SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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JUVEL BALTAZAR,

Plaintiff,

-*against*-

SULLIVAN FARMS, II, INC., SULLIVAN FARMS III, LLC, RAYMOND FARMS, LLC and RAY BUILDER NY CORP.,

Defendants.
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SULLIVAN FARMS, II, INC. and RAY BUILDER NY CORP.,

Third-Party Plaintiffs,

-against-

E.TETZ & SONS, INC.,

Third-Party Defendant.
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E.TETZ & SONS, INC.

Second Third-Party Plaintiff,

-against-

ORANGE COUNTY SUPERIOR CONCRETE, INC.,

Second Third-Party Defendant.
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DECISION AND ORDER

(Motions 1-3)

Index No.: 031976/2015

Sherri L. Eisenpress, J.

The following papers, numbered 1 to 14, were reviewed in connection with (i) Plaintiff Juvel Baltazar's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting him partial summary judgment as to liability on his Labor Law Sec. 240(1) cause of action against Defendants Sullivan Farms II, Inc. and Ray Builder NY Corp. (Motion #1); (ii) Second Third-Party Defendant Orange County Superior Concrete, Inc.'s Notice of Motion for an Order pursuant to *Civil Practice Law and Rules* § 3212, granting it

summary judgment and dismissal of the Second third-Party Complaint in its entirety along with any and all cross-claims against it (Motion #2); and (iii) Third-Party Defendant/Second Third-Party Plaintiff E. Tetz & Son's Notice of Cross-Motion for an Order pursuant to *Civil Practice Law and Rules* § 3212, granting dismissal of Plaintiff's complaint on the grounds that no Labor Law violations occurred and the Third-Party Defendant was not negligent and denying the motions for summary judgment filed by Plaintiff and Orange County Superior Concrete (Motion #3):

PAPERS	**NUMBERED**
NOTICE OF MOTION (#1)/AFFIRMATION IN SUPPORT/EXHIBITS A-J	1-2
AFFIRMATION IN OPPOSITION (#1)/AFFIDAVIT OF ERNEST GAILOR/ EXHIBITS A-G	3-4
AFFIRMATION IN REPLY TO OPPOSITION OF DEFENDANTS MOTION(#1)/ AFFIRMATION IN REPLY TO E. TETZ & SONS (#3)	5-6
NOTICE OF MOTION (#2)/AFFIRMATION IN SUPPORT/EXHIBITS A-Z/ MEMORANDUM OF LAW (#2)	7-9
NOTICE OF CROSS-MOTION (#3)/AFFIRMATION IN SUPPORT OF CROSS-MOTION/EXHIBITS A-H	10-11
DEFENDANTS' AFFIRMATION IN OPPOSITION (#3)	12
PLAINTIFF'S AFFIRMATION IN OPPOSITION TO MOTION AND IN REPLY TO HIS MOTION (#1 AND #3)	13
AFFIRMATION IN OPPOSITION TO CROSS-MOTION (#3) AND IN REPLY TO SECOND THIRD-PARTY DEFENDANT'S MOTION (#2)	14

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Procedural History

This is an action commenced by Plaintiff on May 5, 2015, seeking damages for personal injuries sustained by him as a result of a fall from an elevated height while standing on a "2 x 4" which was located on the right side of a wall, when he lost his balance and slipped during the course of a concrete delivery. Plaintiff asserts causes of action

sounding in negligence and Labor Law §§ 240(1), 241(6) and 200. Issue was joined as to Defendant Ray Builder NY Corp. ("Ray Builder") by service of an Answer on June 29, 2015. Sullivan Farms II Inc. ("Sullivan") filed an Answer through the NYSCEF system on October 27, 2015. A third-party action was brought against E. Tetz & Sons ("Tetz"), who answered on March 15, 2017. Tetz filed a second-third party action against Plaintiff's employer, Orange County Superior Concrete Inc. ("Orange"), who joined issue by service of an answer on November 13, 2017.

Discovery proceeded and a Note of Issue was filed on September 27, 2018. Per this Court's rules, summary judgment motions were to be filed within 60 days thereafter, to wit: November 26, 2018. Plaintiff filed his summary judgment on October 24, 2018; Second Third-Party Defendant Orange filed its summary judgment motion on November 26, 2018 and Third-Party Defendant Tetz filed its "cross-motion" on January 4, 2019.

Factual Allegations

Plaintiff testified that he was employed by Second Third-party Defendant Orange on a construction project building houses at a development called Chestnut Ridge. At the time of the accident, foundation walls were being poured and Plaintiff testified that he was standing on the upper level on the right side of the wall on a two by four that ran adjacent to the top of the frame of the wall, which was attached to the frame with clips. As he stood on the two by four, the cement truck was located in front of him and the chute was extended towards him. Plaintiff's task involved using a shovel to direct the concrete into the form, which required him to lean forward. Plaintiff testified that as he leaned forward, the chute made some kind of "jerk," which caused him to react since Plaintiff believed that the chute was going to hit him. It is at this point that Plaintiff slipped, fell backwards to the right and went off the plank down approximately twelve feet to the ground. Mr. Baltazar

testified that the plank was wet and oily. Plaintiff was not given any personal safety equipment, nor were there any harnesses, goggles or hard hats.

Plaintiff's co-worker Juan Luis Mendoza Ochoa testified as a non-party witness. Mr Mendoza Ocho testified that foundation walls were being installed and when making such walls, forms would sit on cement footings. Cement would be poured into the form to create the wall. There would be two by fours running alongside the top of the form to keep the walls straight but would also be used for people to walk on. Oil would be sprayed on the form so that it could be easily removed from the completed wall, and in the process, sprayed oil would land on the two by fours, rendering them slippery. Mr. Mendoza Ocho saw Plaintiff standing on the top of the form before he saw him fall. He estimates that Plaintiff had fallen some nine or ten feet. Mr. Mendoza Ocho noted that no protective equipment was issued including safety harnesses, and scaffolding was not utilized to afford the workers at the top of the frame proper fall protection, as he had observed on other jobs.

Jacob Mermelstein was deposed on behalf of Defendant Ray Builders. Ray Builders was the general contractor on the job site, and they would have a site superintendent and project manager on site on a daily basis. Mr. Mermelstein thinks they were pouring foundations for houses and possibly doing framing at the time of the accident. He was not aware of the accident until the lawsuit was commenced. Haim Zuckerman was the site safety person on the job and he had authority to halt work until unsafe practices were rectified. Donald James Drummond was the driver of a Tetz truck which delivered cement to the accident site per a delivery ticket, though he does not remember any a delivery to the accident site in November 2013.

Joel Walter was employed by Orange as the site manager, and testified that Orange hired Tetz to bring concrete into the site at Chestnut Ridge. He testified that each unit had a basement crawl space of four feet as per the building plans and that Orange did not construct any type of wall or scaffold higher than four to five feet. Mr. Walter testified

that "scaffolds" were installed on the panels so that workers could walk on them and they consisted of two-foot brackets in the middle of the form.

The Parties' Contentions

Plaintiff asserts that he is entitled to summary judgment on his Labor Law Sec. 240(1) cause of action against defendant Sullivan Farms II Inc., the admitted owner, and Ray Builder NY Corp., the admitted general contractor on the job.[1] He argues that at the time of the accident, his work activities were at an elevated height and were entirely related to the performance of the project that was in progress on the day of the accident. Plaintiff argues that he was not provided with proper protection such as a scaffold or any of the other enumerated devices, and was forced to stand on a narrow, slippery, temporary plank on top of a wall being poured, which was not equipped with a handrail or other barricade to prevent a fall off it. Additionally, he contends that he the failure to provide a harness was a further violation. These failures were a proximate cause of Plaintiff falling off the two by four several feet below.

