SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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INDEX NO. 158705/2014

DANNY LEDESMA,

Plaintiff,

MOTION DATE 05/15/2019, 06/17/2019

- v -

MOTION SEQ. NO. (MS) 005 006

25 BROADWAY OFFICE PROPERTIES, LLC,WW 25 BROADWAY LLC,WEWORK COMPANIES, INC.,

DECISION + ORDER ON MOTION

Defendants.

----------X

25 BROADWAY OFFICE PROPERTIES, LLC

Third-Party
Index No. 595313/2015

Plaintiff,

-against-

WW 25 BROADWAY LLC, WEWORK COMPANIES, LLC

Defendants.

----------X

WW 25 BROADWAY LLC, WEWORK COMPANIES, INC.

Second Third-Party
Index No. 595186/2016

Plaintiffs,

-against-

UNITED ALLIANCE ENTERPRISES LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 188, 189, 190, 191, 192, 193, 194, 197, 198, 199

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 195, 196, 200

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law matter, plaintiff Danny Ledesma moves in MS 005 pursuant to CPLR 3212 for: (1) partial summary judgment on the issue of liability under Labor Law § 240 in favor of plaintiff against defendants 25 Broadway Office Properties, LLC ("25 Broadway"), WW25 Broadway, LLC ("WW25"), and WeWork Companies, Inc. ("WeWork")[1] on the issue of liability; and (2) setting this matter down for a trial as to damages (NYSCEF #140 – Notice of Motion). Defendants oppose the motion.

For their part, defendants/second third-party plaintiffs 25 Broadway, WW25, and WeWork move in MS 006 for summary judgment pursuant to CPLR 3212 on their claims for common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance against second third-party defendant United Alliance Enterprises, LLC ("United") (NYSCEF #157 – Notice of Motion). United opposes the motion. The Decision and Order is as follows:

FACTS

On August 27, 2014, plaintiff was employed as a carpenter for United, a construction company (NYSCEF #150 – Plaintiff's tr at 10). As of that date, plaintiff had been employed in the role for about a month. For the duration of plaintiff's employment with United, he worked on a complete renovation and build-out of an office space on the fifth floor a building located at 25 Broadway ("premises" or "building") in the city, county, and state of New York (*id.* at 18, 20).

Defendant 25 Broadway owns the premises and leased them to defendant WW25 on August 8, 2013, for a five-year term (NYSCEF #154 – Lease). WW25 is a WeWork entity (NYSCEF #152 – Bernhard tr at 12, 23). WW25 contracted with United to perform construction and renovation work on the fifth floor of the premises to create office space for a WeWork project (*id.* at 12-13, 23). WeWork's director of development, Bryan Bernhard, acted as WW25's representative and had direct oversight over the project's scheduling, budget, and the quality of the work performed (*id.* at 7, 11-12).

Plaintiff's work at the premises consisted of framing and hanging drywall (NYSCEF #150 at 19-20). Plaintiff worked exclusively on the fifth floor, seven days a week, from 7:00 a.m. to 9:00 p.m. (*id.* at 21). Plaintiff's supervisor was United foreman Fernando Mendez Savedra, who provided plaintiff with daily instructions as to which tasks plaintiff was assigned to complete (*id.* at 15, 20, 25).

On August 27, 2015, at approximately 8:40 p.m., Savedra instructed plaintiff to use screws to fasten a piece of stop-metal to the concrete ceiling at a pre-marked

[1] Defendants attached a signed Stipulation of Discontinuance dated November 1, 2016 executed between the parties as to defendant WeWork that does not appear to have been uploaded prior to this motion (NYSCEF #189 – Stipulation of Discontinuance).

location (*id.* at 26-28). The piece of stop-metal was approximately twenty-inches long, two-inches wide, and weighed approximately one-half pound (*id.* at 29-30). Plaintiff claims that he had never previously done that type of work (*id.* at 29-30).

In order to reach the ceiling, plaintiff used a seven to eight-foot A-frame ladder (*id.* at 35). Savedra provided the ladder, which had the letters "UA" written on it in marker (*id.* at 36, 50). Plaintiff described the ladder as made of metal, red, and lacked any type of rubber shoes or feet at the bottom (*id.* at 37-38). Plaintiff had been using the same ladder for the full day for framing work (*id.* at 37-38). Plaintiff was working alone, and there was no one holding the ladder for him (*id.* at 27).

Plaintiff claims that he set up the ladder on the concrete floor, which he described as somewhat rough (*id.* at 51-52). Plaintiff testified that he cleaned the floor prior to setting up the ladder and climbing it (*id.* at 52-53). Plaintiff further testified that he told Savedra that he thought he needed a safety harness to perform the task, but Savedra declined the request (*id.* at 54-55). Plaintiff further claims that harnesses were not available at the job site (*id.* at 54).

At the time of the accident, plaintiff was standing on the ladder one rung below the top platform (*id.* at 50). Plaintiff used a cordless drill to drive the screws through the metal and into the concrete ceiling (*id.* at 32-33). Plaintiff claims that in order to do so, he looked up at the ceiling and applied pressure to the bottom of the drill to drive the screws in the ceiling (*id.* at 59). Plaintiff claims that while he did this, the ladder moved and plaintiff fell to the concrete floor below, sustaining a fractured right ankle and injuries to his back (*id.* at 34, 99-100).

DISCUSSION

Summary Judgment Standard

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Plaintiff's Motion for Partial Summary Judgment (MS 005)

Plaintiff's complaint makes claims for violations of Labor Law §§ 200, 240, and 241(6). Plaintiff's instant motion seeks partial summary judgment solely on his § 240 claim.

Plaintiff is entitled to judgment on his Labor Law §240(1) claim. Labor Law §240(1) provides that: "[a]ll contractors and owners and their agents... in the... altering... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor... ladders... and other devises which shall be so constructed, placed and operated as to give proper protection to a person so employed." "The statute imposes absolute liability on... owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker. Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal citations omitted). The "core premise [of the statute is]... that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" (*id.*).

Plaintiff need not demonstrate that a ladder was defective or failed to comply with applicable safety regulations (*see Ocana v Quasar Realty Partners, L.P.*, 137 AD3d 566, 567 [1st Dept 2016]). Instead, the decisive question is whether plaintiff's injuries were a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). As such, it is well settled that where an elevated work surface fails to remain stable or erect and results in the injury of a worker, there is prima facie liability under §240(1) (*see Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012]; *Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 534-535 [1st Dept 2012]). In particular, "the failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Montalvo v J. Petrocelli Construction, Inc.*, 8 AD3d 173 [1st Dept 2004]).

Here, there is no dispute that the ladder shifted, and plaintiff fell to the floor. There is no dispute that United failed to provide a spotter to stabilize the ladder and United did not provide any safety equipment to harness plaintiff. There is thus no issue of fact regarding the nature of plaintiff's accident and he is entitled to summary judgment on his Labor Law § 240(1) claim regarding liability.[2]

[2] The court notes that the motion is denied as to defendant WeWork as it is out of the action pursuant to the Stipulation of Discontinuance.

Defendants make multiple arguments to defeat plaintiff's motion. First, defendants claim that there is a question of fact regarding whether plaintiff caused his own accident. Defendants points to Savedra's testimony about plaintiff being on the top step of the ladder, which is prohibited, when he fell (NYSCEF #192 – Savedra EBT at 6-7). This is the only piece of evidence defendants offer to create a material issue of fact. However, Savedra's testimony was that he heard that plaintiff was on the top step of the ladder from plaintiff's co-workers. Defendants' evidence is pure hearsay, and "[a]lthough hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where... it is the only evidence submitted in opposition" (*Briggs v 2244 Morris, L.P.*, 30 AD3d 216 [1st Dept 2006] [*quoting Narvaez v NYRAC*, 209 AD2d 400 (2002)]). As such, the hearsay evidence cannot be the basis for denial of plaintiff's motion.

Indeed, plaintiff followed the instructions of his supervisor and used the provided equipment in the expected manner. Plaintiff cannot be the proximate cause of his own injury when plaintiff follows the instructions of his supervisor and does not take a "foolhardy risk" on his own initiative (*Harris v City of New York*, 83 AD3d 104, 110 [1st Dept 2011]; *see also Pichardo v Aurora Contractors, Inc.*, 29 AD3d 879 [2d Dept 2006]). While defendants also attempt to make an argument that plaintiff could have used scaffolding that was on-site, there is no evidence that plaintiff knew such equipment existed. As such, there is no basis to find that plaintiff is the sole proximate cause of his accident.

Next, defendants argue that plaintiff is required to provide expert testimony indicating that a harness device was required at the subject location. This argument is without merit. Expert testimony is only required when the subject matter is "beyond the ken of the typical juror", or when the issues involved are of "such scientific or technical complexity as to require the explanation of an expert in order for the jury to comprehend them" (*Hendricks v Baksh*, 46 AD3d 259, 260 [1st Dept 2007]). Defendants have not made a showing that an expert is needed to opine on whether a harness is required at the elevation in question here (*see Coyne v Consolidated Edison Co. of New York, Inc.*, 44 Misc 3d 1221[a] at *4 [Sup Ct New York County 2014]). As such, there is no basis to deny plaintiff's motion for failure to provide expert testimony.

Second Third-Party Plaintiffs' Indemnification Claims (MS6)

Second third-party plaintiffs 25 Broadway, WW25, and WeWork move in MS6 for summary judgment on their claims for contractual indemnification, common law indemnification, and breach of contract against second third-party defendant Untied.

United's Untimeliness Argument

United argues that third-party plaintiffs' motion should be denied at the outset as it is untimely. Plaintiff's Note of Issue was filed on March 15, 2019. Pursuant to the Preliminary Conference Order, motions for summary judgment were due within 90 days of the filing of the Note of Issue (NYSCEF #6 – Preliminary Conference Order). Third-party plaintiffs filed the instant motion on June 14, 2019, one day late. United argues that this is a sufficient reason to deny the motion.

United's argument is rejected. Third-party plaintiffs' delay is *de minimis* and United suffered no prejudice due to the slight untimeliness of the motion. Indeed, United itself was granted multiple extensions to file late opposition to the instant motion. As such, the one-day delay in filing the motion is not a sufficient basis to deny it.

Contractual Indemnification Claim

"Summary judgment is appropriate on a claim for contractual indemnification where... [the contract] is unambiguous and clearly sets forth the parties' intention that a [contractor] indemnify the [owner] for injuries sustained" (*Roddy v Nederlander Producing Co. of America, Inc.*, 44 AD3d 556 [1st Dept 2007]; *see also Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018]). In Labor Law cases, a party seeking contractual indemnification must be found free of negligence (*see Rodriguez v Heritage Hills Soc., Ltd.*, 141 AD3d 482, 483 [1st Dept 2016]).

The pertinent terms of the contract between third-party plaintiffs and United are as follows:

> "To the fullest extent permitted by law, Contractor [UNITED] shall indemnify, defend, save and hold the Developer and the Entire Design Team and all officers, employees, and agents of any of the foregoing, Developer [WW25], Architect...Consultants and each of their respective direct and indirect members, partners and principals, disclosed and undisclosed, and their respective trustees, officers, directors, agents and employees (herein collectively called "Indemnitees") harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever (including attorney's fees and disbursements) which arise out of or are connected with, or are claimed to arise out of or be connected with: (1) The performance of the Work by the Contractor...(2) Any accident or occurrence which happens...in or about the place where the Work is being performed...(3) The use, misuse, erection, maintenance, operation of or failure of any machinery or equipment (including...ladders...) whether or not such machinery or equipment was

furnished...to the Contractor." (NYSCEF #178 – WW25-United Construction Contract at Art. 9).

A party is entitled to contractual indemnification for damages so long as the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and surrounding facts and circumstances (*see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Here, there is a clear indication that the parties intended to indemnify the third-party plaintiffs.

Nevertheless, United argues that the motion should be denied on the basis that third-party plaintiffs did not affirmatively prove that they did not have notice of the alleged condition of the ladder. United claims that due to Bernhard's (WeWork's director) weekly visits, plaintiff had notice of the potentially defective ladder.

However, the evidence does not indicate that third-party plaintiffs had control or notice of plaintiff's activities at the construction site. United, not third-party plaintiffs, controlled the means and methods of plaintiff's work at the construction site. There is simply no evidence indicating that the third-party plaintiffs had any notice of the alleged defect.

As such, third-party plaintiffs have established that they are entitled to indemnification here. There is a clear indication that the parties intended to indemnify third-party plaintiffs from a ladder-based injury, the third-party plaintiffs are free from negligence, and plaintiff's injury arose exclusively from his work on behalf of United. Accordingly, third-party plaintiffs are entitled to contractual indemnification from United.

Common Law Indemnification

"Implied, or common-law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*McCarthy v Turner Construction, Inc.*, 17 NY3d 369, 374-375 [2011]). In order to establish common-law indemnification, an owner is required to prove "not only that they were not negligent, but also that the proposed indemnitor... was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2d Dept 2006]). A party is entitled to common-law indemnification where there is no proof of any negligence or supervision on its own part, and where the proposed indemnitor was responsible for supervision (*McCarthy*, 17 NY3d at 377-378).

As discussed above, third-party plaintiffs are free from negligence in this action. United provided the ladder and supervised plaintiff's activities at the

worksite. As such, third-party plaintiffs are entitled to common-law indemnification to the extent plaintiff's claims are successful in this matter.

Breach of Contract

Third-party plaintiffs claim that Untied failed to procure insurance for their benefit. The pertinent terms are as follows:

> "Article 10. "The Contractor...shall obtain and submit to Developer, before undertaking any part of the Work...indicating coverage from companies, in amounts and on such other terms as provided for hereinafter and in the Insurance Schedule annexed to this Contract as Exhibit "F"...The Contractor also shall submit, to the Developer an endorsement to The Contractor's Commercial General Liability Policy evidencing Developer, and the other entities identified in Exhibit F or designated by The Developer each as an Additional Insured....
>
> I. Insurance Requirements:
>
> A. General Liability:
>
> 1. Limits: $1,000,000 per occurrence, $2,000,000 aggregate.
>
> 2. Additional Insured: WeWork Companies, Inc.; 25 Broadway Office Properties LLC; 25 Broadway Realty LLC....
>
> E. Umbrella Liability:
>
> 1. Limits: $25,000,000 per occurrence; $25,000,000 aggregate.
>
> 2. Additional insured: Same as above.
>
> II. Contractual Provisions
>
> B. Contractor shall hold harmless, defend and indemnify the additional insured for any and all claims for damages arising from the work performed by the contractor....
>
> D. Owner, Construction Manager or General Contractor (as applicable), and all other parties required by United Alliance Enterprises, LLC, shall be included as insureds on the CGL, using ISO Additional Insured Endorsement....It shall apply as Primary and Non-Contributing Insurance..." (NYSCEF #178).

Even when a contractor procures insurance, if the insurance procured is not in compliance with the terms of the contract, it has breached its obligation (*see Lima v NAB Construction Corp.*, 59 AD3d 395, 397 [2d Dept 2009]).

Third-party plaintiffs claim that United's umbrella policy has "failed/refused to date to concede that its policy is applicable to the incident in question" (NYSCEF #158 – Third-Party Plaintiffs' Aff in Support at ¶4). However, there is no evidence that United failed to procure the umbrella policy or that it will not cover plaintiff's accident in the event that the general policy does not cover plaintiff's damages. As such, this branch of third-party plaintiffs' motion is meritless and the breach of contract claim is dismissed.

United's Prematurity Argument

United argues that third-party plaintiffs' motion is premature as a finder of fact has not yet concluded if anyone has breached a duty to plaintiff. However, as discussed above, plaintiff's motion for summary judgment on its Labor Law § 240(1) claim is granted and therefore liability in this matter has been determined. It is therefore appropriate to adjudicate third-party plaintiffs' motion for summary judgment at this time and United's argument is rejected.

United's Argument that the Notice to Admit is Improper

United claims that a Notice to Admit that it signed is improperly relied upon here as it provides a legal conclusion that plaintiff was acting in the course of his employment with United and that Untied agreed to all of the terms of the contract. However, this argument is of no moment as the court did not need to rely upon the Notice to Admit establishing that plaintiff was working within the scope of his employment with United and the contract between United and third-party plaintiffs was valid. As such, this argument is rejected.

CONCLUSION

Plaintiff's motion for summary judgment on its Labor Law § 240(1) claim is granted. The branches of third-party plaintiffs' motion for summary judgment on its claims for common-law and contractual indemnification are granted. The branch of third-party plaintiffs' motion for summary judgment on its claim for breach of contract is denied.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim against 25 Broadway and WW25 is granted; it is further

ORDERED that the branches of third-party plaintiffs' 25 Broadway, WW25, and WeWork motion for summary judgment regarding common-law and contractual indemnification against third-party defendant United are granted; it is further

ORDERED that the branch of third-party plaintiffs' 25 Broadway, WW25, and WeWork motion for summary judgment regarding breach of contract against third-party defendant Untied is denied and dismissed; it is further

ORDERED that plaintiff's complaint is dismissed without prejudice pursuant to the November 1, 2016 "Stipulation Discontinuing Action as to Defendant/Second Third-Party Plaintiff, WeWork Companies, Inc."; it is further

ORDERED that the first third-party action between 25 Broadway, WW25, and WeWork is dismissed without prejudice pursuant to the July 5, 2016 Stipulation of Discontinuance (NYSCEF #36); it is further

ORDERED that this matter be set down for a trial on damages on plaintiff's Labor Law § 240(1) claim and for liability as to plaintiff's Labor Law § 200 and § 241(6) claims; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the Court.

1/13/2020
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE