observed plaintiff walking on top of the block walls all morning and did not tell him to refrain from doing so. According to Hochberg, "that is the way our job

is performed" and that it is within the individual ironworker's discretion to use a ladder or walk on top of a block wall to perform the work. Hochberg testified no instructions were given to the ironworkers to use a ladder or scaffold.

Frank Niemann ("Niemann") testified that he is one of the owners of both Waverly and Medsteel, and a project manager for Waverly. He testified that his function as Waverly's project manager was to oversee the subcontractor, Medsteel, to ensure the work was being done. Niemann testified that Hochberg reported directly to him and that as foreman for Medsteel, Hochberg was the supervisor in charge of the work being performed by plaintiff and Striplin. Niemann testified that both he and Hochberg had the authority to stop work if any unsafe conditions existed; neither did so on the Project. He also testified that Waverly provided the bar joists, decking, ladders, and other materials and tools needed to perform the work.

Eric Baumack, the current president and co-owner of of CCLI, testified that the corporation manages projects and enters into subcontracts for all of the labor and materials; it does not perform any of the work. Baumack testified that CCLI was one of the prime contractors on the Project, and as the general contractor was responsible for developing the safety plan and hiring the subcontractors for the construction aspect of the Project. He visited the Project site weekly to determine the progress of the work but did not provide any instructions or directions to the laborers. Baumack testified that he was not aware that Waverly had subcontracted the installation of the steel to another entity, and only became aware that the ironworkers were employed by Medsteel upon receipt of the summons and complaint.

Ward Nicholson, who at the time of the accident was the field supervisor on the Project for CCLI, testified he was at the site every day to oversee the subcontractors and track materials. Nicholson testified that Waverly had been hired as the subcontractor to perform the steel work and it was his understanding that the ironworkers who were at the site were employed by that entity. Nicholson testified that he did not witness plaintiff's accident, and did not know if any anchor or attachment points were installed, but acknowledged that no scaffolding was erected at the time of the accident. Nicholson testified, as did the other deponents, that he did not consider walking on top of block walls unusual or dangerous for ironworkers and, if he had observed plaintiff doing so, would not have advised him to stop. He also acknowledged that as the field supervisor, he was ultimately responsible for job site safety, and that from his observations, the ironworkers were performing the work in compliance with CCLI's safety plan.

Plaintiff also submits the affidavit of his expert, who asserts that walking on top of the block walls is an accepted and customary method of performing the steel work. The expert opines that proper protection required the use of a fall arrest system such as an anchorage point, a guard rail, net or other protective barrier, and that the failure to provide such equipment was a substantial factor in causing plaintiff's accident.

Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction or alteration of a building (*see* ***Ross v Curtis-Palmer Hydro Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]; ***Cannon v Putnam***, 76 NY2d 644, 563 NYS2d 16 [1990]). A contractor, owner or agent

will be held strictly liable where a violation of this section of the Labor Law statute is a proximate cause of a plaintiff's injuries (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*; ***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]). The intent of the legislation is to protect workers by placing "'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor'" (***Klein v City of New York***, 89 NY2d 833, 835, 652 NYS2d 723 [1996], quoting ***Zimmer v Chemung County Perf. Arts, Inc.***, *supra* at 520). Thus, an owner or general contractor may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*). "[O]ther parties, such as subcontractors, may be held liable only if they are acting as the 'agents' of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and *control* the work being performed at the time of the injury" (***Serpe v Eyris Prods., Inc.***, 243 AD2d 375, 379-380, 663 NYS2d 542 [1st Dept 1997]; *see* ***Russin v Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; ***Wellington v Christa Constr. LLC***, 161 AD3d 1278, 75 NYS3d 667 [3d Dept 2018]; ***Van Blerkom v America Painting, LLC***, 120 AD3d 660, 992 NYS2d 52 [2d Dept 2014]). To prevail under Labor Law § 240 (1) a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Rapalo v MJRB Kings Highway Realty, LLC***, 163 AD3d 1023, 82 NYS3d 63 [2d Dept 2018]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]).

Here, plaintiff established, prima facie, entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) cause of action. The evidence submitted establishes that plaintiff was injured when he fell from the 11-foot block wall which lacked anchors or tie offs, that other adequate protection was not provided to prevent him from falling to the ground, and that such lack of fall protection was a proximate cause of his injuries (*see* ***Vasquez-Roldan v Two Little Red Hens, Ltd.***, 129 AD3d 828, 10 NYS3d 603 [2d Dept 2015]; ***Doto v Astoria Energy II, LLC***, 129 AD3d 660, 11 NYS3d 201 [2d Dept 2015]; ***Gallagher v Resnick***, 107 AD3d 942, 968 NYS2d 151 [2d Dept 2013]). Thus, as CCLI was retained as the general contractor to coordinate and supervise the construction portion of the extension and vested with the concomitant power to enforce safety standards and to hire responsible contractors, it is absolutely liable under § 240 (1) of the Labor Law (*see* ***Valdez v Turner Constr. Co.***, 171 AD3d 836, 839, 98 NYS3d 79 [2d Dept 2019]; ***Aversano v JWH Cont., LLC***, 37 AD3d 745, 746, 831 NYS2d 222 [2d Dept 2007]). Similarly, the subcontractor agreement together with the deposition testimony established that Waverly had the authority to supervise and control the particular work plaintiff was performing. Therefore, Waverly is a statutory agent of CCLI and absolutely liable under Labor Law § 240 (1) (*see* ***Van Blerkom v America Painting, LLC***, *supra*; ***Gallagher v Resnick***, *supra*). Thus, the burden shifts to the opponents to rebut and present "evidence of a triable issue of fact relating to the prima case or to plaintiff's credibility" (***Klein v City of New York***, *supra* at 835; *see* ***Blake v Neighborhood Hous. Servs of New York City***, *supra*), or as to his own acts or omissions (*see* ***Antonyshyn v Tishman Constr. Corp.***, 153 AD3d 1308, 61 NYS3d 141 [2d Dept 2017]; ***Bermejo v New York City Health & Hosps. Corp.***, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014], *lv dismissed* 24 NY3d 1096, 2 NYS3d 62 [2015]).

In opposition, CCLI argues that plaintiff was furnished with an 8-foot A-frame ladder and a 24-foot extension ladder, enumerated safety devices under Labor Law § 240 (1), therefore no basis exists to hold it liable even if other additional devices may have also prevented the accident. Moreover, CCLI

argues, plaintiff's ill-advised decision to step on, rather than over, the unsecured bar joist raises an issue of fact as to whether his conduct was the sole proximate cause of the accident. Therefore, CCLI maintains, plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action should be denied. In support of these arguments, CCLI submits the affidavit of its expert who opines that the ladders were sufficient for the performance of the work, and that plaintiff's decision to walk atop of the block wall rather than use a ladder was the sole cause of the accident. CCLI also relies on Hochberg's testimony that the ladders were adequate and sufficient. Additionally, it is argued that plaintiff failed to offer any expert evidence to support his claims and that plaintiff's expert does not address the suitability of the ladders provided.

In opposition and in support of its cross for summary judgment dismissing the complaint, Waverly argues that plaintiff's claims against it are barred by the exclusivity provisions of the Workers' Compensation Law, as it is the alter ego of Medsteel and, alternatively, plaintiff's special employer. In addition to making the sole proximate cause argument, Waverly argues that plaintiff seeks to hold it liable without proving negligence or that it is a statutory agent.

In response, plaintiff maintains that he has demonstrated that Labor Law § 240 (1) was violated, thus, his conduct was not the sole proximate cause of the accident. Plaintiff argues that CCLI's expert affidavit should not be considered as the expert was not identified during the discovery phase, and that Waverly's cross motion is untimely and should not be considered. He also argues that at the time of the accident, he was considered an employee of Medsteel, not Waverly, and that the latter is a statutory agent of CCLI.

A plaintiff's negligence is the sole proximate cause of his injuries when the safety devices are "readily available at the work site...*and* plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (***Przyborowski v A & M Cook, LLC***, 120 AD3d 651, 653, 992 NYS2d 56 [2d Dept 2014]; *see* ***Gallagher v New York Post***, 14 NY3d 83, 896 NYS2d 732 [2010]; ***Doto v Astoria Energy II, LLC***, *supra*). Here, the testimony reveals that it was within plaintiff's discretion to walk on top of the block walls to perform the work. Indeed, CCLI points out that Hochberg testified and explained to plaintiff that it was his choice to perform the work using the ladders. Thus, plaintiff's exercise of such discretion cannot be the sole proximate of his accident given that there is no evidence that anyone instructed him that he was "expected to" use a ladder (*see* ***Vasquez-Roldan v Two Little Red Hens, Ltd.***, *supra*; ***Doto v Astoria Energy II, LLC***, *supra*; ***Przyborowski v A & M Cook, LLC***, *supra*). To the extent the opponents attempt to invoke the "recalcitrant worker" defense, it has no application where, as here, plaintiff was not expected to use any fall protection devices when working less than 15 feet above ground (*see* ***Gallagher v New York Post***, *supra*; ***Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 790 NYS2d 74 [2004]; ***Stolt v General Foods Corp.***, 81 NY2d 918, 920, 597 NYS2d 650 [1993]; ***Garzon v Viola***, 124 AD3d 715, 2 NYS3d 522 [2d Dept 2015]). Additionally, to the extent plaintiff's decision to step on the unsecured bar joist was ill-advised, such conduct would render plaintiff contributorily negligent, a defense not available under Labor Law § 240 (1) (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*; ***Salinas v 64 Jefferson Apts., LLC***, 170 AD3d 1216, 97 NYS3d 136 [2d Dept 2019]), and "the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices" (***Stolt v General Foods Corp.***, *supra* at 920; *see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]).

As to the expert affidavit, a party's failure to disclose an expert prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider the affidavit submitted in the context of a timely motion for summary judgment (***Abreu v Metropolitan Transp. Auth.***, 117 AD3d 972, 986 NYS2d 557 [2d Dept 2014]; ***Salcedo v Weng Qu Ju***, 106 AD3d 977, 965 NYS2d 595 [2d Dept 2013]). Moreover, where, as here, a plaintiff has the opportunity to refute the expert's conclusion in a reply, there is no evidence of prejudice (***Abreu v Metropolitan Transp. Auth.***, *supra*). Thus, the court will consider the affidavit of CCLI's expert.

Although CCLI's expert's opinion conflicts with that of plaintiff's expert as to the adequacy of the ladders and the issue of sole proximate cause, the affidavit is insufficient to raise a question of fact as to "absolute liability under Labor Law § 240 (1), which 'is not predicated on fault'" (***Wellington v Christa Constr. LLC***, *supra* at 1281, quoting ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 179, 556 NYS2d 991 [1990]). Moreover, once atop the block wall, the bar joists and decking served conceptually and functionally as an elevated platform which failed to protect plaintiff from falling thereby evincing a violation of Labor Law § 240 (1) (*see* ***Bisram v Long Is. Jewish Hosp.***, 116 AD3d 475, 983 NYS2d 518 [1st Dept 2014]; ***Berrios v 735 Ave. of the Americas, LLC***, 82 AD3d 552, 919 NYS2d 16 [1st Dept 2011]). Where a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct, of necessity, cannot be deemed the sole proximate cause (*see* ***Blake v Neighborhood Hous. Servs. of New York City***, *supra*; ***Wellington v Christa Constr. LLC***, *supra*; ***Melchor v Singh***, *supra*).

Contrary to plaintiff's argument, Waverly's cross motion for summary judgment dismissing the complaint is timely. Unless another time frame is set by the court, summary judgment motions must be made within 120 days of the filing of the note of issue (*see* CPLR 3212 [a]). "A motion is made when a notice of motion is served" (CPLR 2211). In the instant case, Waverly's cross motion for summary judgment was made on June 18, 2018, when according to the affidavit of service, it was served by mail on the attorney for the plaintiff. Since June 18, 2018 was 118 days after the note of issue of filed, Waverly's cross motion for summary judgment is timely. However, the cross motion is denied.

Waverly has failed to make a prima facie showing that plaintiff's action is barred by the Workers' Compensation Law ("WCL"). Sections 11 and 29(6) under the WCL provide that an employee who elects to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained (***Gonzalez v Woodbourne Arboretum, Inc.***, 100 AD3d 694, 954 NYS2d 113 [2d Dept 2012]; ***Slikas v Cyclone Realty, LLC***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]). "A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (***Slikas v Cyclone Realty, LLC***, *supra* at 150; ***Alfonso v Pacific Classon Realty, LLC***, 101 AD3d 768, 769, 956 NYS2d 111 [2d Dept 2012]). Moreover, where facts "demonstrate the plaintiff's dual employment status, whether the relationship between two corporate entities is that of joint venturers, parent and subsidiary, corporate affiliates, or general and special employers, immunity will be extended to all the plaintiff's employers" (***Alfonso v Pacific Classon Realty, LLC***, *supra* at 769; ***Degale-Selier v Preferred Mgt. & Leasing Corp.***, 57 AD3d 825, 825, 870 NYS2d 94 [2d Dept 2008]; *see* ***Gonzalez v Woodbourne Arboretum, Inc.***, *supra*).

"A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (***Salinas v 64 Jefferson Apts., LLC***, *supra* at 1218; ***Haines v Verazzano of Dutchess, LLC***, 130 AD3d 871, 872, 12 NYS3d 906 [2d Dept 2015]; ***Quizhpe v Luvin Constr. Corp.***, 103 AD3d 618, 618-619, 960 NYS2d 130 [2d Dept 2013]). Closely associated corporations, even those that share officers and directors, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct (*see* ***Lee v Arnan Dev. Corp.***, 77 AD3d 1261, 909 NYS2d 826 [3d Dept 2010]; ***Longshore v Paul Davis Systems of Capital Dist.***, 304 AD2d 964, 759 NYS2d 204 [3d Dept 2003]). "A mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (***Salinas v 64 Jefferson Apts., LLC***, *supra* at 1218-1219; ***Samuel v Fourth Ave. Assoc. LLC***, 75 AD3d 594, 906 NYS2d 67 [2d Dept 2010]).

Here, while Waverly has demonstrated that it and Medsteel are closely related, the submissions reveal the existence of triable issues of fact as to whether the relationship between the two entities is that of alter ego entitling Waverly to rely upon the workers' compensation bar as a defense (*see* ***Perla v Daytree Custom Bldrs., Inc.***, 119 AD3d 758, 989 NYS2d 322 [2d Dept 2014]; ***Thomas v Dunkirk Resort Props., LLC***, 101 AD3d 1721, 957 NYS2d 542 [4th Dept 2012]; ***Gonzalez v Woodbourne Arboretum, Inc.***, *supra*; ***Samuel v Fourth Ave. Assocs., LLC***, *supra*; ***Andrade v Brookwood Communities, Inc.***, 97 AD3d 711, 947 NYS2d 912 [2d Dept 2012]; ***Degale-Selier v Preferred Mgt. & Leasing Corp.***, *supra*). Among other things, neither entity is a subsidiary of the other and the entities were formed for different corporate purposes. Also of significance is that the purchase order between Waverly and Medsteel for the subject Project explicitly requires the latter to maintain a workers' compensation policy, a commercial general liability policy, an automobile policy and an umbrella policy naming Waverly, CCLI and the School District as additional insureds.

Waverly has also failed to make a prima facie showing that plaintiff is its special employee. A special employee is "one who is transferred for a limited time of whatever duration to the services of another" (***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 578 NYS2d 106 [1991] *supra*; ***Schramm v Cold Spring Harbor Lab.***, 17 AD3d 661, 662, 793 NYS2d 530 [2005]). While a person's categorization as a special employee is usually a question of fact, under proper circumstances it may be determined by the court as a matter of law (***Thompson v Grumman Aerospace Corp.***, *supra*; ***Charles v Broad St. Dev., LLC***, 95 AD3d 814, 947 NYS2d 518 [2d Dept 2012]). A significant and weighty factor in determining whether a special employment relationship exists is "who controls and directs the manner, details and ultimate result of the employee's work" (***Thompson v Grumman Aerospace Corp.***, *supra*; ***Gonzalez v Woodbourne Arboretum, Inc.***, *supra* at 697; ***Schramm v Cold Spring Harbor Lab.***, *supra* at 662). Other critical factors are which entity paid the employee, to whom the employee reported, who controlled the employee's daily assignment and hours of work, and who prepared the accident report (*see* ***Salinas v 64 Jefferson Apts., LLC***, *supra*; ***Munion v Trustees of Columbia Univ. in City of New York***, 120 AD3d 779, 991 NYS2d 460 [2d Dept 2014]; ***Charles v Broad St. Dev., LLC***, *supra*).

In the case at bar, the testimony reveals that since April 2014, plaintiff was employed by both Waverly and Medsteel. However, it is not disputed that when plaintiff, or any other worker employed by

both entities, works in the field as an ironworker erecting steel, he or she is considered an employee of and paid by Medsteel; when in the shop fabricating steel the worker is considered an employee of and paid by Waverly. The ironworkers/fabricators are never assigned to both employers on the same day. No evidence has been submitted to establish that Waverly controlled and directed the manner, details and ultimate result of the work, who controlled plaintiff's daily assignment and work hours. Additionally, no evidence has been submitted to satisfy the other critical factors, except that the accident report was prepared by Nicholson, a CCLI employee. Thus, Waverly has failed to establish a special employment relationship (*see* ***Gonzalez v Woodbourne Arboretum, Inc.***, *supra*; ***Samuel v Fourth Ave. Assocs., LLC***, *supra*; ***Degale-Selier v Preferred Mgt. & Leasing Corp.***, *supra*), and is not entitled to summary judgment dismissing plaintiff's complaint based. In opposition, plaintiff has failed to establish that the workers' compensation bar defense is in inapplicable (*cf.* ***Salinas v 64 Jefferson Apts., LLC***, *supra*; ***Gonzalez v Woodbourne Arboretum, Inc.***, *supra*).

Therefore, the branch of Waverly's motion for summary judgment dismissing the complaint is denied. Inasmuch as it cannot be determined at this juncture whether Waverly is entitled to immunity under the Workers' Compensation Law, plaintiff's motion for partial summary judgment as to liability on the Labor Law § 240 (1) cause of action is granted contingent upon a determination at trial as to whether the exclusivity provisions of the Workers' Compensation Law are applicable (*see* ***Perla v Daytree Custom Bldrs., Inc.***, 119 AD3d 758, 989 NYS2d 322 [2d Dept 2014]; ***Nelson v Shaner Cable, Inc.***, 2 AD3d 1371, 770 NYS2d 498 [4th Dept 2003]).

Turning to CCLI's cross motion, the withdrawal of Waverly's timely motion for summary judgment dismissing the third-party complaint (004), made on the 120th day after the note of issue was filed, does not preclude the court from considering CCLI's facially untimely cross motion for summary judgment (005). At the time CCLI's cross motion was made Waverly's motion was still pending, and both are premised upon essentially the same grounds, namely the applicability and enforceability of the indemnification clause at issue. Thus, the court will consider the merits of CCLI's cross motion (*see* ***Sikorjak v City of New York***, 168 AD3d 778, 91 NYSA3d 186 [2d Dept 2019]; ***Reutzel v Hunter Yes, Inc.***, 135 AD3d 1123, 25 NYS3d 270 [3d Dept 2016]; ***Homeland Ins. Co. v National Grange Mut. Ins. Co.***, 84 AD3d 737, 922 NYS2d 522 [2d Dept 2011]; *cf.* ***Giambona v Hines***, 104 AD3d 811, 961 NYS2d 303 [2d Dept 2013] [untimely motion not considered where other motions for summary judgment were already decided]).

"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'" (***Dzrewinski v Atlantic Scaffold & Ladder Co., Inc.***, 70 NY2d 774, 777, 521 NYS2d 216 [1987], quoting ***Margolin v New York Life Ins. Co.***, 32 NY2d 149, 153, 344 NYS2d 336 [1973]; *see* ***Bermejo v New York City Health & Hosps. Corp.***, *supra* at 503 ["The right to contractual indemnification depends upon the specific language of the contract"]). "A party who has been held liable to an injured worker solely on the basis of the statutory liability imposed by section 240 (1), without any fault on its part, is entitled to recover under a contract of indemnity" (***Bermejo v New York City Health & Hosps. Corp.***, *supra* at 503; *see* ***Brown v Two Exch. Plaza Partners***, *supra*).

The Hold Harmless Rider (the "Rider") is an enumerated document in Article 16 of the Subcontract Agreement which together form the Subcontract Documents for the Project. Contrary to the arguments by Waverly, the language in the Rider, when read as an integrated whole with the language of the Subcontract Agreement, contains plain and unambiguous terms (*see generally* ***Brad H. v City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***South Bend Assocs., LLC v Imternational Bus. Machs.***, 4 NY3d 272, 798 NYS2d 835 [2005]; ***CNR Healthcare Network, Inc. v 86 Lefferts Corp.***, 59 AD3d 86, 874 NYS2d 174 [2d Dept 2009]). The Rider explicitly provides for Waverly to indemnify CCLI for any claims arising out of work performed pursuant to the subcontract, whether performed by Waverly or a subcontractor of Waverly, and is not conditioned on a finding that Waverly was negligent (*see* ***Bermejo v New York City Health & Hosps. Corp.***, *supra*; ***Pope v Supreme-K.R.W. Constr. Corp.***, 261 A2d 523, 690 NYS2d 632 [2d Dept 1999]).

Further, the general authority of CCLI to coordinate the work of its various subcontractors, inspect and monitor the progress of the work, and enforce safety standards are insufficient to raise an issue of fact as to whether CCLI was actively negligent (*see* ***Bink v F.C. Queens Place Assocs., LLC***, 27 AD3d 408, 813 NYS2d 94 [2d Dept 2006]; ***Allen v Village of Farmingdate***, 282 AD2d 485, 723 NYS2d 219 [2d Dept 2001]). Therefore, since CCLI has made a prima facie showing of its entitlement to summary judgment establishing its freedom from negligence and that it can only be held liable based on statutory or vicarious liability, and plaintiff's injuries arose out of the performance of the subcontracted work, CCLS is entitled to summary judgment on its contractual indemnification claim against Waverly (*see* ***Bermejo v New York City Health & Hosps. Corp.***, *supra*; ***Bink v F.C. Queens Place Assocs., LLC***, *supra*; ***Stachura v 615-51 St. Realty Corp.***, 22 AD3d 744, 803 NYS2d 114 [2d Dept 2005]; ***Allen v Village of Farmingdate***, 282 AD2d 485, 723 NYS2d 219 [2d Dept 2001]). *A fortiori*, that branch of Waverly's cross motion which seeks dismissal of all cross claims asserted against it must be denied.

Any arguments not explicitly addressed herein have been considered by the court and deemed to be without merit.

Dated: October 4, 2019
Riverhead, New York

**WILLIAM G. FORD J.S.C.**

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**