In opposition thereto, Defendants argue that there are triable issues of fact as to whether Plaintiff fell off a four foot wall or the eight to twelve feet testified to by Plaintiff and his co-worker. They further claim that the two by four plank, or alleged "scaffold," did not collapse or fail in any manner, and as such, Labor Law Sec. 240(1) was not violated. Additionally, Defendants submit the affidavit of Ernest Gailor, a Professional Engineer, who opines that Plaintiff fall was less than five feet; that the scaffold Plaintiff was provided with provided proper protection and was not defective and that no available safety equipment could have prevented Plaintiff's fall if he was working at a height of five feet or less. Defendants also argue that Plaintiff was a recalcitrant worker because a jury may believe that plaintiff was standing on top of the form and refused to use the scaffold provided.

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[1]Admissions were made in the defendants' respective Answers.

Lastly, they argue that there are issues of fact as to whether the accident happened at all because the cement truck drivers who delivered the cement to the construction site both testified that they did not see Plaintiff fall and that if someone fell on the site, it "would have went through like wildfire, the gossip."

Third-party defendant Tetz opposes the motion and cross-moves to dismiss Plaintiff's entire actions including his Labor Law Sec. 241(6) cause of action and Labor Law Section 200 cause of action. Despite the fact that Plaintiff does not have a direct cause of action against Tetz, and did not move against it on his Labor Law Section 240(1) cause of action, Tetz argues that it is not a statutory "agent" under the Labor Law because it did not direct, supervise or control Plaintiff's work. They further argue that Plaintiff's Labor Law Sect. 240(1) claim is meritless because he slipped on some unknown substance, rather than fell because the safety device was defective.

Second Third-Party Defendant Orange moves to dismiss the Second Third-Party action which was commenced based upon indemnification language contained on the back-side of the delivery ticket, which reads:

> "Purchaser shall provide suitable roadways or approachways to points of delivery other than on public roadways or alleyways and will indemnify seller against all liability, loss and expense incurred as a result of deliveries beyond the public roadways and alleyways."

Orange notes that it had no role whatsoever in the manner by which the concrete was delivered; that Tetz drivers checked in with "security" upon arrival and were then escorted to the location where the concrete was to be discharged. Both Tetz drivers testified that there were no problems encountered by them on the site in question as they drove their vehicles from the security checkpoint to the site of the concrete pour. Accordingly, cursory review of the indemnification language shows that the indemnification-triggering event did not occur, as Plaintiff's accident had nothing to do with the fact that Tetz vehicles had to drive "off-road" to reach the place of the pour.

Additionally, it argues that the delivery tickets were given to any Superior Concrete worker who happened to be in the area of the delivery of a particular concrete load and thus there was no "meeting of the minds" nor any other indicia of assent by Orange to the alleged indemnification agreement. Accordingly, they argue that the agreement was unconscionable and thus unenforceable. Lastly, Orange argues that General Obligations Law Sec. 5-322.1 is controlling and holds that an indemnification clause which requires indemnification of a party even for that party's own negligence is a nullity.

In opposition to Orange's motion, Tetz argues that the indemnification terms on the back of the delivery ticket are both valid and triggered by the subject accident. Tetz argues that it was not negligent and is therefore entitled to indemnification despite the lack of a savings clause in the provision. Additionally it argues that the agreement is not unconscionable because the front of the ticket directly above the signature line states that the customer acknowledged and understood all of the terms contained on both sides of the document. Tetz argues that by accepting the material and signing the delivery tickets, Orange demonstrated its intention to be bound by the terms and conditions therein. Lastly, it argues that the terms were triggered because it states that Orange "will indemnify seller against all liability, loss and expense incurred as a result of deliveries beyond the public roadways and alleyways."

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

Labor Law Sec. 240(1)

Labor Law Sec. 240(1) states:

> All contractors and owners and their agents, except owners of one or two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or caused 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.

This statute imposes absolute liability upon an owner, contractor or their agents for their failure to provide or erect safety devices necessary to give proper protection to a worker who sustains an injury proximately caused by that failure. Zimmer v. Chemung County Performing Arts, 65 NY2d 513; 493 N.Y.S.2d 102, 105 (1985). This duty is non-delegable and an owner is liable even though the job is performed by an independent contractor over which the owner has no supervision or control. Rocovich v. Consolidated Edison Co., 78 NY2d 589; 577 N.Y.S.2d 219 (1993), Cosban v. New York City Transit Authority, 227 A.D.2d 160; 641 N.Y.S.2d 838 (1st Dept. 1996). Furthermore, it is well established that the purpose of Labor Law § 240 (1) is the maximum protection of workmen from injury. Zimmer, 493 N.Y.S.2d. at 105. Therefore, the

statute is to be liberally construed so as to achieve its legislative purpose. Id

The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of differences 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., 577 N.Y.S.2d 219 (1991). Thus, Labor Law § 240 (1) was designed to prevent those types of accidents in which a ladder, scaffold, netting or other protective devices proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person.* [Emphasis in the original] Ross v. Curtis-Palmer Hydro-Electric Co., 577 N.Y.S.2d 219 (1993).

As an initial matter, defendants Sullivan Farms II, as owner of the subject property, and Ray Builder NY Corp., as the general contractor for the project, are responsible parties under the Labor Law. The Court is somewhat perplexed that third-party defendant Tetz argues that it is not a "statutory agent" under the Labor Law when Plaintiff does not have a direct action against it nor did Plaintiff move against or argue in its summary judgment motion that Tetz is a proper Labor Law defendant.

In the instant matter, Plaintiff has established his prima facie entitlement to summary judgment on his Labor Law Sec. 240(1). Here, Plaintiff has demonstrated that the two by four plank, or "scaffold," was insufficient to prevent Plaintiff's fall from the edge, particularly in light of the fact that it lacked any guarding or handrails, and no safety devices such as a safety belt was provided. In Madalinski v. Structure-Tone Inc., 47 A.D.3d 687, 850 N.Y.S.2d 505 (2d Dept. 2008), the court held that plaintiff was entitled to summary judgment on his Labor Law Sec. 240(1) claim when he was injured when he turned on a high-pressure water hose and the pressure of the water caused him to fall off a scaffold. "The scaffold, which the plaintiff had been directed to use, had no side rails, and no other protective device was

provided to the plaintiff to prevent him from falling." Id.

Likewise, in Celaj v. Cornell, 144 A.D.3d 590, 42 N.Y.S.3d 25 (1st Dept. 2016), plaintiff made a prima facie showing of entitlement to summary judgment as a matter of law on the Labor Law Sec. 240(1) claim by presenting undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall." See also Torino v. KLM Const. Inc., 257 A.D.2d 541, 685 N.Y.S.2d 24 (1st Dept. 1999)(make-shift platform without any safety features failed in its "core objective" to prevent plaintiff from falling off of it.); Conklin v. Triborough Bridge & Tunnel Auth., 49 A.D.3d 320, 855 N.Y.S.2d 54 (1st Dept. 2008).

In opposition thereto, Defendants and Third-party Defendant fail to demonstrate a triable issue of fact sufficient to deny summary judgment on the Labor Law Sec. 240(1) cause of action. There is no merit to defendants claim that a triable issue of fact exists with respect to whether Plaintiff fell a distance of four or five feet, or a distance of eight to twelve feet. Although a motion for summary judgment "should not be granted where the facts are in dispute," the dispute "must relate to material issues." Leconte v. 80 E. End Owners Corp., 80 A.D.3d 669, 671, 915 N.Y.S.2d 140 (2d Dept. 2011). Here, whether Plaintiff fell four feet or twelve feet, he would be entitled to summary judgment.. In Hoyos v. NY-1095 Ave. Of the Ams. LLC, 156 A.D.3d 491, 495, 67 N.Y.S.3d 597 (1st Dept. 2017), plaintiff fell from a loading dock which was several feet off the floor, which had no railing, chain, demarcation or other protective safety device to prevent soemone on the platform from falling off the edge. The court noted that "whether the dock was elevated three or four feet off the ground, plaintiff's fall therefrom cannot be described as a fall from a de minimus height." Id.

Nor is there a triable issue of fact because Plaintiff's fall was caused because he slipped and lost his balance. "A lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause." Vergara v. SS 133 W. 21, LLC, 21 A.D.3d 279, 280, 800 N.Y.S.2d 134 (1st Dept. 2005). "It does not matter whether plaintiff's fall was the result of the scaffold falling over, or is tipping, or was due

to plaintiff misstepping off its side." Id. In any of those circumstances, either defective or inadequate protective devices constituted a proximate cause of the accident." Id.

Defendants argue that summary judgment must be denied because Plaintiff's actions constitute the sole proximate cause of the occurrence and/or he was a "recalcitrant worker." A plaintiff under Labor Law § 240(1) need only show "that his injuries were at least partially attributable to defendants' failure to take statutorily mandated safety measures to protect him from the risks arising from an elevation differential." Pardo v. Ialystoker Center & Bikur Cholim, 308 A.D.2d 384, 764 N.Y.S.2d 409, 411 (1st Dept. 2003). As stated by the Court "there may be more than one proximate cause of a workplace accident." Id. Moreover, where the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence. Tavarez v. Weissman, 297 A.D.2d 245, 247; 747 N.Y.S.2d 424 (1st Dept. 2002). The Court of Appeals in *Blake.*, 1 N.Y.3d 380, 771 N.Y.S.2d 484 (2003) has further clarified the defense of "sole proximate cause:"

> Under Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. FN8

With respect to the "recalcitrant worker" defense, where adequate equipment has been provided to the worker, a condition precedent to successful invocation of that defense is proof that the injured worker "deliberately refused" to use the equipment. Gordon v. Eastern Railway Supply, Inc., 82 N.Y.2d 555, 563; 606 N.Y.S.2d 127 (1993) While such a refusal can be implied from a worker's conduct and not just from his words, the mere fact that a worker has been repeatedly instructed to use certain equipment does not in itself support an inference of deliberate refusal when he has failed to do so. Id. at 563; Van Alstyne v. New York State

Thruway Authority, 244 A.D.2d 978, 665 N.Y.S.2d 220 (4th Dept. 1997); Baum v. Ciminelli-Cowper Co., 755 N.Y.S.2d 138 (4th Dept. 2002) To even raise an issue of fact as to plaintiff's recalcitrance, the owners and general contractors were required to show that: (a) plaintiff had adequate safety devices at this disposal; (b) he both knew about them and that he was expected to use them: (c) for "no good reason" he chose not to use them; and (d) had he used them, he would not have been injured. Tzic v. Kasampas, 93 A.D.3d 438, 439 (1st Dept. 2012).

Here, Defendants and Third-Party Defendant have failed to demonstrate a triable issue of fact as to either the proximate cause defense or the recalcitrant worker defense. With respect to the proximate cause defense, the failure to provide railings, barricades or safety harnesses on the two by four/"scaffold" is a proximate cause of the subject occurrence and thus any action on the part of Plaintiff cannot be the sole proximate cause. Additionally, Defendants have failed to show recalcitrance in any manner. Both Plaintiff and eye-witness Juan Luis Mendoza Ochoa both testified that Plaintiff was standing on the two by four/"scaffold" when he slipped and fell. There has been no showing that any other safety devices were available, that Plaintiff was directed to use them or that he refused to do so. Since there are no triable issues of fact as to Defendants' violation of Labor Law Sec. 240(1), Plaintiff is entitled to partial summary judgment on this cause of action. See Crespo v. Triad, Inc. 294 A.D.2d 145, 147, 742 N.Y.S.2d 25 (1st Dept. 2002).

Indemnification

General Obligations Law Sec. 5-322.1 provides in part:

> A convenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewtih, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance

> contract, workers' compensation agreement or other agreement issued by an admitted insurer..."

GOL Sec. 5-322.1 was enacted "to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others." Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 179-180, 556 N.Y.S.2d 991 (1990).

While an indemnification clause that provides that the promissor will indemnify the promisee "to the fullest extent permitted by law" has been held to not violate the GOL, there is no such limiting language in the instant matter where it requires indemnification for "...all liability, loss and expense incurred." See Brooks v. Judlau Contr. Inc., 11 N.Y.3d 204, 208, 869 N.Y.S.2d 366 (2008). Moreover, although a party may protect itself from losses resulting from its liability for negligence by means of an agreement to indemnify, "indemnity provisions will not be construed to indemnify a party against his own negligence unless such intention is expressed in unequivocal terms." Eggeling v. Ryder Truck Rental, 254 A.D.2d 789-790, 677 N.Y.S.2d 845 (4th Dept. 1998).

Under the circumstances present in this case, the Court finds that the indemnification language contained on the back-side of the delivery ticket violates General Obligations Law Sec. 5-322.1 and the common law. In the instant matter, there are no allegations by any party that any negligence on behalf of Orange, caused or contributed to Plaintiff's accident. Tetz was the party delivering the concrete at the time of the accident and both drivers testified that there were no problems encountered by them on the site in question as they drove their vehicles from the security checkpoint to the site of the concrete pour. Given these facts, while Tetz has not been found negligent in this action (it must be noted that there are no direct claims against it for negligence made by Plaintiff), any indemnification sought by them against Orange would necessarily be with respect to their own negligence and not that of Orange. Additionally, the Court finds that the "trigger" for

the application of the indemnification clause is not present. As such, Second Third-Party Defendant Orange County superior Concrete, Inc.'s motion to dismiss the Second Third-Party Action and all cross-claims is granted in its entirety.

Tetz' Cross-Motion

Third-Party Tetz' Notice of Cross-Motion seeking to dismiss Plaintiff's Labor causes of action is untimely and will not be considered. Plaintiff filed his Note of Issue on September 28, 2018, and per the Court's rules, all summary judgment motions were to be filed within 60 days thereafter. This cross-motion was not made until January 4, 2019. As an initial matter, Plaintiff has no affirmative claims against Tetz so that this cannot be characterized as a cross-motion. Additionally, while a court may entertain an untimely cross motion for summary judgment if the court is deciding a timely motion made on nearly identical grounds, entirely different causes of action even under the general umbrella of "Labor Law claims" cannot be considered identical. Paredes v. 1668 Realty Assoc., LLC, 110 A.d.3d 700, 702, 972 N.Y.S.2d 304 (2d Dept. 2013). Nor has Tetz attempted to make any showing of "good cause" for its failure to make the cross-motion in a timely manner. Additionally, while Orange moved for summary judgment against Tetz, Tetz is not seeking affirmative relief against Orange in its "cross-motion." Thus, the Court will not consider Tetz' untimely Notice of Cross-Motion and it is hereby denied in its entirety.

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion (#1) for an Order granting summary judgment, pursuant to CPLR Sec. 3212, on his Labor Law Sec. 240(1) cause of action against Defendants Sullivan Farms, II, Inc. and Ray Builder NY Corp. is GRANTED in its entirety; and it is further

ORDERED that Second Third-Party Defendant Orange County Superior Concrete, Inc.'s Notice of Motion (#2) for summary judgment, pursuant to CPLR Sec. 3212, and dismissal of the Second Third-Party Complaint and all cross-claims against it is

GRANTED in its entirety and the Second Third-Party action is hereby dismissed; and it is further

ORDERED that E. Tetz & Sons, Inc.'s Notice of Cross-Motion (#3) for summary judgment, pursuant to CPLR Sec. 3212, and dismissal of Plaintiff's Complaint in its entirety, is DENIED in its entirety; and it is further

ORDERED that the parties are to appear for a conference on **WEDNESDAY, JULY 26, 2019, at 9:30 a.m.,** in the Trial Readiness Part.

The foregoing constitutes the Decision and Order of this Court on Motion #'s 1-3.

Dated: New City, New York
June 25, 2019

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing