Nowicki v Sumagli Realty Co. LLC
2019 NY Slip Op 33008(U)
October 7, 2019
Supreme Court, Kings County
Docket Number: 51637/16
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — KINGS COUNTY

PRESENT: HON. PAUL WOOTEN *Justice* **PART** 97

ADRIAN NOWICKI,

Plaintiff,

INDEX NO. 511637/16

MOTION SEQ. NO. 2, 3

-against-

SUMAGLI REALTY COMPANY LLC and RIALTO MANAGEMENT CORPORATION,

Defendants.

SUMAGLI REALTY COMPANY LLC and RIALTO MANAGEMENT CORPORATION,

Third-Party Plaintiffs,

-against-

AJ & GA CONSTRUCTION, INC.,

Third-Party Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2, 3-4
Answering Affidavits — Exhibits (Memo)	5, 6
Replying Affidavits (Reply Memo)	7, 8

Motions sequence numbers 2 and 3 are consolidated for disposition.

This is a personal injury action commenced by plaintiff Adrian Nowicki (plaintiff) against defendant-third party plaintiffs Sumagli Realty Company LLC (Sumagli) and Rialto Management Corporation (Rialto) (collectively, defendants) to recover for injuries allegedly sustained while performing construction work on October 28, 2015

Before the Court is a motion by plaintiff, pursuant to CPLR 3212, for partial summary judgment against Sumagli on his Labor Law § 240(1) cause of action (motion sequence 2). Also before the Court is a motion by Sumagli and Rialto for summary judgment dismissing plaintiff's Labor Law §§ 241(6), 200 and common-law negligence causes of action. Defendants further move for summary judgment on their third-party contractual and common-law indemnification claims against third-party defendant AJ & GA Construction, Inc. (AJ & GA) (motion sequence 3).

BACKGROUND

The instant action arises out of an October 28, 2015 scaffold fall accident in which plaintiff sustained various injuries while performing renovation work on a mixed commercial/residential use building located at 319 East 75th Street in Manhattan (the building). The work itself consisted of refurbishing the facade of the building, performing electrical work, and creating a laundry room inside the building. Prior to the accident, in a written agreement dated July 29, 2015, Sumagli, which owned the building, hired plaintiff's employer AJ & GA to perform this renovation work. Among other things, this contract contained a provision which required that AJ & GA indemnify Sumagli and its agents for claims arising out of the work, but only to the extent caused by AJ & GA's negligence. As part of the planned work, AJ & GA also executed a separate agreement entitled "Rialto Management Corp. Indemnification, Insurance Procurement and Liens Agreement for Contractors" (AJ & GA/Rialto Indemnification Agreement) in which it agreed to indemnify Sumagli and Rialto, which managed the building, for claims arising out of the work.

Plaintiff was employed by AJ & GA as a foreman. On the date of the accident, plaintiff arrived at the building, where he was responsible for performing construction work and supervising several AJ & GA workers including Oleskandr "Alex" Dovgalenko (Alex). According to plaintiff's deposition testimony, after arriving at the job site, he climbed up to the platform of a

six-foot Baker's scaffold in order to take some measurements of an I-beam that would support the facade in the front of the building. Plaintiff further testified that while performing this work, the scaffold suddenly collapsed, causing him to fall to the ground along with the scaffold itself, which landed on top of plaintiff when he hit the ground. In addition, plaintiff testified that as he was falling, he attempted to grab the beam, which caused him to injure his shoulder. As a final matter, plaintiff testified that Alex witnessed the accident and helped to pull the scaffold off of him after the accident occurred. Plaintiff's account of the accident is supported by Alex, who testified that he witnessed the accident and that he saw the scaffold collapse while plaintiff was on the platform taking measurements.

Plaintiff and Alex's account of the accident is contradicted by the deposition testimony of Szymon Lisowski (Mr. Lisowski), the Vice President of AJ & GA. In particular, Mr. Lisowski testified that, right after the accident occurred, plaintiff called him and told him that "he slipped, that he wanted to climb a scaffold and he slipped and dislocated" his shoulder. Mr. Lisowski further testified that he went to the job site after the accident, where he spoke to plaintiff once he returned from the hospital. According to Mr. Lisowski, plaintiff told him that:

> "he didn't open the scaffolding all of the way and he wanted to take some measurements of something that was above his head and he tried to climb an unopened scaffolding and he slipped and he grabbed with one hand, he grabbed a beam with one hand and then that is when he dislodged his shoulder" (Lisowski tr at 33, lines 4-10, annexed as exhibit F to defendants' opposition papers).

Following the accident, plaintiff executed a Workers Compensation Board C-3 claim form in which he indicated the cause of his injuries was "fall off scaffold causing injury."[1] On or about December 22, 2105, Jerzy Gajniak, the president of AJ & GA, filled out and executed a Workers Compensation Board C-2 accident report. Regarding the cause of the injury, the report stated: "Unwitnessed accident - 'Climbing steps on side of scaffold (bars) - 6' scaffold.

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[1] This claim form is not dated.

Lost balance and fell few feet below.' Per claimant."

By Summons and Complaint dated July 8, 2016, plaintiff commenced the instant action against defendants. Among other things, the Complaint alleged that he sustained injuries as a result of the scaffold collapsing and that these injuries were caused by defendants' violation of Labor Law §§ 240(1), 241(6), 200, as well as their negligence. Thereafter, defendants served a joint answer which generally denied the allegations in the complaint. Defendants also commenced a third-party action against AJ & GA seeking common-law indemnification and contractual indemnification, as well as damages for breach of contract to procure liability insurance. On November 15, 2016, plaintiff and defendants entered into a stipulation whereby plaintiff agreed to discontinue his action against Rialto, without prejudice. Discovery is complete and the instant motions are before the Court.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81

[2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

A. *Plaintiff's Summary Judgment Motion*

Plaintiff moves for partial summary judgment against Sumagli on his Labor Law § 240(1) cause of action. In support of his motion, plaintiff points to his own deposition testimony, as well as the testimony of his co-worker Alex. In particular, plaintiff notes that this testimony indicates that he was injured when the scaffold that he was working on collapsed. According to plaintiff, this collapse constitutes prima facie evidence of a Labor Law § 240(1). Moreover, plaintiff maintains that, as the owner of the building, Sumagli is liable for this violation as a matter of law. As a final matter, plaintiff contends that any alleged comparative negligence on his part is not a defense to his Labor Law § 240(1) cause of action.

In opposition to plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action, defendants maintain that there are issues of fact regarding the circumstances of the accident. In particular, defendants note that, although plaintiff and Alex testified that the scaffold collapsed, Mr. Lisowski testified that plaintiff told him on two separate

occasions that he merely slipped and lost his balance as he was climbing the scaffold. According to defendants, Mr. Lisowski's testimony in this regard is supported by the C-2 accident report. Defendants aver that evidence that a worker slipped and/or lost his balance while climbing a ladder is insufficient to support a motion for summary judgment under Labor Law § 240(1). Defendants further note that Mr. Lisowski testified that plaintiff told him that the scaffold was not fully opened when he attempted to climb to the scaffold platform. According to defendants, this raises an issue of fact as to whether plaintiff's own actions were the sole proximate cause of the accident.

Labor Law § 240(1) provides, in pertinent 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, [or] altering . . . 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."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500). However, given the exceptional protection offered by Labor Law § 240(1), the statute does not cover

accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Here, plaintiff has made a prima facie demonstration of his entitlement to summary judgement against the building owner Sumagli on his Labor Law § 240(1) cause of action. In particular, plaintiff has submitted the deposition testimony of himself and Alex, both of which indicate that plaintiff was injured during the course of a construction project when the scaffold that he was standing upon collapsed. In this regard, it is well settled that a scaffold collapse constitutes prima facie evidence of a Labor Law § 240(1) violation (*see Bermejo v New York City Health and Hosp. Corp.*, 119 AD3d 500, 501-502 [2d Dept 2014]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801 [2d Dept 2010]).

However, in opposition to plaintiff's motion, defendants have submitted admissible evidence which raises a triable issue of fact regarding Sumagli's liability under the statute. In particular, Mr. Lisowski's sworn deposition testimony indicates that on two separate occasions after the accident, plaintiff told him that the accident occurred when he slipped and lost his balance when climbing to the scaffold platform. Unlike a scaffold collapse, evidence that a worker slipped and/or lost his balance while climbing a ladder or other safety device is insufficient to establish a prima facie violation of Labor Law § 240(1) absent evidence that the device shifted, moved or otherwise failed (*Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2d Dept 2012]; *Olberding v Dixie Contr. Inc.*, 302 AD2d 574 [2d Dept 2003]). Accordingly, plaintiff's motion for summary judgment under his Labor Law § 240(1) claim against Sumagli is denied.

B. *Defendants' Cross-Motion for Summary Judgment*

I. Plaintiff's Labor Law § 241(6) Claim Against Sumagli

Defendants move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim against Sumagli.[2] In support of this branch of their motion, defendants maintain that the Industrial Code regulations which plaintiff alleges were violated are inapplicable given the circumstances of the accident. In particular, defendants note that 12 NYCRR 23-1.7(d) prohibits employers from permitting employees to use a scaffold "which is in a slippery condition." Here, plaintiff testified at his deposition that the accident was caused by a scaffold collapse, not a slipping condition. Similarly, defendants note that 12 NYCRR 23-1.7(e) pertains to tripping hazards, and plaintiff does not allege that he tripped. Finally, defendants point out that 12 NYCRR 23-1.21 pertains to "ladders and ladderways." Here, plaintiff's allegations concerning the scaffold collapse are unrelated to ladders or ladderways.

In opposition to this branch of defendants' motion, plaintiff contends that he alleged a violation of 12 NYCRR 23-1.7(f) in his second amended verified bill of particulars which defendants have not addressed. Plaintiff further contends that this regulation, which requires that ladders be provided to afford safe means of access to above-ground working levels, is sufficiently specific to support a Labor Law § 241(6) claim. Plaintiff also maintains that there is an issue of fact as to whether this regulation was violated given the fact that no ladder was provided in order to allow him access to the scaffold platform and the evidence in the form of Mr. Lisowski's testimony indicating that he slipped while attempting to climb up the scaffold.

In reply to plaintiff's opposition, defendants maintain that the Court must reject plaintiff's allegation that 23-1.7(f) was violated. In particular, defendants note that the second amended

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[2] In their motion papers, defendants seek summary judgment dismissing plaintiff's Labor Law §§ 241 (6), 200, and common-law negligence claims against Sumagli and Rialto. However, as previously noted, plaintiff discontinued his action against Rialto. Thus, to the extent that defendants seek the dismissal of plaintiff's claims against Rialto, their motion is moot.

verified bill of particulars does not allege a violation of 23-1.7(f) and the only place where plaintiff alleges a violation of this regulation is in his instant opposition papers. Defendants further contend that the court may not consider this belated allegation inasmuch as it is based upon a new theory of liability. In this regard, defendants point out that plaintiff has alleged and continues that the accident involved a scaffold collapse. According to defendants, plaintiff may not now claim a violation of 23-1.7(f) based upon him allegedly slipping while climbing up the scaffold.

Labor Law § 241(6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [4th Dept 1995]).

Here, plaintiff's pleadings allege violations of 12 NYCRR 23-1.7(d), 23-1.7(e), and 23-1.21. Although these regulations are sufficiently specific to support a Labor Law § 241(6) claim, defendants have made a prima facie showing that these regulations are inapplicable. Further, plaintiff's opposition papers do not address defendants' argument that these regulations are

inapplicable. Thus, plaintiff has effectively abandoned his reliance upon these Industrial Code regulations (*see Genovese v Gambino*, 309 AD2d 832 [2d Dept 2003]). Accordingly, to the extent that it is based upon violations of 12 NYCRR 23-1.7(d), 23-1.7(e), and 23-1.21, plaintiff's Labor Law § 241(6) cause of action is dismissed.

Turning to the alleged violation of 12 NYCRR 23-1.7(f), the Court initially notes that, contrary to plaintiff's claim, the second amended verified bill of particulars does not allege a violation of this regulation. Rather, plaintiff actually alleges a violation of 12 NYCRR 23-1.7(e) (*see* Memorandum of Law in Opp, exhibit A). Nevertheless, it is well-settled that a defendant may allege a violation of a specific Industrial Code regulation for the first time in opposition to a plaintiffs' summary judgment motion provided that "the plaintiffs' belated allegation . . . involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants" (*Kelleir v Supreme Indus. Park, LLC*, 293 AD3d 513, 514 [2d Dept 2002]; *see Klimowicz v Powel Cove Assocs.*, LLC, 111 AD3d 605, 607 [2d Dept 2013]; *Ross v DD 11th Avenue, LLC*, 109 AD3d 604, 606 [2d Dept 2013]). Here, the alleged violation of 23-1.7(f) does raise a new theory of liability. In particular, plaintiff has alleged and continues to allege in support of his motion for partial summary judgment under Labor Law § 240(1) that he was injured when the scaffold collapsed as opposed to slipping while climbing up the apparatus. However, it cannot be said this new theory of liability is based upon new factual allegations, or that defendants have been prejudiced by this new theory. In particular, plaintiff's claim that he slipped while climbing up the scaffold is based upon Mr. Lisowski's deposition testimony, which was taken in October of 2017. Further, in opposition to plaintiff's motion for summary judgment under Labor Law § 240(1), defendants themselves pointed to and relied upon Mr. Lisowski's testimony that plaintiff told him that he slipped while climbing up the scaffold. Thus, defendants were clearly aware of this factual allegation and are not prejudiced by plaintiff's reliance upon this testimony in opposition to the instant motion to dismiss his Labor Law § 241(6) claim. As a

final matter, 23-1.7(f) is sufficiently specific to support a Labor Law § 241(6) claim and there is an issue of fact as to whether plaintiff's injuries were caused by a violation of this provision given the lack of a ladder to provide access to the scaffold platform along with the evidence that plaintiff slipped while attempting to climb up the scaffold.

Accordingly, to the extent that plaintiff relies upon a violation of 23-1.7(f), defendants' motion to dismiss his Labor Law § 241(6) claim against Sumagli is denied.

II. Plaintiff's Labor Law § 200 and Common-Law Negligence Claims

Defendants move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Sumagli. In support of this branch of their motion, defendants maintain that Sumagli did not exercise any control or authority over the work performed by plaintiff. In particular, defendants point out that both plaintiff and his boss Mr. Lisowski testified that the underlying work was directed and controlled solely by AJ & GA. Defendants further maintain that Scott Leman (Mr. Leman), who managed the building on behalf of Rialto, testified that neither Rialto nor Sumagli exercised any control over the work.

In opposition to this branch of defendants' motion, plaintiff maintains that Sumagli has failed to meet its prima facie burden of proving that it did not exercise control or authority over plaintiff's work. In support of this contention, plaintiff claims that Mr. Leman only testified that Rialto did not supervise the work, and did not mention Sumagli. In addition, plaintiff notes that Mr. Lisowski merely testified that Sumagli did not provide tools or the scaffold and that he (i.e., Lisowski) did not have any conversations with Sumagli about the work. Finally, plaintiff notes that defendants' motion is not supported by any evidence such as an affidavit or deposition testimony of a Sumagli representative.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and

for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2d Dept 2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2d Dept 2004]; *Akins v Baker*, 247 AD2d 562, 563 [2d Dept 1998]). Specifically, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

On the other hand, "when 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 the party to be charged had authority to supervise or control the performance of the work" (*id.*). General supervisory authority to oversee the progress of the work is insufficient to impose liability. Rather, [a] defendant has the authority to supervise or control the work for purposes of Labor Law § 200 [only] when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega*, 57 AD3d at 62). Further, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010] [internal quotation marks omitted]). "If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]).

Here, the accident arose out of alleged defects in the equipment used by plaintiff inasmuch as he alleges that the scaffold collapsed, or alternatively, that he slipped while

climbing up the scaffold. Accordingly, any liability against Sumagli under Labor Law § 200 or common-law negligence must be premised upon a showing that Sumagli had the authority to supervise and control the means and methods employed by plaintiff and his AJ & GA coworkers when carrying out the work. Contrary to plaintiff's argument, Sumagli has made a prima facie showing that it lacked such authority. In particular, when asked at his deposition if "anybody from the building [was] there supervising your work?" plaintiff replied, "No. No. I don't remember. Only [Mr. Lisowski and Mr. Gajniak]. No. Only them, I think so." Further when Mr. Lisowski was asked if he ever had any conversations with representatives from Rialto or Sumagli regarding instruction or direction over how AJ & GA would perform the work, he responded "[m]inimally." When further asked if these conversations were with Sumagli directly, Mr. Lisowski responded, "no." Finally, when asked whether "any of the conversations that you had with [Rialto or Sumagli] [dealt] with how your employees should use tools, scaffolds or any other type of device to complete their work," Mr. Lisowski responded, "no." Thus, it is clear from plaintiff and Mr. Lisowski's testimony that Sumagli did not exercise any control or authority over the manner in which AJ & GA and plaintiff performed the work. Accordingly, that branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Sumagli is granted.

III. Defendants' Indemnification Claims Against AJ & GA

Defendants move for summary judgment under their common-law and contractual indemnification claims against AJ & GA. In support of their motion for contractual indemnification, defendants point to the aforementioned AJ & GA/Rialto Indemnification Agreement. In particular, defendants note that this agreement contained a clause in which AJ & GA agreed to "indemnify and hold harmless . . . the Owner [and] Rialto" for any claims or costs, including attorneys' fees, arising out of "the Work, its execution or performance, or any conditions created by the Work." The defendants further note that this clause stated that AJ &

GA was obligated to indemnify "for liability imposed upon any Indemnitiees, without negligence on their part but by reason of statute." Here, defendants maintain that plaintiff's claims against them clearly arose out of AJ & GA's work. Defendants further maintain that the indemnification provision does not violate General Obligations Law § 5-322.1 and that, in any event, the provision is fully enforceable inasmuch as the accident was not caused by any negligence on their part and any liability they face is strictly vicarious in nature.

With respect to their common-law indemnification cause of action, defendants argue that, inasmuch as the accident was not caused by any negligence on their part, and plaintiff was controlled and supervised by AJ & GA, they are entitled to summary judgment on this claim as well.

In opposition to this branch of defendants' motion, AJ & GA initially maintains that defendants are not entitled to common-law indemnification against it inasmuch as it is clear from the pleadings as well as plaintiff's own deposition testimony that he did not sustain a grave injury for purposes of Workers Compensation Law § 11.

AJ & GA also argues that defendants' motion for summary judgment under their contractual indemnification claims must be denied. In this regard, AJ & GA argues that it is not obligated to indemnify Sumagli under the AJ & GA/Rialto Indemnification Agreement inasmuch as neither Sumagli nor Rialto executed this agreement. AJ & GA further contends that, to the extent that defendants rely upon the indemnification clause in the Sumagli/AJ & GA contract, defendants' motion for contractual indemnification must also be denied. In particular, AJ & GA contends that the clause runs afoul of General Obligations Law § 5-322.1 since it specifically allows for Sumagli to be indemnified for its own negligence.

"The right to contractual indemnification depends upon the specific language of the contract. The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances"

(*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). Here, under the terms of the AJ & GA/Rialto Indemnification Agreement executed by AJ & GA, AJ & GA agreed to indemnify both Rialto and Sumagli for any claims arising out of the work, including claims where Rialto and Sumagli's liability is based upon statute rather than negligence (i.e., Labor Law §§ 240[1] and 241[6]). Contrary to AJ & GA's argument, the fact that Rialto and Sumagli did not execute this agreement does not preclude its enforcement inasmuch as the obligation to indemnify was imposed upon AJ & GA, who did execute the agreement (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 513 [1st Dept 2009] ["With respect to contractual indemnification, the stand-alone [ ] indemnity agreement was an enforceable writing, containing sufficient detail and signed by the party to be charged"]). Furthermore, inasmuch as the accident clearly arose out of AJ & GA's work and was not caused by any negligence on Sumagli or Rialto's part, this agreement is fully enforceable against AJ & GA. Moreover, AJ & GA is also obligated to indemnify Sumagli under the terms of the Sumagli/AJ & GA contract. In particular, enforcement of this provision is not barred by General Obligations Law § 5-322.1 inasmuch as it authorizes indemnification "to the fullest extent permitted by law" (*Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 870-871 [2d Dept 2008]). In any event, the indemnification clause is fully enforceable inasmuch as the accident was not caused by any negligence on Sumagli's part (*see id.* at 871). Accordingly, that branch of defendants' motion which seeks summary judgment on their contractual indemnification claim against AJ & GA is granted.[3]

Turning to defendants' common-law indemnification claims against AJ & GA, Workers' Compensation Law § 11 precludes third-party common-law indemnification or contribution claims against employers for injuries sustained by their employees unless the employee's injuries are shown to be grave as set forth in the statute (*Cassese v SVJ Joralemon, LLC*, 168

[3] Inasmuch as plaintiff has discontinued his claims against it, Rialto's contractual indemnification claim against AJ & GA is only relevant with respect to attorneys' fees and litigation costs.

AD3d 667, 669 [2d Dept 2019]). Here, defendants motion papers do not even attempt to demonstrate that plaintiff sustained a grave injury as defined in Workers' Compensation Law § 11. Under the circumstances, that branch of defendants' motion which seeks summary judgment under their common-law indemnification claim against AJ & GA is denied.

CONCLUSION

Based upon the foregoing, it is hereby,

ORDERED that plaintiff's motion for partial summary judgment against Sumagli on his Labor Law § 240(1) cause of action is denied (motion sequence 2); and it is further,

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) claim against Sumagli is granted as to alleged violations of 12 NYCRR 23-1.7(d), 23-1.7(e), and 23-1.21 but denied as to an alleged violation of 12 NYCRR 23-1.7(f) (motion sequence 3); and it is further,

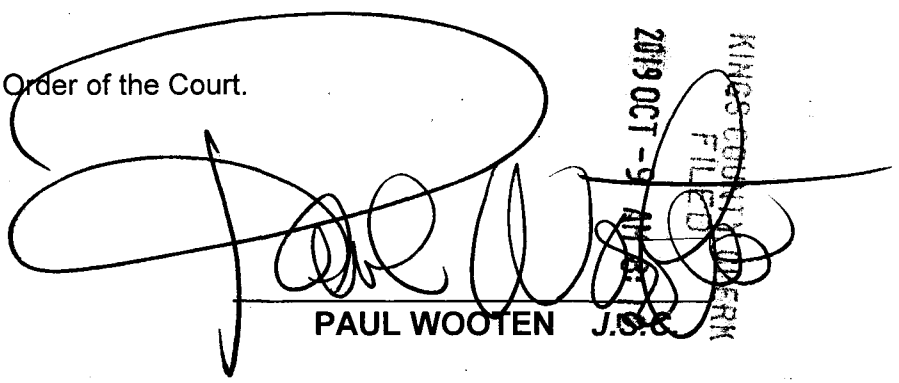
ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Sumagli is granted (motion sequence 3); and it is further,

ORDERED that the branch of defendants' motion which seeks summary judgment on their common-law and contractual indemnification claims against AJ & GA is granted with respect to their contractual indemnification claims and denied with respect to their common-law indemnification claims (motion sequence 3); and it is further,

ORDERED that counsel for Sumagli is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/7/19



PAUL WOOTEN J.S.C.