AMENDED SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 8

X

SERGIO RODRIGUEZ VEGA,

Plaintiff,

-against-

Index No.: 607211/16
Motion Sequence…04, 05, 06, 07
Motion Date…09/26/18

118 SACKSVILLE ROAD LLC and TARR'S HOME IMPROVEMENTS, INC.,

Defendants.

X

TARR'S HOME IMPROVEMENTS, INC.,

Third-Party Plaintiff,

-against-

ARRIAZA HOME IMPROVEMENTS CORP.,

Third-Party Defendant.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 04).....x
Affirmation in Partial Opposition.....x
Reply Affirmation.....x
Notice of Motion (Mot. Seq. 05).....x
Notice of Cross-Motion (Mot. Seq. 06).....x
Affirmation in Opposition.....x
Affirmation in Partial Opposition.....x
Reply Affirmation.....x
Notice of Cross-Motion (Mot. Seq. 07).....x
Affirmation in Partial Opposition.....x

Upon the foregoing papers, the motion (Seq. 04) by the Plaintiff, SERGIO RODRIGUEZ VEGA (hereinafter "RODRIGUEZ"), seeking an Order, pursuant to CPLR § 3212, granting him summary judgment on the issue of liability under New York Labor Law §§ 240 (1) and 241 (6), and pursuant to CPLR § 3025 (b), granting the Plaintiff leave to file a supplemental Bill of Particulars to assert violations of Industrial Code regulations, 23-12 NYCRR §§ 23-1.21 (b)(4)(ii) and 23-1.21(b)(4)(iv), and deeming the Supplemental Verified Bill of Particulars timely served, *nunc pro tunc*; the motion (Seq. 05) by the Third-Party Defendant, ARRIAZA HOME IMPROVEMENTS CORP. (hereinafter "ARRIAZA"), pursuant to CPLR §§ 3211 and 3212, seeking an Order granting it summary judgment dismissing the Third-Party Complaint of the Defendant/Third-Party Plaintiff, TARR'S HOME IMPROVEMENTS, INC. (hereinafter "TARR'S"), together with all crossclaims and counterclaims asserted against it; the cross-motion (Seq. 06) by the Defendant, TARR'S, seeking an Order pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff's claims for common law negligence and Labor Law 200; and the cross-motion (Seq. 07) by TARR's as Third-Party Plaintiff, seeking summary judgment on its third-party claims for breach of contract and contractual indemnification, are determined as hereinafter provided.

In the instant labor law action, the Plaintiff seeks to recover damages for personal injuries allegedly sustained on June 2, 2016, while working on a construction project for his employer, Third-Party Defendant, ARRIAZA (*See* Verified Bill of Particulars, annexed to Plaintiff's Motion [Mot. Seq. 04] as Exhibit "F"). The Plaintiff

sustained injuries during a construction project at 118 Sacksville Road, Garden City, New York, a private residence (hereinafter "subject premises"), which involved the demolition of a pre-existing structure and construction of a new structure for purposes of resale (investment).

The Defendant, 118 SACKSVILLE, is the owner of the subject premises. The Defendant/Third-Party Plaintiff, TARR'S was the general contractor for the construction project at the subject premises. TARR'S also acted as 118 SACKSVILLE's representative for the project. The Third-Party Defendant, ARRIAZA, was the Plaintiff's employer on the date of the accident. At that time, ARRIAZA was installing Hardi Board siding at the subject premises.

The Plaintiff commenced this action predicated upon Labor Law §§ 240 (1) and 241 (6) on September 19, 2016, naming TARR'S and 118 SACKSVILLE as party-Defendants. 118 SACKSVILLE has defaulted. By Short Form Order dated January 31, 2018, this Court granted a default judgment in favor of the Plaintiff as against 118 SACKSVILLE based upon its failure to answer or otherwise appear in this action.

TARR'S commenced a third-party action against ARRIAZA, Plaintiff's employer asserting causes of action for common law contribution and indemnification, as well as contractual indemnification. In June 2015, TARR'S entered into a written agreement with ARRIAZA pursuant to which ARRIAZA agreed to procure general liability insurance naming TARR'S as an additional insured. The agreement also contained an indemnification provision, pursuant to which ARRIAZA agreed to defend, indemnify

and hold harmless TARR'S from any personal injury claims arising out of ARRIAZA's work, or any work performed by its employees.

At his Examination Before Trial ("EBT"), the Plaintiff testified that at the time of the accident, he had been employed by ARRIAZA for ten years and was the "boss in charge of each project." (*See* Plaintiff's EBT at pp. 12-13, annexed to Plaintiff's Motion [Seq. 04] as Exhibit "G"). The Plaintiff was assigned to complete the siding of the project at the subject premises (*Id.* at pp. 15, 19). ARRIAZA was completing the siding at the request of TARR'S (*Id.* at p. 16). The garage, walls, lighting, front and back of the structure were already completed by the time he arrived on the day of the accident (*Id.* at p. 21).

The Plaintiff testified that he was specifically assigned to work on the soffits. On the date of the accident, the Plaintiff prepared the soffits, prepared the grinder used to cut the soffits, and put up the ladder (*Id.* at pp. 23-24). At the job site, there were four ladders and scaffolding available (*Id.* at p. 25). The ladder was a "leaning ladder", twenty-four (24) feet tall that leaned along the side of the structure (*Id.* at p. 27). The Plaintiff testified that the ladder was owned by ARRIAZA.

The Plaintiff testified that the ladder could not be fastened to the building until the siding was complete (*Id.* at p. 27). He leveled out the dirt on the ground, dug the rubber feet of the ladder approximately two to three (2-3) inches into the ground, and checked that the nails were correctly in the ladder feet. The Plaintiff inspected the ladder to make sure it was positioned correctly, it was level to the ground, and steady at the top prior to working on it (*Id.* at pp. 38-40).

The Plaintiff chose not to move the scaffolding that was already set up at another part of the subject residence because the area where he was working did not have enough space (*Id.* at p. 31). He was not wearing a safety harness at the time of the accident. The Plaintiff testified that there was no safety equipment kept at the subject premises nor had he ever previously used safety equipment (*Id.* at p. 54).

The accident occurred at approximately at 8:30 a.m., while the Plaintiff was in the process of performing the work on the ladder at a height of about 19 feet (*Id.* at p. 18). At this time, the Plaintiff and his co-worker, Jorge Vallecios, were the only people on the subject premises. Vallecios was the Plaintiff's "helper".

The Plaintiff was using a grinder to cut the wood soffits at the time of the accident. His left hand was holding onto the ladder while he was cutting the soffits with the grinder in his right hand. He had cut most of them and only had two left. While cutting a wood soffit with the grinder with his right hand located approximately 16 inches to his right, the Plaintiff felt the ladder shift to the left approximately 2 feet, causing him to lose his balance (*Id.* at pp. 36, 41-42). In an attempt to hold onto the ladder with his left hand, he dropped the grinder (*Id.* at p. 36). This caused the grinder to strike his head and chest resulting in lacerations to the head, chest and arms.

The Plaintiff testified that he was never instructed to have anyone hold the ladder while performing work on top of the ladder (*Id.* at 37).

Jorge Vallecios, the Plaintiff's coworker, testified at his EBT that he was working on a ladder immediately to the left of the Plaintiff at the time of the accident (*See*

Jorge Vallecios EBT at pp. 30-32, 45-46, annexed to Plaintiff's Motion [Mot. Seq. 04] as Exhibit "J"). Prior to the accident, Vallecios placed his ladder and the Plaintiff placed his own ladder (Id. at pp. 25-26). Vallecios testified that the Plaintiff placed his ladder "well" and that he did not observe any loose dirt in the area of the Plaintiff's ladder (*Id.* at pp. 31-32).

According to Vallecios, the accident occurred when the grinder that Plaintiff was using "jumped" and struck the Plaintiff in the forehead and right hand. When specifically asked whether he saw Plaintiff's ladder move in any way immediately prior to the accident, Vallecios testified, "No I didn't see; I don't know." (*Id.* at pp. 45-46). The Plaintiff did not fall off the ladder. He climbed down after the accident (*Id.* at p. 47).

Vallecios confirmed that the scaffold was available at the subject premises on the date of the accident, but that it was not used because the area where he and the Plaintiff were working was too small for the scaffold (*Id.* at pp. 19-20). Vallecios also testified, contrary to the Plaintiff's testimony, that safety harnesses were available at the subject premises and available for their use (*Id.* at p. 35).

Jose Arriaza, the principal of Third-Party Defendant, ARRIAZA, testified at his EBT that when he was present at the subject premises, he would direct the work and provide the Plaintiff with instructions as to how he should perform the work. While a "pump jack plank scaffold" was available for the work being performed at the subject premises, Arriaza testified that on the date of the accident the scaffold could not be used because it was a small section of only approximately ten feet. Only the ladder could be

used at that time (*Id.* at p. 46). That area was also a place that safety harnesses could not be used, although they were available (Id. at p. 47).

Arriaza testified that the grinder the Plaintiff was using at the time of the accident was not the correct tool to cut the rafter tails. Rather, according to Arriaza, Plaintiff should have been using a Sawzall (*Id.* at pp. 55-56). Arriaza had previously instructed the Plaintiff that every time a rafter tail needs to be cut, only a sawzall can be used, "because that's the right tool to do that" (*Id.* at p. 56). However, he did not think it was "dangerous to use a grinder to cut the rafter tails" (*Id.* at p. 57).

Following the accident, Arriaza received a call from Vallecios informing him about the accident. When Arriaza arrived at the subject premises, Vallecios told him that the Plaintiff "cut himself when the ladder moves [*sic*]" (*Id.* at p. 40).

Arraiza testified that no one ever told him that the accident occurred because the disk came off the grinder (*Id.* at p. 55). He recalled seeing a disc in it when he saw the grinder after the accident that day.

Plaintiff's Worker's Compensation Claim

The Plaintiff filed a claim for Workers' Compensation benefits on June 6, 2016, wherein the New York State Workers Compensation Board ("WCB") identified ARRIAZA as the Plaintiff's employer at the time of the accident. The WCB filed contained a New Loss Snapshot, two versions of a First Report of Injury, and a Claimant Intake Form from the Plaintiff's IME (independent medical examination by WCB) which reflect that the Plaintiff was injured as a result of a disc detaching from the grinder and striking the

Plaintiff, with no mention of the ladder shifting (*See* Reports, annexed to TARR'S Motion [Mot. Seq. 06] as Exhibits "B", "C", "D", & "E").

ARRIAZA was directed by the WCB to pay the Plaintiff's medical bills and lost wages (*See* WCB Decision, annexed to ARRIAZA Motion [Mot. Seq. 05] as Exhibit "C").

Plaintiff's Motion (Seq. 04) and TARR'S Cross-Motion (Seq. 06):

In support of his motion, the Plaintiff asserts two principal bases for summary judgment. First, the Plaintiff asserts that the Defendants fall within the purview of Labor Law §§ 240 (1) and 241 (6) given their status of owner and general contractor, to which the statutory provisions apply. The Plaintiff argues that the Defendants violated Labor Law § 240 (1) by failing to provide the Plaintiff with adequate protection against an unsecured extension ladder which shifted while the Plaintiff was on it. The Plaintiff further avers that his "elevation-related" injuries were the direct consequence of the Defendants' failure to properly secure the ladder.

Second, the Plaintiff argues that the Defendant, TARR'S, violated Labor Law § 241 (6) by failing to provide the Plaintiff with adequate safety devices in the form of a safety harness or scaffolding, and that such failure was the proximate cause of the Plaintiff's injuries. The Plaintiff posits that the Defendant also violated Labor Law § 241 (6) based upon its violation of Industrial Code regulations 12 NYCRR §§ 23-1.21(b)(4)(ii) and 23-1.21(b)(4)(iv). It is claimed that these Industrial Code violations occurred when TARR'S allowed work to be performed on the subject premises, higher than ten (10) feet

above the ladder footing, without the mechanical means for securing the ladder so as to prevent it from slipping.

The Plaintiff also seeks leave to file a Supplemental Bill of Particulars asserting violations of Industrial Code regulations 23-1.21(b)(4)(ii) and 23-1.21(b)(4)(iv). This is unopposed by the Defendant and is thus **GRANTED**.

TARR'S application, labeled as a "cross-motion" (Mot. Seq. 06), seeks an Order granting it summary judgment dismissing the Plaintiff's claims pursuant to Labor Law § 200 and common law negligence. TARR'S also submits opposition to the Plaintiff's motion seeking summary judgment on the issue of liability as to Labor Law §§ 240 (1) and 241 (6).

As a preliminary matter, TARR'S summary judgment motion, erroneously labeled as a "cross-motion", is admittedly untimely. The Preliminary Conference Order and the Certification Order direct summary judgment motions to be filed within sixty (60) days of the filing of the Note of Issue. The Note of Issue was filed on May 23, 2018 and the deadline by which to file summary judgment motions was July 23, 2018. TARR'S concedes that it untimely filed and served its motions (Seq. 06 and 07) on August 10, 2018, well beyond the Court-ordered deadline.

In TARR'S attorney's affirmation in support, counsel requests that "the instant cross-motion be deemed timely in that it addresses the same claims upon which the Plaintiff and Third-Party Defendant brought their timely motions." (*See* Streelman Affirmation, Doc. No. 80, at ¶4). Counsel claims that the Court may consider an untimely

"motion or cross-motion...where a timely motion for summary judgment was made on nearly identical grounds." Counsel further argues that the nearly identical nature of the grounds for the cross-motion may serve as the requisite good cause to consider TARR'S untimely cross-motion on the merits. The Court disagrees.

The Plaintiff's motion (Seq. 04) seeks partial summary judgment on the issue of liability as to its claims pursuant to Labor Law 240 and 241. The Plaintiff's motion does not seek judgment as a matter of law on his common law negligence and Labor Law 200 claims. As such, TARR'S "cross-motion" (Seq. 06) seeking partial summary judgment dismissing the Plaintiff's claims for common law negligence and Labor Law 200 is not being brought on "nearly identical grounds" as counsel for TARR'S urges. The issues raised by TARR'S "cross-motion" were thus not already before the Court since the claims TARR'S seeks to dismiss are not those at issue in the Plaintiff's motion.

The cases cited by TARR'S are readily distinguishable. In *Grande v. Peteroy*, 39 A.D.3d 590 [2d Dept. 2007], the court found that the plaintiff's untimely cross-motion on the issue of serious injury "may be considered" where defendant made a timely motion on the issue of serious injury. In *Perfito v. Einhorn*, 62 A.D.3d 846 [2d Dept. 2009], plaintiff's motion and defendant's motion were considered made on "nearly identical grounds" where both parties sought a determination as to the lawful ownership of the real property in issue analyzing whether defendant lawfully owned it by adverse possession. Lastly, *Bressingham v. Jamaica Hospital Medical Center*, 17 A.D.3d 496 [2d Dept. 2005], is a matter that actually goes against TARR'S position. In *Bressingham*, the

pending motion by the codefendant for similar relief and the untimely cross-motion by defendant were not "nearly identical", and thus the untimely cross-motion should not have been considered.

Here, the Court declines to find that TARR'S erroneously labeled "cross-motion" (Seq. 06) was made on nearly identical grounds as either the Plaintiff's motion or ARRIAZA's motion, and is thereby denied as untimely. As such, the Court shall only address the arguments proffered therein that are in opposition to Plaintiff's motion for summary judgment as to his Labor Law 240 and 241 claims.

As to the Plaintiff's claims predicated upon Labor Law § 240 (1), TARR'S argues that there is a clear question of fact as to whether the accident occurred due to a "gravity related risk" or if the Plaintiff was the sole proximate cause of his accident. In support, TARR'S relies on the testimony of Vallecios that the accident occurred as a result of the grinder "jumping". TARR'S also argues that the scaffolding could have been set up in the location of the accident which would have protected the Plaintiff from the injuries. TARR'S further relies upon the documents contained in the WCB file which reflect that the Plaintiff was injured as a result of a disc detaching from the grinder, with no mention of the ladder shifting.

TARR'S contends that safety harnesses were made available by the Defendant, ARRIAZA, which the employees were required to use every day unless the location of their work prevented them from doing so. TARR'S also highlights Vallecios' testimony that safety harnesses were available at the subject premises on the morning of

the Plaintiff's accident. Thus, TARR'S alleges that too great of a question of fact exists to justify a summary motion decision in favor of the Plaintiff under Labor Law § 240(1).

TARR'S further argues in opposition that the Plaintiff's motion on the issue of liability must also be denied inasmuch as the Plaintiff was the sole proximate cause of the subject accident. TARR'S contends that the manner in which the ladder was placed and its location, combined with the Plaintiff's failure to use the safety equipment made available to him, were the proximate cause of his injuries. More specifically, counsel asserts that the Plaintiff could have braced the ladder and used the available harnesses, tag lines, and scaffolding. Additionally, counsel argues that as a general contractor, TARR'S, did not direct or control the means and methods by which the Plaintiff performed the work on the day of the accident.

With respect to the Plaintiff's claims predicated on Labor Law § 241 (6) asserting violations of Industrial Code § 1.21(b)(4)(ii) (Ladder on Firm Surfaces) and § 1.21(b)(4)(iv) (Secured Ladder), TARR'S argues that there is a clear question of fact as to the condition of the ground on which the Plaintiff placed the ladder. TARR'S points to the Plaintiff's testimony that he had to level the dirt which counters with Mr. Tarr's testimony that the ground was flat when he observed it the day prior to the incident.

Legal Analysis

The standards for summary judgment are well settled. A court may grant summary judgment where the moving party has made a *prima facie* showing that there are no genuine issues of material fact, and the moving party is, therefore, entitled to judgment

as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact (*Id.*) Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; the court's task is to determine whether or not there exists a genuine issue for trial (*See Miller v. Journal News*, 211 A.D.2d 626 [1995].

To establish liability under Labor Law § 240 (1) (the "Scaffold Law") a plaintiff must demonstrate a violation of the statute and show that such violation was the proximate cause of his or her injuries (*Reinoso v. Ornstein Layton Management, Inc.*, 19 A.D.3d 678 [2nd Dept. 2005]).

Labor Law § 240 (1) provides, in pertinent part, as follows:

> All contractors and owners and their agents, *** who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure, shall furnish or erect, or caused to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, swings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.***

The statute mandates the imposition of "absolute liability" and is deemed to create a statutory cause of action unrelated to questions of negligence (*Striegel v. Hillcrest Hgts. Dev. Corp.*, 100 N.Y.2d 974, 977 [2003]; *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 522 [1985]).

The statute was ordinarily read to be *impliedly* limited to those accidents and injuries that arose from elevation-related hazards where the plaintiff was exposed to "extraordinary elevation risks" of the kind that safety devices listed in the Labor Law § 240 (1) protect against (*Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 [2007]; *Toefer v. Long Is. R. R.*, 4 N.Y.3d 399 [2005]) and not just usual and ordinary dangers of a construction site.

In 2009, the Court of Appeals in *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599 [2009], determined that prior cases read Labor Law § 240 (1) too narrowly and explained that "[t]he breadth of the statute's protection has...been construed to be less wide than its text would indicate" (*Runner v. New York Stock Exchange, Inc.*, supra at 603). As a result, the Court of Appeals in *Runner v. New York Stock Exchange, Inc.*, supra, re-framed and reiterated the applicable rule in Labor Law § 240 (1) stating as follows:

> "[T]he dispositive inquiry. . . does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, *the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential* " (*Id.* at 603 [Emphasis Added])

Significantly, in 2011, the Court of Appeals in *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, supra, reaffirmed its holding in *Runner*. The Court of Appeal's reasoning that the scope of Labor Law § 240 has "evolved" such that the statute's "core purpose" is now "to provide workers with adequate protection from reasonably

preventable, gravity-related accidents", advanced its best pronouncement of the more expansive application of Labor Law § 240 (1) stating therein that the "single decisive question" regarding this limitation is whether the worker's injuries " 'were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Wilinski v. 334 East 92nd Housing Development Fund Corp.*, supra at 10, *quoting, Runner v. New York Stock Exchange, Inc.*, supra at 603). The *Wilinski* Court expanded the protections of Labor Law § 240 (1) to include a more *generalized* risk stemming from a "physically significant" elevation differential (*Wilinski v. 334 East 92nd Housing Development Fund Corp.*, supra at 7; *Salazar v. Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011]).

Thus, ultimately, entitlement to recovery under Labor Law § 240 (1) requires a demonstration of two things: (1) a violation of the statute – i.e., a failure of the defendant to provide the required protection at a construction site – proximately caused the plaintiff's injury; and, (2) that the "injury sustained is the type of elevation related hazard to which the statute applies" (*Wilinski v. 334 East 92nd Housing Development Fund Corp.*, supra at 7; *see Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 288–289 [2003]).

Here, the Plaintiff's injury clearly resulted from work that was required to be performed at an upper elevation differential (*See, D'Egidio v. Frontier Ins. Co.*, 270 A.D.2d 763 [3rd Dept. 2000], *lv denied* 95 N.Y.2d 765 [2000]).

Having carefully reviewed the record herein, the Court finds that questions of fact exist as to whether the Plaintiff was properly provided with adequate safety devices,

whether any failure to provide such safety devices was a "contributing cause" of the Plaintiff's accident, and whether the Plaintiff's actions were the sole proximate cause of his accident. The varying deposition testimony of the parties raises issues of fact as to the happening of the accident – i.e. whether there was a shift in the ladder due to it being improperly secured, and if there was, whether the ladder's movement caused Plaintiff to lose his balance and drop the grinder. A question has also been raised as to whether the available scaffold and/or safety harnesses could have been utilized for the specific area where the work was being performed. A jury may find that the Plaintiff's actions were the sole proximate cause of the injuries whereby liability under Labor Law 240 (1) would not attach (*See, Robinson v. East Med. Ctr., L.P.*, 6 N.Y.3d 550 [2006]; *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 [2003]; *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 [1998]. A jury may also find that adequate safety devices were made available at the job site, but the Plaintiff did not use the devices (*Robinson v. East Med. Ctr., L.P.*, 6 N.Y.3d 550 [2006], *supra*). Based on the record presented, the Court finds it just as likely that a jury could find that the owner or contractor failed to provide adequate safety devices and that the absence of such devices was the proximate cause of injury to the Plaintiff *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 [1985]. A jury may also find that the owner and contractor failed to construct, place and operate elevation-related safety devices to afford the Plaintiff proper protection from the risks inherent in working at an elevated work site (*Ball v. Cascade Tissue Group-New York, Inc.*, 36 A.D.3d 1187

[3rd Dept. 2007]), such that the leaning ladder was not placed and operated so as to give proper protection to the Plaintiff (*Klein v. City of N.Y.*, 89 N.Y.2d 833 [1996]).

Accordingly, based upon the foregoing, the branch of the Plaintiff's motion (Mot. Seq. 04), pursuant to CPLR § 3212, which seeks an Order granting him summary judgment on the issue of liability against the Defendant, TARR'S, under Labor Law § 240 (1), is **DENIED**.

