Short v Sandpebble Bldrs., Preconstruction Inc.
2019 NY Slip Op 32960(U)
October 9, 2019
Supreme Court, Suffolk County
Docket Number: 11-8901
Judge: Joseph Farneti
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[* 1]

SHORT FORM ORDER

INDEX No. 11-8901
CAL. No. 18-01117OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 11-8-18 (004 & 005)
MOTION DATE 11-15-18 (006)
MOTION DATE 11-29-18 (007)
ADJ. DATE 1-17-19
Mot. Seq. # 004 - MD # 006 - MD
005 - MG # 007 - MotD

APRIL SHORT,

Plaintiff,

- against -

SANDPEBBLE BUILDERS PRECONSTRUCTION, INC., SANDPEBBLE BUILDERS, INC, and THE WESTHAMPTON FREE LIBRARY ASSOCIATION,

Defendants.

THE WESTHAMPTON FREE LIBRARY ASSOCIATION,

Third-Party Plaintiff,

- against -

ROEBELL PAINTING CO., INC.,

Third-Party Defendant.

DELL & DEAN, PLLC
Attorney for Plaintiff
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

MARSHALL DENNEHY WARNER COLEMAN & GOGGIN
Attorney for Defendant Sandpebble Builders, Inc.
105 Maxess Road, Suite 303
Melville, New York 11747

HAMILL O'BRIEN CROUTIER DEMPSEY PENDER & KOEHLER, P.C.
Attorney for Defendant/Third-Party Plaintiff The Westhampton Free Library Association
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

BRAVERMAN GREENSPUN, P.C.
Attorney for Third-Party Defendant Roebell Painting Co., Inc.
110 East 42nd Street, 17th Floor
New York, New York 10017

Upon the following papers numbered 1 to 113 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 51; 52 - 68; 69 - 90 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 91 - 95; 96 - 97; 98 - 99; 100 - 103; 104 - 105 ; Replying Affidavits and supporting papers 106 - 107; 108 - 110; 111 - 113 ; Other ___; it is,

ORDERED that the motion by plaintiff, the motion by Sandpebble Builders, Inc., the motion by Roebell Painting Co., Inc., and the motion by The Westhampton Free Library Association are consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff for summary judgment in her favor on the issue of liability pursuant to Labor Law § 240 is denied; and it is further

ORDERED that the motion by defendant Sandpebble Builders, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by third-party defendant Roebell Painting Co., Inc., for summary judgment dismissing the complaint, the cross claims for common law indemnification and contribution, and the third-party claims of common law indemnification, contribution, and breach of contract against it is denied; and it is further

ORDERED that the motion by defendant The Westhampton Free Library Association for summary judgment dismissing the complaint and the cross claims against it and for summary judgment in its favor as to its breach of contract claim against Roebell Painting Co., Inc., is granted in part and denied in part.

This is an action to recover damages for injuries allegedly sustained by plaintiff April Short on January 9, 2010, when she fell from a ladder on the premises of a construction side at the Westhampton Free Library, owned by defendant The Westhampton Free Library Association ("Westhampton Library"). The accident occurred during plaintiff's employ as a painter by third-party defendant Roebell Painting Co., Inc. ("Roebell"). Sandpebble Builders, Inc. ("Sandpebble") was the construction manager of the Westhampton Free Library construction project ("the library project"). Plaintiff asserts claims against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Westhampton Library asserts a third-party claim against Roebell for breach of contract.

Plaintiff, an experienced commercial painter, testified that ladders were onsite when she arrived on the Westhampton Free Library job site five to seven days prior to the accident. She stated that she had no understanding whether Sandpebble supplied any equipment for her use on the day of the accident, and that no one other than Roebell directed or supervised her work. Plaintiff stated that no one identified themselves as an employee or representative of Sandpebble in the days before the accident, and that she had no understanding of Sandpebble's responsibility or role with respect to the project. Plaintiff testified that she did not see anyone associated with the library or Sandpebble onsite on the day of the accident. She further testified that on the day of the accident, Sal Aletto, her foreman, directed her to caulk wood frames around windows. Plaintiff used an eight-foot, wooden A-frame ladder that Sal gave her from

when she began working at 6:00 a.m. to completely caulk ten eight-foot floor-to-ceiling windows. Plaintiff explained that at 11:00 a.m., Sal needed the wooden ladder for other workers, so he took the wooden ladder and set up a five-foot aluminum A-frame ladder in its place for plaintiff to utilize. Plaintiff stated that she did not know who owned the ladder or where Sal acquired it. Plaintiff testified that she had never used the ladder prior to the accident and did not see anyone using it on the day of the accident. She testified that she did not inspect the ladder before using it, that she did not see anything defective with the ladder, that it did not have a warning label or claws on its bottom, and that it looked level before she got on it. Plaintiff explained that while standing on the middle rung of the ladder with both feet for one minute, she caulked the top half of a window. Plaintiff then intended to caulk the bottom half of the window from the floor. As plaintiff descended the ladder, it twisted and she fell to the concrete floor, which was free from drop cloths. Plaintiff explained that she felt, but did not see, the ladder bend, and that she never saw what happened to the ladder after it fell.

Victor Canseco, president of Sandpebble, testified that there was no general contractor on the library project. He explained that Sandpebble requested contractor proposals on behalf of Westhampton Library, and then Westhampton Library entered into contracts with the contractors and paid them directly. Mr. Canseco testified that Sandpebble did not enter into any contracts with contractors, vendors, or suppliers pertaining to this project, and did not supervise any work on the project or train any of the contractors' workers. Mr. Canseco further explained that Sandpebble "strictly coordinated the work of the 35 or 40 trade contractors" in the demolition and construction of a library. He stated that Sandpebble created the construction schedule and looked at the contractors' work for the general conformity with the plans and specifications. Mr. Canseco further testified that Robert Viola coordinated work of the different contractors regarding scheduling, but he did not control the means and methods of the contractors' work. Mr. Canseco also testified that Sandpebble ran "toolbox safety meetings" with workers, progress meetings with the owner, and coordination meetings with contractors. Finally, Mr. Canseco stated that each contractor had an obligation to enforce safety standards.

Robert Viola, Sandpebble's superintendent on the library project, testified that there was no general contractor on the library project. The scope of his work was site security, opening and closing the job site, interacting with clients, general conformance with plans and specifications, reviewing shop drawings before sending it to architects or engineers, coordination meetings, head count, and staying on the client's schedule. Mr. Viola stated that he coordinated start dates for most of the library project's contractors, coordinated contractors to avoid conflicts, made sure all work was in conformance with the plans and the design intent, and evaluated for cleanliness. Mr. Viola stated that he did not supervise any of the contractors on the library project and only sometimes decided on better building practices for all of the contractors. Mr. Viola also ran coordination meetings to coordinate efforts when contractors brought up issues regarding their means and methods of work.

Mr. Viola also testified that for approximately 18 months, he conducted a weekly "toolbox safety talk meeting" attended by all the workers onsite to discuss relevant work. Mr. Viola testified that if he observed a contractor's employee violating OSHA regulations pertaining to ladders, he would talk to the employee's supervisor, remind him or her of the responsibility for employee safety and "ask them to up their management a bit." Mr. Viola stated that if he observed an unsafe condition, he would address it

with the contractor's foreman. Mr. Viola testified that he put up generic safety signs on the job site and that Sandpebble would have created an accident report if any worker was injured on the job site.

Mr. Viola testified that Victor Canseco was his supervisor and that Dan Kowalski was the project manager, with whom he worked collaboratively. Mr. Kowalski would manage meetings, interact with the design team, work with bidding documents, write advertisements, write instructions for bidders, manage plans, keep contractors responsible for their shop drawing permits, log the shop drawings in and submit them to design professionals, handle budgeting, and hand contractors off when they were done. He also stated that Sandpebble provided general labor services at his discretion, as other contractors provided general labor services within their scope of work.

Matthew Bollerman, former library director of the Westhampton Free Library, testified that he was the owner's representative and main contact on the construction of the library. He made sure the library project met Westhampton Library's expectations, but he did not attend safety meetings. Mr. Bollerman testified that the library did not execute a contract with Sandpebble to be a general contractor. Instead, Sandpebble was the project manager and supervisor. He further testified that Sandpebble compared contractor bids, that the library entered into contracts with subcontractors based on Sandpebble's "leveling sheet," and that Sandpebble made sure the contractors did what they agreed to do. Mr. Bollerman testified that he assumed Sandpebble oversaw safety and remedied unsafe conditions. While he was unsure whether Sandpebble had authority to direct the means and methods of the contractors' work or if Mr. Viola had the authority to stop work, he did know that Mr. Viola had authority to coordinate the contractors' work.

Scott Palma, an assistant project manager for Roebell at the time of plaintiff's accident, testified that his job responsibilities including evaluating the existence of unsafe means and methods of work or conditions. He stated that Mr. Viola was in charge of the project, but that he did not micro-manage Roebell's crew. He also stated that no one from Sandpebble told him how to do his job. Mr. Palma testified that no one from Sandpebble was onsite on the day of the accident. He explained that Sal Aletto, the Roebell foreman, assigned plaintiff to her task. Mr. Palma further explained that Roebell has scaffolds and ladders for its employees to set up on their own. He stated that Roebell ladders were rated "1A," the highest rating, and could hold 250-300 pounds. Mr. Palma testified that he inspected the ladder after plaintiff's accident and found no signs of damage. The metal did not appear bent and the rubber feet were still in place. As he did not observe any defect in the ladder after plaintiff fell, he placed the ladder back into rotation. Mr. Palma testified that the aluminum five or six-foot ladder that plaintiff fell from had markings that indicated it belonged to Roebell and its locks were fully locked when the ladder was on the ground.

Plaintiff now moves for summary judgment in her favor on the issue of liability on the ground that Sandpebble and Westhampton Library violated Labor Law § 240 (1). Plaintiff submits, among other things, copies of the pleadings, the bills of particulars, copies of contracts, and the transcripts of the deposition testimony of herself, Matthew Bollerman, Danielle Waskiewicz, Robert Viola, Scott Palma, and Victor Canseco. In opposition, Sandpebble argues that the affidavit of plaintiff's expert engineer was insufficient to demonstrate a violation of Labor Law § 240 (1) and that it was not a general contractor for

purposes of the Labor Law. Sandpebble submits, in opposition, copies of the pleadings and the attorney affirmation and memorandum of law of its cross motion. Also in opposition, Roebell and Westhampton Library argue that plaintiff's loss of footing while descending the ladder does not give rise to liability under Labor Law § 240 (1) and that the affidavit of plaintiff's expert engineer was insufficient to demonstrate a violation of Labor Law § 240 (1).

Sandpebble moves for summary judgment dismissing the complaint and cross claims against it on the ground that it had no authority to supervise or control's plaintiff's work. Sandpebble submits, among other things, copies of the pleadings, the bill of particulars, contracts, and the transcripts of the deposition testimony of plaintiff, Victor Canseco, Robert Viola, Matthew Bollerman, and Scott Palma. In opposition, plaintiff argues that Sandpebble is liable under the Labor Law as a general contractor and that it violated 12 NYCRR 23-1.21 (b) (3) (iv). Plaintiff submits, in opposition, the affidavit of Stephen Fournier, P.E. Also in opposition, Westhampton Library argues that Sandpebble had a supervisory role and controlled safety measures during the library project.

Roebell also moves for summary judgment dismissing plaintiff's complaint and the claims for common law indemnification and contribution against it on the grounds that plaintiff did not suffer a grave injury pursuant to Workers Compensation Law § 11. In addition, Roebell seeks summary judgment dismissing Westhampton Library's third-party claims for common law indemnification, contribution, and breach of contract on the grounds of waiver and estoppel. Roebell submits, among other things, copies of the pleadings, the bill of particulars, a discovery response, the contract between Westhampton Library and Roebell, the transcripts of the deposition testimony of plaintiff and Scott Palma, the correspondence of rehabilitation specialist Joseph Pessalano, and the affirmed medical reports of radiologist Craig Sherman, M.D., orthopedic surgeon William Healy, III, M.D., and neurologist Howard Reiser, M.D. In opposition, Westhampton Library argues that Roebell failed to submit evidence that it procured insurance naming it as an additional insured and that it offered no evidence demonstrating Westhampton Library's clear manifestation of intent to relinquish its contractual protections.

Westhampton Library also moves for summary judgment dismissing the complaint and cross claims against it. It further seeks summary judgment in its favor on the breach of contract claim asserted against Roebell. Westhampton Library submits, among other things, copies of the pleadings, the bills of particulars, a contract between Westhampton Library and Sandpebble, the correspondence of Northland Insurance and American Guarantee and Liability Insurance Company, Roebell's bid for painting and vinyl wall coverings, and the transcripts of the deposition testimony of plaintiff, Scott Palma, Victor Canseco, Danielle Waskiewicz, Matthew Bollerman, and Robert Viola. In opposition plaintiff argues that Westhampton Library violated 12 NYCRR 23-1.21 (b) (3) (iv). Plaintiff submits, in opposition, the affidavit of Stephen Fournier, P.E. Also in opposition, Roebell argues that issues of fact exist as to the breach of contract claim on the basis of waiver and estoppel.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden

of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A construction manager is not considered a contractor responsible for the safety of workers at a construction site pursuant to Labor Law §§ 200, 240 (1), and 241 (6) (***Giannas v 100 3 Ave. Corp.***, 166 AD3d 853, 88 NYS3d 442 [2d Dept 2018]). However, a construction manager may become responsible for the safety of workers at a construction site pursuant to Labor Law §§ 200, 240 (1), and 241 (6) if it has the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (***Giannas v 100 3 Ave. Corp.***, *supra*; ***Lamar v Hill Inter., Inc.***, 153 AD3d 685, 59 NYS3d 756 [2d Dept 2017]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]). A party is an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being performed where a plaintiff is injured (***Giannas v 100 3 Ave. Corp.***, *supra*; ***Vazquez v Humboldt Seigle Lofts, LLC***, 145 AD3d 709, 42 NYS3d 333 [2d Dept 2016]; ***Fucci v Plotke***, 124 AD3d 835, 3 NYS3d 67 [2d Dept 2015]). General supervision by the construction manager is insufficient to impose liability under the Labor Law (***Giannas v 100 3 Ave. Corp.***, *supra*; ***Lamar v Hill Inter., Inc.***, *supra*). To impose liability on a construction manager for a violation of Labor Law §§ 200, 240 (1), and 241 (6), the plaintiff must establish that the defendant had the authority to supervise and control the work which brought about plaintiff's injury so as to enable the defendant to avoid or correct an unsafe condition (***Lamar v Hill Inter., Inc.***, *supra*; ***Rodriguez v JMB Architecture, LLC***, *supra*). The agent's liability is limited "to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created" (***Lamar v Hill Inter., Inc.***, *supra* at 686, citing ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]).

Sandpebble established a prima facie case of entitlement to summary judgment dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims against it by demonstrating that it was not an owner, contractor, or statutory agent, because it lacked the requisite authority to supervise or control plaintiff's work (*see* ***Giannas v 100 3 Ave. Corp.***, *supra*; ***Vazquez v Humboldt Seigle Lofts, LLC***, *supra*; ***Fucci v Plotke***, *supra*; ***Myles v Claxton***, 115 AD3d 654 [2d Dept 2014]; ***Rodriguez v JMB Architecture, LLC***, *supra*; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; ***Aversano v JWH Contr., LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]). Sandpebble submitted evidence that its role at the subject worksite was to ensure compliance with design plans and coordinate contractors. Mr. Canseco testified that there was no general contractor on the library project. He further testified that Sandpebble requested contract proposals for Westhampton Library, coordinated contractors, created a construction schedule, ran safety meetings,, and looked for the contractors' general conformity with plans and specifications, but it did not supervise any contractors' workers or control their means and methods or work. Mr. Viola similarly testified that there was no general contractor on the library project. Mr. Viola stated that he coordinated the contractors' work and start dates, but he did not supervise any contractors. Mr. Bollerman, testified that Sandpebble was Westhampton Library's project manager and supervisor, not a general contractor. Mr. Palma testified that Mr. Viola did not "micro-manage"

Roebell's crew and that no one from Sandpebble told him how to do his job. In addition, § 2.3.15 of the contract between Westhampton Library and Sandpebble specifically provided that "[w]ith respect to each [c]ontractor's own [w]ork, the [c]onstruction [m]anager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedure, or for safety precautions and programs in connection with the [w]ork of each of the [c]ontractors, since these are solely the [c]ontractor's responsibility." In addition, the agreement between Westhampton Library and Sandpebble did not give Sandpebble many of the powers of a general contractor (*see* ***Nienajadlo v Infomart N.Y., LLC***, 19 AD3d 384, 797 NYS2d 504 [2d Dept 2005]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether Sandpebble was a general contractor or Westhampton Library's statutory agent for purposes of Labor Law §§ 240 (1) and 241 (6) (*see* ***Gonzalez v Magestic Fine Custom Home***, 115 AD3d 796, 982 NYS2d 498 [2d Dept 2014]; ***Linkowski v City of New York***, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]). Plaintiff argues that Sandpebble was a de facto general contractor, because it was responsible for planning and coordinating construction activity, providing safety supervision of all contractors, and conducting daily safety walkthroughs on the worksite. Plaintiff points to Mr. Bollerman's testimony that Sandpebble was responsible for overseeing safety, that it had the authority to correct unsafe conditions without the owner's permission, that it performed safety measures, and performed weekly safety meetings. Plaintiff also points to Ms. Waskiewicz's testimony that Sandpebble advised her that it was acting as the owner's representative during construction. Plaintiff also points to Mr. Canseco's testimony that Westhampton Library's contract with Roebell stated that Mr. Viola could remove workers that failed to wear a hard hat. However, Sandpebble's general supervisory authority over plaintiff's work was insufficient to impose liability under the Labor Law (*see* ***Fucci v Plotke***, *supra*; ***Gonzalez v Magestic Fine Custom Home***, *supra*; ***Linkowski v City of New York***, *supra*). Plaintiff failed to demonstrate that Sandpebble had control or supervision over plaintiff's work that would have enabled it to prevent or correct the unsafe condition of the ladder (*see* ***Rodriguez v JMB Architecture, LLC***, *supra*).

A party can establish prima facie entitlement to summary judgment dismissing a cause of action for common-law indemnification and contribution asserted against it by demonstrating that it was not negligent and that it did not have authority to direct, supervise, or control the work giving rise to the injury (***Cutler v Thomas***, 171 AD3d 860, 98 NYS3d 230 [2d Dept 2019]; ***Uddin v A.T.A. Constr. Corp.***, 164 AD3d 1402, 82 NYS3d 535 [2d Dept 2018]; ***State of New York v Defoe Corp.***, 149 AD3d 889, 49 NYS3d 897 [2d Dept 2017]). In this case, as Sandpebble was not negligent and did not have authority to direct, supervise, or control plaintiff's work, Sandpebble made a prima facie case of entitlement to summary judgment dismissing the cross claims by Westhampton Library and Roebell (*see* ***Payne v 100 Motor Parkway Assoc., LLC***, 45 AD3d 550, 846 NYS2d 211 [2d Dept 2007]).

Labor Law § 200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Wadlowski v Cohen***, 150 AD3d 930, 55 NYS3d 279 [2d Dept 2017]; ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a

work site, and those involving the manner in which the work is performed" (***Melendez v 778 Park Ave. Bldg. Corp.***, 153 AD3d 700, 702, 59 NYS3d 762 [2d Dept 2017], quoting ***Torres v City of New York***, 127 AD3d 1163, 1165, 7 NYS3d 539 [2d Dept 2015]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that he, she, or it had the authority to supervise or control the performance of the work (***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]; ***Rodriguez v Mendlovits***, 153 AD3d 566, 60 NYS3d 87 [2d Dept 2017]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (***Ortega v Puccia***, *supra* at 62; ***Kandatyan v 400 Fifth Realty, LLC***, *supra*). In the alternative, where a defective premises condition is alleged, a property owner may only be held liable for violation of Labor Law § 200 if the owner either created the dangerous condition, or had actual or constructive notice of its existence (***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***La Giudice v Sleepy's Inc.***, *supra*; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; ***Ortega v Puccia***, *supra*).

Westhampton Library established its prima facie entitlement to summary judgment dismissing plaintiff's claims for common law negligence and a violation of Labor Law § 200 through evidence that the subject accident stemmed from the manner of her work (*see* ***Karanikolas v Elias Taverna, LLC***, 120 AD3d 552, 992 NYS2d 31 [2d Dept 2014]; ***Ortega v Puccia***, *supra*), that it did not have the authority to control or supervise the performance of plaintiff's work, and that it did not provide the allegedly defective ladder to plaintiff (*see* ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kandatyan v 400 Fifth Realty, LLC***, *supra*; ***Melendez v 778 Park Ave. Bldg. Corp.***, *supra*; ***Zupan v Irwin Contr. Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; ***Przyborowski v A&M Cook, LLC***, 120 AD3d 651, 992 NYS2d 56 [2d Dept 2014]; ***Karanikolas v Elias Taverna, LLC***, *supra*). Westhampton Library's right to generally supervise the work performed did not amount to supervision and control of the performance of plaintiff's work (*see* ***Zupan v Irwin Contr. Inc.***, *supra*; ***Ferreira v City of New York***, 85 AD3d 1103, 927 NYS2d 100 [2d Dept 2011]; ***Ortega v Puccia***, *supra*). Plaintiff did not oppose this portion of Westhampton Library's motion. Therefore, Westhampton Library is granted summary judgment dismissing plaintiff's Labor Law § 200 claim.

Labor Law § 240 provides, in pertinent part, that all contractors and owners and their agents must furnish or erect, or cause to be furnished or erected, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices to give proper protection to an employee in his or her performance in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]; ***Misseritti v Mark IV***

Constr. Co., Inc., 86 NY2d 487, 634 NYS2d 35 [1995]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 618 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). Owners and contractors can be held liable under Labor Law § 240 (1) "regardless of whether they exercise supervision or control over the work" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 287, 771 NYS2d 484 [2003], citing ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; *see* ***Rocovich v Consolidated Edison Co.***, *supra*). The hazards intended to be mitigated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level[,] or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, *supra* at 514; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*). Labor Law § 240 (1) applies to both "falling worker" and "falling object" cases (***Narducci v Manhasset Bay Assocs.***, 96 NY2d 259, 727 NYS2d 37 [2001]). Specifically, Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed[,] and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]).

To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Yao Zong Wu v Zhen Jia Yang***, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; ***Saavedra v 64 Annfield Ct. Corp.***, 137 AD3d 771, 772, 26 NYS3d 346 [2d Dept 2016]; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]). Whether Labor Law § 240 (1) is applicable depends on "whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (***Jones v City of New York***, 166 AD3d 739, 740, 87 NYS3d 631 [2d Dept 2018], citing ***Escobar v Safi***, 150 AD3d 1081, 1083, 55 NYS3d 350 [2d Dept 2017]). The question of whether the safety device at issue provided adequate protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact for the jury (***Garhartt v Niagara Mohawk Power Corp.***, 192 AD2d 1027, 596 NYS2d 946 [3d Dept 1993]; ***Plass v Solotoff***, 283 AD2d 474, 724 NYS2d 887 [2d Dept 2001]). Moreover, "[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1)" (***Xidias v Morris Park Contr. Corp.***, 35 AD3d 850, 851, 828 NYS2d 432 [2d Dept 2006]; *see* ***Yao Zong Wu v Zhen Jia Yang***, *supra*; ***Hugo v Sarantakos***, 108 AD3d 744, 970 NYS2d 245 [2d Dept 2013]; ***Gaspar v Pace Univ.***, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]). Rather, there must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries (*see* ***Robinson v Bond St. Levy, LLC***, 115 AD3d 928, 983 NYS2d 66 [2d Dept 2014]; ***Singh v City of New York***, 113 AD3d 605, 977 NYS2d 914 [2d Dept 2014]; ***Xidias v Morris Park Contr. Corp.***, *supra*; *see* ***Melchor v Singh***, *supra*). If a plaintiff is injured in a fall from a ladder which is not otherwise shown to be defective, the issue of whether the ladder provided the plaintiff with the proper protection required under Labor Law § 240 (1) is usually a question of fact (*see* ***Moreta v State of New York***, 272 AD2d 593, 709 NYS2d 829 [2d Dept 2000]; ***Benefield v Halmar Corp.***, 264 AD2d 794, 695 NYS2d 394 [2d Dept 1999]). However, a plaintiff cannot prevail on a Labor Law § 240 (1) claim if "his or her actions were the sole proximate cause of the accident" (***Saavedra v 64 Annfield Ct.***

Corp., *supra* at 772; *see* ***Robinson v East Med. Ctr., LP***, 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*; ***Melchor v Singh***, *supra*; ***Plass v Solotoff***, *supra*).

Westhampton Library failed to make a prima facie case of entitlement to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Westhampton Library argues that plaintiff was the sole proximate cause of the accident, as she fell when she lost her footing while descending the ladder, and that there is no evidence that the ladder was defective or inadequately secured. However, Westhampton Library submitted evidence of a defect in the ladder, as plaintiff testified that the aluminum frame twisted while she descended the ladder (*cf.* ***Hugo v Sarantakos***, 108 AD3d 744, 970 NYS2d 245 [2d Dept 2013]). As Westhampton Library did not meet its prima facie burden, the portion of its motion for summary judgment dismissing plaintiff's the Labor Law § 240 (1) claim must be denied regardless of the sufficiency of any opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Plaintiff also failed to make a prima facie case of entitlement to summary judgment in her favor on her Labor Law § 240 (1) claim against Westhampton Library, as her submissions demonstrated that a triable issue of fact remains as to whether the ladder was defective and whether it provided adequate protection within the meaning of the statute (*see* ***Karanikolas v Elias Taverna, LLC***, *supra*). Plaintiff submitted her testimony that she fell from an unsecured and defective ladder when it twisted as she descended. Plaintiff also submitted testimony of Scott Palma, who stated that he examined the ladder after the accident and did not observe any defect. Mr. Palma testified that he put the subject ladder back into Roebell's rotation of ladders that its employees could utilize. As plaintiff did not meet her prima facie burden, her motion for summary judgment in her favor on the issue of liability pursuant to her Labor Law § 240 claim must be denied regardless of the sufficiency of any opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Labor Law § 241 "[i]mposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866, 90 NYS3d 316 [2d Dept 2018]; *see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Jones v City of New York***, 166 AD3d 739, 87 NYS3d 631 [2d Dept 2018]; ***Lopez v New York City Dept. of Envtl. Protection***, 123 AD3d 982, 999 NYS2d 848 [2d Dept 2014]). "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code, which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54 [2d Dept 2012]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jones v City of New York***, *supra*; ***Simmons v City of New York***, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; ***Aragona v State of New York***, 147 AD3d 808, 47 NYS3d 115 [2d Dept 2017]). The particular provisions relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (***Misicki v Caradonna***, 12 NY3d 511, 882 NYS2d 375 [2009]). Furthermore, a plaintiff must show that the violation of the regulation was a proximate cause of his or her accident (***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Westhampton Library established a prima facie case of entitlement to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as to most of the alleged violations of the Industrial Code. Nearly all the Industrial Code provisions cited by plaintiff are inapplicable to the case at bar or reference mere general safety standards (*see* ***Simmons v City of New York***, *supra*; ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Carrillo v Circle Manor Apts.***, 131 AD3d 662, 15 NYS3d 463 [2d Dept 2015]; ***Palacios v 29th Street Apts, LLC***, 110 AD3d 698, 972 NYS2d 615 [2d Dept 2013]). 12 NYCRR 23-1.5, which merely sets forth a general standard of care for employers, cannot serve as a predicate for liability pursuant to Labor Law § 241 (6) (*see* ***Honeyman v Curiosity Works, Inc.***, 154 Ad3d 820, 62 NYS3d 183 [2d Dept 2017]; ***Ulrich v Motor Parkway Props., LLC.***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Pereira v Quogue Field Club of Quogue, Long Is.***, 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]). 12 NYCRR 23-1.7 (b) is inapplicable, because plaintiff did not fall into an opening. 12 NYCRR 23-1.7 (d) and (e) generally prohibit creating, or allowing, slipping or tripping hazards, respectively. As no testimony has been adduced that plaintiff slipped or tripped, these provisions of law is irrelevant to the instant case (*see* ***Cross v Noble Ellenberg Windpark, LLC***, 157 AD3d 457, 68 NYS3d 456 [1st Dept 2018]; ***Croussett v Chen***, 102 AD3d 448, 958 NYS2d 105 [1st Dept 2013]). 12 NYCRR 23-1.8 (c) (1), requiring the use of head protection where there is a danger of "head bumping," is inapplicable to the facts of this case (*see* ***Karaikolas v Elias Taverna, LLC***, *supra*). 12 NYCRR 23-1.16 and 12 NYCRR 23-1.17 do not apply, as there is no evidence that safety belts or life nets were provided to plaintiff (*see* ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; ***Avendano v Sazerac, Inc.***, 248 AD2d 340, 669 NYS2d 620 [2d Dept 1998]). 12 NYCRR 23-1.22 (a)–(c) are inapplicable, because the ladder from which plaintiff worked and descended was neither a runway nor ramp (*see* ***Purcell v Metlife Inc.***, 108 AD3d 969 NYS2d 43 [1st Dept 2013]). 12 NYCRR 23-1.30 which pertains to illumination of work areas, also is unavailing, since no claim of deficient lighting has been made and the record does not support any such inference (*see* ***Kochman v City of New York***, 110 AD3d 477, 973 NYS2d 114 [1st Dept 2013]; ***Tucker v Tishman Constr. Corp. of N. Y.***, 36 AD3d 417, 828 NYS2d 311 [1st Dept 2007]; ***Carty v Port Auth. of N.Y. & N.J.***, 32 AD3d 732, 821 NYS2d 178 [1st Dept 2006]). 12 NYCRR 23-2.1 (a), which sets forth requirements for material or equipment storage and disposal of debris, is inapplicable under the circumstances of this case (*see* ***Gargan v Palatella Saros Builders Group, Inc.***, 162 AD3d 988, 78 NYS3d 415 [2d Dept 2018]; ***Thompson v BFP 300 Madison II, LLC***, 95 AD3d 543, 943 NYS2d 515 [1st Dept 2012]; ***Zamajtys v Cholewa***, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]). Plaintiff's claim predicated on 12 NYCRR 23-2.1 (b) fails as a matter of law, as it has been consistently held that this provision lacks the specificity required to support a cause of action under Labor Law § 241 (6) (*see* ***Longo v Long Is. R.R.***, 116 AD3d 676, 983 NYS2d 579 [2d Dept 2014]; ***Parrales v Wonder Works Constr. Corp.***, 55 AD3d 579, 866 NYS2d 227 [2d Dept 2008]).

Due to the testimony that the subject ladder twisted while plaintiff descended it, a triable issue of fact remains as to whether the ladder was safe pursuant to 12 NYCRR 23-1.21 (b). It provides, in relevant part, that "[e]very ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon," and that "[a]ll ladders shall be maintained in good condition . . . [and] shall not be used if . . . [i]t has a broken

member or part, [i]f it has any insecure joints between members or parts, . . . [or] [i]f it has any flaw or defect of material that may cause ladder failure."

In opposition to Westhampton Library's prima facie case of entitlement to summary judgment dismissing the Labor Law § 241 (6) cause of action pursuant to 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 1.22, 12 NYCRR 23-1.30, and 12 NYCRR 23-2.1, plaintiff failed to raise a triable issue of fact (*see* ***Passantino v Made Realty Corp.***, *supra*). Therefore, Westhampton Library's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) is granted to the extent of dismissing plaintiff's reliance on 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.22, 12 NYCRR 23-1.30, and 12 NYCRR 23-2.1, and is otherwise denied.

The Court now turns to the branch of Roebell's summary judgment motion seeking dismissal of Westhampton Library's third-party claims against it. Claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (***Fleming v Graham***, 10 NY3d 296, 857 NYS2d 8 [2008]; ***Ironshore Indem., Inc. v W&W Glass, LLC***, 151 AD3d 511, 58 NYS3d 10 [1st Dept 2017]; ***Grech v HRC Corp.***, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]; ***Keita v City of New York***, 129 AD3d 409, 11 NYS3d 20 [1st Dept 2015]). Workers' Compensation Law § 11 describes a "grave injury" to the brain as "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." Parties seeking to establish or disprove the existence of a grave injury to the brain must submit, among other things, expert testimony confirming the degree to which, if any, the plaintiff's injuries have left him or her "no longer employable in any capacity" (***Rubeis v Aqua Club, Inc.***, 3 NY3d 408, 413, 788 NYS2d 292 [2004]; *see* ***Grech v HRC Corp.***, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]; ***Purcell v Visiting Nurses Found. Inc.***, 127 AD3d 572, 8 NYS3d 279 [1st Dept 2015]; ***Bush v Mechanicville Warehouse Corp.***, 79 AD3d 1327, 912 NYS2d 768 [3d Dept 2010]).

Roebell made a prima facie case of entitlement to summary judgment dismissing the third-party claims through its submissions that plaintiff did not sustain injuries that would render her permanently unemployable in any capacity (*see* ***Purcell v Visiting Nurses Found. Inc.***, *supra*; ***Barreiros v JJR Assocs.***, 302 AD2d 544,755 NYS2d 297 [2d Dept 2003]; ***Dunn v Smithtown Bancorp***, 286 AD2d 701, 730 NYS2d 150 [2d Dept 2001]). In his affirmed medical report, radiologist Dr. Sherman opined that the computerized tomography ("CT") scan of plaintiff's brain conducted on the day of her accident was normal and showed no evidence of an acute traumatic injury. Dr. Sherman further opined that the magnetic resonance imaging ("MRI") examination of plaintiff's brain conducted approximately 3½ months after her accident was normal and showed no evidence of a traumatic injury or other pathology. Dr. Sherman also opined that the MRI examination of plaintiff's brain conducted approximately 4½ years after her accident showed "small left interhemispheric and lateral cerebral convexity subdural hematomas, subacute in nature, likely between [one] and [six] weeks of age." Dr. Sherman opined that there was "no possibility" that the hemorrhage related back to 2010. Dr. Sherman found no other parenchymal hemorrhage or other traumatic injury. Dr. Sherman concluded that "[n]otwithstanding the minor subdural hematoma formation, any inability to work would not be related to any finding on any of the imaging studies."

In his affirmed medical report, neurologist Dr. Reiser opined that plaintiff's April 2017 neurological examination revealed "no objective deficit causally related to the incident." Dr. Reiser found plaintiff's cognitive function normal with the exception of lack of memory of the events immediately following the subject accident. Dr. Reiser's examination of plaintiff's cerebellar revealed no dysmetria or intention tremor. Dr. Reiser opined that plaintiff's glove-type hypalgesia is not neurological, and that the left lower extremity sensory finding is from a prior injury. Dr. Reiser also opined that plaintiff's ongoing problems, including a subdural hematoma revealed in an examination subsequent to the subject accident, may have resulted from a fall subsequent to the subject accident. Dr. Resier concluded that he found no "evidence of an objective ongoing neurological disorder causally related to the incident."

In his affirmed medical report, orthopedic surgeon Dr. Healy stated that during a March 2017 orthopedic examination, plaintiff exhibited normal joint function in her cervical and lumbar spine, right shoulder, left shoulder, elbows, wrists, fingers, hips, knees, ankles, and feet. Dr. Healy opined that plaintiff sustained a right scapula fracture, rib fractures, a partial rotator cuff tear of the right shoulder, and cervical and lumbar spine strains as a result of the accident. Dr. Healy opined that plaintiff's fractures healed and that after surgical intervention on her right shoulder, plaintiff made a "full and excellent" recovery, and requires no further intervention. Dr. Healy opined that plaintiff had pre-existing multilevel degenerative changes in her cervical and lumbar spine. He further opined that plaintiff recovered from her cervical and lumbar spine strains and is left with preexisting degeneration. Dr. Healy also opined that plaintiff has non-dermatomal and non-radiculopathic stocking and glove-type deficits in her hands and feet.

In opposition, Westhampton Library failed to raise a triable issue of fact as to whether plaintiff sustained a grave injury pursuant to Workers' Compensation Law § 11 (*see* ***Grech v HRC Corp.***, *supra*; ***Aramburu v Midtown West B, LLC***, 126 AD3d 498, 6 NYS3d 227 [1st Dept 2015]; ***Anton v West Manor Const. Corp.***, 100 AD3d 523, 954 NYS2d 76 [1st Dept 2012]; ***Fried v Always Green, LLC***, 77 AD3d 788, 910 NYS3d 452 [2d Dept 2010]).

Turning to the branch of Roebell's motion for summary judgment dismissing Westhampton Library's claim for breach of contract, Roebell argues that this claim must be dismissed on the grounds of waiver and estoppel. Roebell argues that under its contract with Westhampton Library, it was not permitted to work unless and until Westhampton Library approved its insurance coverage, but that Westhampton Library accepted the coverage it procured, awarded it the contract, allowed it to perform work, and enjoyed the benefit of its work.

Once a contract is formed, the parties may "change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel" (***Kamco Supply Corp. v On the Right Track, LLC***, 149 AD3d 275, 280, 49 NYS3d 721 [2d Dept 2017], citing ***CT Chems., Inc. v Vinmar Impex, Inc.***, 81 NY2d 174, 597 NYS2d 284 [1993]). A breach of contract may be waived by the non-breaching party (***New York Tel. Co. v Jamestown Tel. Corp.***, 282 NY 365 [1940]). Waiver of a contract right is a "voluntary abandonment or relinquishment of a known [contract] right" (***Jefpaul Garage Corp. v Presbyterian Hosp.***, 61 NY2d 442, 446, 474 NYS2d 458, 459 [1984]; *see* ***Colon v***

Martin, 170 AD3d 1109, 97 NYS3d 311 [2d Dept 2019]; ***Sunoce Props., Inc. v Bally Total Fitness of Greater N.Y., Inc.***, 148 AD3d 751, 48 NYS3d 476 [2d Dept 2017]). Rights under a contract may be waived "if they are knowingly, voluntarily and intentionally abandoned," and "[s]uch abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.***, 7 NY3d 96, 104, 817 NYS2d 606, 611 [2006]). However, "as the intentional relinquishment of a known right, a waiver should not be lightly presumed" (***Kamco Supply Corp. v On the Right Track, LLC***, *supra* at 280; *see* ***Stassa v Stassa***, 123 AD3d 804, 805, 999 NYS2d 116 [2d Dept 2014]), and must be based on a "clear manifestation of intent to relinquish a contractual protection" (***Stassa v Stassa***, *supra* at 805; *see* ***Kamco Supply Corp. v On the Right Track, LLC***, *supra*; ***Gilbert Frank Corp. v Federal Ins. Co.***, 70 NY2d 966, 525 NYS2d 793 [1988]). "[A] waiver is not created by negligence, oversight, or thoughtlessness, and is not inferred from mere silence" (***Stassa v Stassa***, *supra*, citing ***Peck v Peck***, 232 AD2d 540, 649 NYS2d 22 [2d Dept 1996]). A waiver may be proved by "undisputed acts or language so inconsistent with [the party's] purpose to stand upon his [or her] rights as to leave no opportunity for a reasonable inference to the contrary" (***Kamco Supply Corp. v On the Right Track, LLC***, *supra* at 281, quoting ***Alsens Am. Portland Cement Works v Degnon Contr. Co.***, 222 NY 34 [1917]). Affirmative conduct or failure to act also may be evidence of an intent not to claim the purported advantage of the contract (***Kamco Supply Corp. v On the Right Track, LLC***, *supra*; ***Stassa v Stassa***, *supra*). However, generally, the existence of an intent to forego a contractual right is a question of fact (*see* ***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.***, *supra*; ***Jefpaul Garage Corp. v Presbyterian Hosp.***, *supra*).

Roebell failed to establish a prima facie case of entitlement to summary judgment dismissing Westhampton Library's breach of contract claim. Roebell submissions failed to demonstrate that Westhampton Library's intentionally relinquished their contractual right to be named as an additional insured on Roebell's policy with specific coverage. In addition, a triable issue of fact remains as to whether Westhampton Library actually reviewed the policy and had knowledge of its terms (*see* ***Trans High Corp. v Pollack Assoc., LLC***, 74 AD3d 489, 902 NYS2d 83 [1st Dept 2010]). As Roebell did not meet its prima facie burden, its motion for summary judgment must be denied regardless of the sufficiency of Westhampton Library's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The Court now turns to the branch of Westhampton Library's motion for summary judgment on its claim for breach of contract against Roebell. Westhampton Library argues that Roebell failed to obtain the requisite insurance naming it as an additional insured with respect to any claims of negligence in the performance of the project. To recover damages for a breach of contract, a plaintiff must show the existence of a contract with defendant, plaintiff's performance under the terms of the contract, defendant's breach of the contractual obligations, and damages resulting from such breach (***Legum v Russo***, 173 AD3d 998 [2d Dept 2019]; ***Arnell Constr. Corp. v NY City Sch. Constr. Auth.***, 144 AD3d 714, 715, 41 NYS3d 101 [2d Dept 2016]; ***PFM Packaging Mach. Corp. v ZMY Food Packing, Inc.***, 131 AD3d 1029, 16 NYS3d 298 [2d Dept 2015]). An agreement to procure insurance is distinct from an agreement to indemnify or hold harmless (***Chong Fu Huang v 57-63 Greene Realty, LLC***, 174 AD3d 777, 2019 NY Slip Op 05760 [2d Dept 2019], citing ***Kinney v Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990]; *see* ***Kennelty v Darlind Constr.***, 260 AD2d 443, 688 NYS2d 584 [2d Dept 1999]; ***Spencer B.A. Painting Co.***, 224 AD2d 307, 638 NYS2d 37 [1st Dept 1996]). The purpose of an indemnification

agreement is to relieve the promisee of liability, whereas an agreement to procure insurance requires the prominsee's "continued responsibility for its own negligence for which the promisor is obligated to furnish insurance" (***Kinney v Lisk Co.***, *supra* at 218). A party seeking summary judgment based on a claim of failure to procure insurance naming that party as an additional insured must establish that a contract provision required such insurance and that the provision was not complied with (***Ginter v Flushing Terrace, LLC***, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; ***Tingling v C.I.N.H.R., Inc.***, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]; ***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 759 NYS2d 107 [2d Dept 2003]).

In this case, Roebell procured insurance naming Westhampton Library as an additional insured under its contract with Westhampton Library, as evidenced by the certificate of liability insurance. However, a triable issue of fact remains as to whether the insurance procured by Roebell was in conformity with its contract with Westhampton Library (*cf.* ***Beharovic v 18 E. 41st St. Partners, Inc.***, 123 AD3d 953, 1 NYS3d 158 [2d Dept 2014]; ***Roldan v New York Univ.***, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]; ***Perez v Morse Diesel Intern., Inc.***, 10 AD3d 497, 782 NYS2d 53 [1st Dept 2004]; ***Nrecaj v Fisher Liberty Co.***, 282 AD2d 213, 723 NYS2d 26 [1st Dept 2001]; *see* ***Verizon N.Y., Inc. v 50 Varick LLC***, 54 Misc 3d 1214(A), 54 NYS3d 613 [Sup Ct, NY County 2017]). The insurance rider contained in the bid and later incorporated into the contract between the parties provided that Roebell's general liability coverage must include bodily injury, personal injury, and property damage of $1,000,000.00 per occurrence and $2,000,000.00 in the aggregate. The general liability policy was also required to include, among other things, blanket contractual or contractual liability, and worker's compensation and employer's liability coverage. By correspondence dated May 2, 2011, Northfield Insurance Company explained that it denied coverage for the claims against Westhampton Library, because the damages were bodily injury to its employee arising out of and in the course of her employment by Roebell and while performing duties related to Roebell's business, as expressly excluded in Roebell's commercial general liability coverage. By correspondence dated October 12, 2011, Northfield Insurance Company explained that it denied coverage for the claims against Roebell, because Roebell assumed liability in a contract or agreement, as expressly excluded in Roebell's commercial general liability coverage. By correspondence dated November 29, 2011, Zurich North America Specialty Claims explained that American Guarantee and Liability Insurance Company denied coverage for the claims against Roebell, because there was no coverage under Northfield Insurance Company's primary policy, and the damages were bodily injury to its employee and based on assumption of liability based on a contract, as expressly excluded in Roebell's insurance policy. However, no insurance contracts are contained in the record, and the correspondence is insufficient to demonstrate the substance of the provisions in the subject insurance policies (*cf.* ***Nrecaj v Fisher Liberty Co.***, *supra*). As Westhampton Library did not meet its prima facie burden, its motion for summary judgment must be denied regardless of the sufficiency of Roebell's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by plaintiff April Short for summary judgment in her favor on the issue of liability pursuant to Labor Law § 240 (1) is denied, the motion by defendant Sandpebble Builders, Inc., for summary judgment dismissing the complaint and cross claims against it is granted, the motion by Roebell Painting Co., Inc. is denied, and the motion by defendant The Westhampton Free Library

Association is granted to the extent of dismissing plaintiff's Labor Law § 200 claim and dismissing plaintiff's Labor Law § 241 (6) claim as to 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-1.8, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.22, 12 NYCRR 23-1.30, and 12 NYCRR 23-2.1, and is otherwise denied.

Dated: October 9, 2019

Hon. Joseph Farneti
Acting Justice Supreme Court

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