Section 241 (6) of the Labor Law provides:

> § 241. Construction, excavation and demolition work
> 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> * * *
> 6. 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

It is incumbent upon the plaintiff proceeding under Labor Law § 241 (6) to show that some "concrete specification" in the regulations was violated and also that this was a substantial factor in causing the subject accident (*Ross v. Curtis-Palmer Hyrdo-Electric Company*, supra; *Morrison v. City of New York*, 5 A.D.3d 642 [2d Dept. 2004]). Once this threshold is met, a Labor Law defendant can be held vicariously liable for the

regulatory violation even in the absence of notice thereof (*Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 349-350 [1998]). That is, while the statute does not impose "absolute liability" it does impose a "nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein" (*Id.* at 350). Therefore, once it is established that *any* construction site participant either caused or negligently allowed a condition violative of any of the "concrete" specifications of the Industrial Code, then the owner or general contractor is vicariously liable, subject to comparative negligence, irrespective of whether said defendant had notice of the condition.

Here, the Plaintiff's Labor Law § 241 (6) claim is based chiefly upon violations of the Industrial Code §§ 12 NYCRR 23-1.21, entitled "Ladders and ladderways", specifically subdivisions (b)(4)(ii) and (iv), provide, in pertinent part:

> (b) General requirements for ladders.
>
> ***
>
> (4) Installation and use.
>
> ***
>
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
>
> ***
>
> (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being

> performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

In this matter, the Court finds Industrial Code § 12 NYCRR 23-1.21 (b)(4)(ii) inapplicable as there is no evidence that the ladder was not firm, or that it was placed on a slippery surface, or that insecure objects were used as ladder footings.

However, the Court does find subdivision (iv) relevant to the facts herein as it is undisputed that the "mechanical means for securing the upper end of such ladder against side slip" was never done in accordance therewith. While the rubber safety feet were used to secure the lower portion of the ladder, the failure to secure the upper end of such ladder by mechanical means, as mandated for work performed from rungs higher than 10 feet above the ladder footing, warrants judgment in favor of the Plaintiff on his claim pursuant to Labor Law 241 (6). Moreover, the Plaintiff testified that he was never instructed on how to properly use the leaning ladder.

Thus, the branch of the Plaintiff's motion (Mot. Seq. 04), pursuant to CPLR § 3212, seeking an order granting him summary judgment on the issue of liability based upon Labor Law § 241 (6) is **GRANTED**.

ARRIAZA's Motion (Seq. 05) and TARR'S Cross-Motion (Seq. 07):

Finally, Third-Party Defendant, ARRIAZA, filed a motion (Seq. 05), seeking summary judgment dismissing the Third-Party Complaint on the grounds that: (i) the causes of action asserted against ARRIAZA are based in part upon common law indemnity

and contribution; (ii) the Worker's Compensation Law ("WCL") Section 11, bars common law actions for indemnity and contribution against employers where the Plaintiff has not sustained a "grave injury"; (iii) ARRIAZA complied with the terms of any applicable agreement entitling it to summary judgment dismissing TARR'S breach of contract claim; and (iv) the indemnity clause in the parties' Agreement which purports to afford contractual indemnity to TARR'S by ARRIAZA, does not pertain to the Plaintiff's accident as it did not arise from any negligence on the part of ARRIAZA, and further, that the indemnity clause violates General Obligations Law ("GOL") §5-322.1.

It is noted at the outset that TARR'S, in its "Affirmation in Support of Cross-Motion and in Partial Opposition to Third-Party Defendant's Summary Judgment Motion" does not oppose that portion of ARRIAZA's motion seeking to dismiss the Third-Party claims for common law indemnification and contribution as TARR'S concedes that the Plaintiff did not sustain a "grave injury" as defined by the WCL. Thus, the branch of ARRIAZA's motion (Seq. 05) seeking summary judgment dismissing the common law indemnification and contribution claims asserted in the Third-Party Complaint, is **GRANTED**.

The Third-Party Plaintiff, TARR'S filed another cross-motion (Seq. 07) seeking summary judgment as to its third-party claims for breach of contract and contractual indemnification. While the "cross-motion" is untimely, the Court shall consider its merits based on the untimely cross-motion's "nearly identical grounds" as ARRIAZA's motion which seeks dismissal of the same claims. Distinct from the untimely

cross-motion (Seq. 06) filed by TARR'S as a Defendant wherein it sought dismissal of claims not at issue in the Plaintiff's motion (Seq. 04), the instant cross-motion (Seq. 07) addresses claims and arguments that were squarely put before the Court in ARRIAZA's timely filed motion. As such, the Court shall turn to the merits of TARR'S breach of contract and contractual indemnification causes of action.

TARR'S claims that ARRIAZA breached the terms of their contract by failing to procure insurance coverage for TARR'S as required therein. While ARRIAZA only cites to Section (1), (B) of the parties' Agreement, the Court finds pertinent subdivisions (A), (B) and (C), which provide as follows:

> (1) **INSURANCE:** Sub-Contractor's Insurance:
>
> Sub-Contractor agrees to supply to Contractor named herein, the following Certificates of Insurances – PRIOR TO THE START OF ANY SUB-CONTRACTING WORK for TARR'S. More specifically:
>
> (A) A Certificate of Compensation Insurance, naming Sub-Contractor as the "Insured" and Tarr's Home Improvements, Inc. at the above address, as the "Certificate Holder". Said Certificate must be dated prior to any sub-contracting work being done by you for Contractor and shall run for the entire period of the job and thereafter. When Certificate of Worker's Compensation is due to expire, IT IS THE SUB-CONTRACTOR'S OBLIGATION TO FORWARD TO TARR'S…A NEW UPDATED COMPENSATION CERTIFICATE; and
>
> (B) A Certificate of Liability Insurance, naming Sub-Contractor as the "Insured" and TARR'S…as the "Certificate Holder". The Liability Insurance must be in the amount of one million/two million and must CLEARLY LIST TARR'S…AS "ADDITIONAL INSURED AND LOSS PAYEE". Liability Certificate must be dated prior to any sub-contracting work done by you for Contractor; and shall run for the entire period

of the job and thereafter. When the Liability Certificate of Insurance is due to expire, IT IS THE SUB-CONTRACTOR'S OBLIGATION TO FORWARD TO TARR'S...A NEW UPDATED LIABILITY CERTIFICATE; and

(C) Sub-Contractor agrees that if there is any change in the status of any of his/her Insurances above listed, THAT SUB-CONTRACTOR WILL PROVIDE CONTRACTOR (CERTIFICATE HOLDER) NO LESS THAN 30 DAYS WRITTEN NOTICE OF CANCELLATION OF SUB-CONTRACTOR'S INSURANCE. This Insurance shall include contractual liability insurance covering the Sub-Contractor's obligations.

(*See* Agreement, annexed to ARRIAZA Motion [Seq. 05] as Exhibit "H")

ARRIAZA submits that it did in fact comply with the foregoing terms by procuring liability insurance from Essex Insurance Company under policy number 3DY4078 and policy renewal 3DU5772, which was in effect from June 2015 through June 2016, with applicable limits of $1,000,000 per occurrence and $2,000,000 in the aggregate ("Policy") (*See* Essex Insurance Policy, annexed to ARRIAZA's Motion as Exhibit "O"). The Policy contains a "BLANKET ADDITIONAL INSURED" endorsement which provides coverage for "any person or organization to whom you are obligated by valid written contract to provide such coverage." (*Id.*)

ARRIAZA's counsel relies upon the matter of *Perez v. Morse Diesel Intern. Inc.,* 10 A.D.3d 497 [1st Dept. 2004], where third-party plaintiff's claim for breach of contract for failure to procure insurance was dismissed as the record established that third-party defendant purchased a liability policy with a blanket endorsement for contractually designated additional insureds, including third-party plaintiff. The court found that third-

party plaintiff's claim that defendant breached its obligation to procure insurance untenable. Moreover, as pertinent here, the court held that the insurer's refusal to indemnify third-party plaintiff under the coverage purchased by third-party defendant does not alter this conclusion (*Perez v. Morse Diesel Intl., Inc.*, 10 A.D.3d at 498, *citing KMO-361 Realty Assoc. v. Podbielski*, 254 A.D.2d 43 [1998]).

In this matter, the Court is constrained to find that ARRIAZA did in fact comply with its contractual obligations pursuant to the terms of the Agreement. There is no express term in the Agreement that obligates ARRIAZA to procure insurance for personal injuries arising out of the work performed by ARRIAZA or its employees. The only term referencing any specificity concerning the insurance to be procured is that "This Insurance shall include contractual liability insurance covering the Sub-Contractor's obligations" [*See* Agreement at ¶ (1)(C)]. However, pursuant to an endorsement entitled "Employer's Liability and Bodily Injury to Contractors and Subcontractors" of the Policy, TARR'S was denied coverage for bodily injuries sustained by an insured employee while in the course of his or her employment, which extended to any liability assumed by ARRIAZA under an "Insured Contract." Pursuant to this exclusion, TARR'S tender to ARRIAZA was denied by Markel on behalf of Essex Insurance Company. TARR'S claims that the subject exclusion essentially rendered the Policy moot in that it did not provide coverage for contractual liability arising out of occurrences such as the subject accident. The Court disagrees.

Here, based on the four corners of the parties' contract, and just as in *Perez, supra,* the Court concludes that ARRIAZA complied with the terms of the parties' Agreement by procuring insurance naming TARR'S as an additional insured with the appropriate coverage limits. The fact that the insurer denied coverage based on a policy exclusion does not render ARRIAZA's conduct a breach of its contractual obligations.

Lastly, turning to TARR'S cross-motion for summary judgment on its claim for contractual indemnification, subdivisions (2) and (3) of the Agreement, denominated as "Indemnification" and "Hold Harmless Clause", respectively, read as follows:

> (2) INDEMNIFICATION: Sub-Contractor hereby agrees, to the extent permitted by law, to assume the entire responsibility and liability for and the defense of and to pay and indemnify the Contractor herein stated, against any loss, expenses or liability and will hold the Contractor harmless for any pay and any or all losses, damages, costs or expense (including without limitation – judgments, attorney's fees, court costs, and the cost of appellate or other court proceedings) which the Contractor incurs because of injury or death of any person or on account of damage(s) arising out of or in connection with or as a result of Sub-Contractor doing work for the Contractor.
>
> (3) HOLD HARMLESS CLAUSE: To the fullest extent permitted by the law, the Sub-Contractor agrees to indemnify and hold harmless the Contractor herein named and any and all of its' Owners, Partners, directors, their agents, officers and all employees from and against any and all claims, damages, losses and expenses – including, but not limited to, attorney's fees arising out of or resulting from the performance, or failure in performance, of the Sub-contractor's work being done for Contractor herein at any time – provided that any such claim, damage, loss or expense is attributed to any bodily injury, sickness, disease or death or to injury to or destruction of tangible property (other than the work itself) including the loss of use

> resulting there from [*sic*] omission and is caused in whole or in part by any negligent act by the Sub-Contractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused – in whole or in part by a party indemnified hereunder.

(*See* Agreement, annexed to ARRIAZA's Motion as Exhibit "H")

General Obligations Law § 5-322.1 provides the following, in pertinent part:

> "[a] covenant, promise, agreement or understanding in, or in connection with * * * a contract or agreement relative to the construction, alteration, repair or maintenance of a building * * * purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to person or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees or indemnitee, where such negligence be in whole or in part, is against public policy and is void and unenforceable.

ARRIAZA does not dispute that the contractual indemnification claim may only be properly dismissed if it establishes its own freedom from negligence and the indemnification clause limits itself to the fullest extent permitted by law. The latter is unequivocally contained in the Agreement. ARRIAZA thus attempts to establish its own "freedom from negligence" and argues that the Plaintiff's conduct was the sole proximate cause of the accident and resultant injuries.

Given this Court's determinations herein, the claims predicated upon Labor Law § 240 (1), Labor Law § 200, and common law negligence remain. The Court has granted judgment in favor of the Plaintiff on his Labor Law § 241 (6) claim. Recognizing that the statutory violations are not the equivalent of negligence and do not give rise to an

inference of negligence, and further noting that the statutory prohibition against indemnifying a general contractor or owner for its own negligence may still be implicated by a finding of negligence on the part of TARR'S, the application is premature.

Accordingly, it is hereby

ORDERED, that the branch of the motion (Seq. 04) by the Plaintiff, SERGIO RODRIGUEZ VEGA, seeking an Order, pursuant to CPLR § 3212, granting him summary judgment on the issue of liability under New York Labor Law §§ 240 (1), is **DENIED**, and the branch of the motion (Seq. 04) seeking summary judgment on the issue of liability under Labor Law 241 (6), is **GRANTED**; and it is further

ORDERED, that the unopposed branch of the Plaintiff's motion (Seq. 04), seeking an Order pursuant to CPLR § 3025 (b), granting leave to file a supplemental Bill of Particulars to assert violations of Industrial Code regulations, 23-12 NYCRR §§ 23-1.21 (b)(4)(ii) and 23-1.21(b)(4)(iv), and deeming the Supplemental Verified Bill of Particulars timely served, *nunc pro tunc*; is **GRANTED**; and it is further

ORDERED, that the branch of the motion (Seq. 05) by the Third-Party Defendant, ARRIAZA HOME IMPROVEMENTS CORP., pursuant to CPLR §§ 3211 and 3212, seeking an Order granting it summary judgment dismissing the Third-Party claims for common law indemnification (Second Cause of Action), contribution (Third Cause of Action) and breach of contract (Fourth Cause of Action), is **GRANTED**, and the motion (Seq. 05) is otherwise **DENIED**; and it is further

ORDERED, that the cross-motion (Seq. 06) by the Defendant/Third-Party Plaintiff, TARR'S HOME IMPROVEMENTS, INC., seeking an Order pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff's claims for common law negligence and Labor Law 200, is **DENIED**, in all respects; and it is further

ORDERED, that the branch of the cross-motion (Seq. 07) by the Defendant/Third-Party Plaintiff, TARR'S HOME IMPROVEMENTS, INC., seeking an Order pursuant to CPLR § 3212, granting it summary judgment on its breach of contract claim is **DENIED** as moot, and the branch of the cross-motion (Seq. 07) seeking summary judgment on its Third-Party claim for contractual indemnification (First Cause of Action) is **DENIED**, as premature.

All matters not specifically addressed herein are **DENIED**.

This constitutes the decision and Amended Order of this Court.

DATED: Mineola, New York
January 30, 2019

Hon. Randy Sue Marber, J.S.C.

ENTERED
JAN 30 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE