Yong Jung v Argus Realty 202 LLC
2020 NY Slip Op 30192(U)
January 27, 2020
Supreme Court, New York County
Docket Number: 156665/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD, ***Justice*** — **PART** **IAS MOTION 35EFM**

---X

YONG JUNG,

Plaintiff,

- v -

ARGUS REALTY 202 LLC, LENNYS 40TH STREET LLC, INDIVIDUALLY AND D/B/A LENWICH BY LENNY'S AT 40TH STREET, LENNY'S CATERING, LLC,

Defendant.

---X

INDEX NO. 156665/2014

MOTION DATE 08/19/2019, 09/16/2019

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

LENNYS 40TH STREET LLC, INDIVIDUALLY AND D/B/A LENWICH BY LENNY'S AT 40TH STREET,

Plaintiff,

-against-

TRIMOND CONSTRUCTION INC.,

Defendant.

---X

Third-Party
Index No. 595108/2015

ARGUS REALTY 202 LLC,

Plaintiff,

-against-

TRIMOND CONSTRUCTION INC.,

Defendant.

---X

Second Third-Party
Index No. 595413/2015

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 237, 238, 239, 240, 241, 242, 243, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 262, 263, 266, 269, 270, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 224, 225, 244, 245, 246, 259, 260, 261, 265, 268, 271, 272, 273, 286

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

Upon the foregoing documents the memorandum decision below, it is

ORDERED that the motion of third-party defendant/second third-party defendant Trimond Construction Inc. for summary judgment dismissing the third-party complaint and the second third-party complaint is denied (motion seq. No. 003); and it is further

ORDERED that defendant/third-party plaintiff Lenny's 40th Street LLC (Lenny's) cross-motion for summary judgment is granted only to the extent that Lenny's has leave from the court, pursuant to CPLR 3025 (a), to amend the third-party complaint to incorporate the claim that Plaintiff is totally disabled such that he has sustained a "grave injury" under the Workers Compensation Law; and it is further

ORDERED that defendant/second third-party plaintiff Argus Realty 202 LLC's (Argus) cross motion is denied; and it is further

ORDERED that Plaintiff's motion for partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims (motion seq. No. 004) is granted; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

NON-FINAL DISPOSITION

In this Labor Law action, third-party defendant/second third-party defendant Trimond Construction Inc. (Trimond) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and the second third-party complaint (motion seq. No. 003). Defendant/third-party plaintiff Lenny's 40th Street LLC (Lenny's) opposes Trimond's motion and cross-moves for summary judgment granting it: (1) contractual indemnity and conditional common-law indemnity against Trimond; (2) breach of contract against Trimond for failure to procure insurance; (3) dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims; (4) leave from the court, pursuant to CPLR 3025 (a), to amend the third-party complaint to incorporate plaintiff Yong Kyoo Jung's (Plaintiff) claim that he is totally disabled such that he has sustained a "grave injury" under the Workers Compensation Law.

Defendant/second third-party plaintiff Argus Realty 202 LLC's (Argus) also opposes Trimond's motion and cross-moves, seeking summary judgment granting it: (1) conditional common-law indemnity against Trimond; (2) liability on its breach of contract for failure to procure insurance claim against Trimond; (3) dismissal of Plaintiff's Labor Law § 200 and common-law negligence.

Plaintiff moves for partial summary judgment as to liability on Labor Law §§ 240 (1) and 241 (6) (motion seq. No. 004). Trimond, Lenny's, and Argus all oppose Plaintiff's application. The motions are consolidated for disposition.

BACKGROUND

On June 14, 2014, Plaintiff was working for Trimond on a renovation project in a building owned by Argus. Lenny's leased the subject premises from Argus and entered into a contract with Trimond, by which Trimond was to perform renovations to ready the space for operation of a restaurant/deli.

Plaintiff was smoothing concrete on a mezzanine floor, crouched down and moving backward, when he fell fifteen feet through a hole onto the kitchen below. Plaintiff was in a coma for five days following his accident and alleges that the fall caused a grave injury to his brain. Plaintiff initiated this action by filing his summons and complaint on July 8, 2014.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Labor Law § 240 (1)

> Labor Law § 240 (1) provides, in relevant part:
>
> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising

from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Plaintiff submits an expert affidavit from Kathleen Hopkins (Hopkins), a site safety manager. Hopkins opines that a violation of section 240 (1) caused his accident, reasoning:

> "The hazardous floor opening should have been protected with a cover or guarded with safety railings of iron, ropes or wood to prevent the Plaintiff from falling into and through the opening .... [I]f it was infeasible to cover or provide safety railings to guard the floor opening on the storage area Mezzanine floor, then Fall Protection should have been provided. Fall protections includes covering the floor opening on the Mezzanine floor; installing a life net not more than five feet beneath the storage area opening; or providing Plaintiff with a safety harness, tail line (lanyard) and fixed anchorage point"

(NYSCEF doc No. 170 at 5).

Lenny's argues in opposition that there is an issue of fact as to whether Plaintiff was the sole proximate cause of his own accident. More specifically, Lenny's argues that if Plaintiff had looked behind him while he was moving backwards, he would have seen the hole and avoided it. Argus also argues that there is a question of fact as to whether Plaintiff was the sole proximate cause of the accident, arguing that "plaintiff's bizarre decision to move to an elevated position, crouch, walk backwards and *never look around* is so extraordinary as to defeat any application of § 240 (1)" (NYSCEF doc No. 246, ¶ 17). Trimond joins this argument, contending that Plaintiff should have simply used more common sense. None of the three parties opposing Plaintiff's motion submit an expert opinion suggesting that section 240 (1) was not violated.

Here, Plaintiff has made *prima facie* showing that a violation of the statute was a proximate cause of his injuries through the submission of Hopkins' opinion. None of the

opposing parties raise a question of fact as to sole proximate causation, as there is nothing in the record to suggest that Plaintiff refused to use safety devices or disregarded a specific directive to perform his work in a manner that would lessen the gravity-related risk present on the jobsite (*see Gallagher v New York Post*, 14 NY3d 83, 89 [2010] [holding that there was no sole proximate causation, as the record did not "raise a question of fact that (the plaintiff) knew of the availability of … safety devices and unreasonably chose not to use them]). Thus, as Plaintiff's showing that his injuries were proximately caused by a violation of the statute is unrebutted, Plaintiff is entitled to partial summary judgment as to liability on his section 240 (1) claim.

II. Labor Law § 241 (6)

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

> "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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he

Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Plaintiff argues that defendants violated 12 NYCRR 23-1.7 (b) (1) (i) and 12 NYCRR 23-1.7 (b) (1) (iii). 12 NYCRR 23-1.7 (b) (1) is entitled "Protection from general hazards; Falling hazards; Hazardous openings." Its first subsection provides: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." This provision is sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g., Barillaro v Beechwood RB Shorehaven*, 69 AD3d 543, 544 [2d Dept 2010]).

Hopkins opines that "violation of Industrial Code Rule § 23-1.7 (b) (1) (i) was a direct, substantial and proximate cause of the Plaintiff's accident and injuries" (NYSCEF doc 170 at 7). Hopkins reasons that "[i]t is self-evident that had the Mezzanine hazardous opening been covered or provided with a safety railing, the Plaintiff would not have fallen 15 feet down to the 1st floor" (*id.*).

12 NYCRR 23-1.7 (b) (1) (iii) provides:

> "Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (*a*) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (*b*) An approved life net installed not more than five feet beneath the opening; or (*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

This regulation is sufficiently specific to serve as a predicate to liability under the statute (*see Scarso v M.G. General Const. Corp.*, 16 AD3d 660, 661 [2d Dept 2005] [holding generally that the provisions of 12 NYCRR 23-1.7 (b) (1) are "sufficiently specific"]). Hopkins opines that the regulation is applicable to Plaintiff's accident, as "it is self-evident that had a life net been installed beneath the hazardous opening," or "had the Plaintiff had been provided with a safety

belt attached lifeline, the Plaintiff would not have fallen 15 feet down …" (NYSEF doc No. 170 at 7-8).

Thus, Plaintiff makes a *prima facie* showing of entitlement to judgment as to liability under the statute through Hopkins' opinion and the record. Lenny's and Trimond reiterate the sole proximate cause argument that was rejected above, while Argus does not address section 241 (6) at all. Thus, as Plaintiff's *prima facie* showing is unrebutted, Plaintiff is entitled to partial summary judgment as to his section 241 (6) claims.

III. Labor Law § 200 and Common-law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp*., 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp*., 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id*.).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable

under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Lenny's and Argus each separately argue that they are entitled to dismissal of Plaintiff's Labor Law § 200 claims as against it, as they did not have supervisory control over Plaintiff's work. Plaintiff argues initially that both applications are technically improper, as Lenny's and Argus cross-moved against a non-moving party. Moreover, Plaintiff notes that Argus's cross motion would have been untimely had it brought as a regular motion, whereas Lenny's motion was brought timely. In any event, Plaintiff argues that there is a question of fact as to whether Lenny's and Argus had notice of the dangerous condition on the premises.

Here, Plaintiff is correct that the branches of Lenny's and Argus's cross motions that seek relief as against them are improper, as they are brought against a non-moving party: "A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Terio v Spodek*, 25 A.D.3d 781, 785 [2d Dept 2006]). As to untimeliness, it is well established that a late cross motion for dispositive relief may be entertained when the issues raised are "nearly identical" to those raised by a timely a motion (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014] [internal quotation marks and citation omitted]). This rule does not apply to improperly labeled cross motions (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [a cross motion is an improper vehicle for seeking relief from a nonmoving party]).

Kershaw held that "[a]llowing movants to file untimely, mislabeled 'cross motions' without good cause shown for the delay affords them an unfair and improper advantage" (*id.*).

Thus, the Court cannot entertain Argus's application, as it is both technically defective and untimely, and Argus does not make any showing of good cause for the untimeliness. As to the technical defect of cross-moving against a non-moving party, in the absence of untimeliness, courts have held that "a technical defect of this nature may be disregarded where, as here, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought" (*Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]).

Here, Plaintiff does not make a showing of prejudice. Thus, it will entertain Lenny's motion to dismiss Plaintiff's Labor Law § 200 and common-law negligence claims as against it. Lenny's characterizes Plaintiff's accident as having been caused by the means and methods of the work, while Plaintiff characterizes the accident as having arisen from a dangerous condition on the premises – the unguarded hole. Lenny's has made a *prima facie* showing that it did not have supervisory control, as the record clearly shows that Plaintiff only took directions as to how to perform his work from other Trimond employees. However, Lenny's makes no showing as to notice, as it submits no evidence as to when it last inspected the subject building (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]).

When presented with a dangerous condition, such as the unguarded hole here, that arises during a construction project, the First Department has analyzed the property owner's liability in the alternative, using both the manner-and-method and the dangerous-condition frameworks (*see*

Lopez v Dagan, 98 AD3d 436 [1st Dept 2012]). Thus, Lenny's must make a showing as to supervisory control and notice in order to show entitlement summary judgment. As Lenny's has not made a showing as to notice, it is not entitled to summary judgment in these circumstances. Accordingly, the branch of Lenny's cross motion seeking dismissal of Plaintiff's Labor § 200 and common-law negligence claims as against it must be denied.[1]

IV. Grave Injury

Plaintiff does not have direct claims against Trimond, although he is alleging that he suffered a grave injury. Lenny's and Argus each brought third-party claims against Trimond, alleging that Trimond is liable to them for common-law indemnification and contribution, among other things. Section 11 of the Workers' Compensation Law provides:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external force resulting in permanent total disability."

Plaintiff alleges that he suffered the last category of grave injury in his accident: an "injury to the brain caused by external force resulting in permanent total disability." In *Rubeis v Aqua Club* (3 NY3d 408 [2004]), the Court of Appeals held that "permanent total disability under section 11 is one of unemployability *in any capacity*" (*id.* at 417 [emphasis in original]).

The First Department has employed this standard in *Aramburu v Midtown W. B* (126 AD3d 498 [1st Dept 2015]), where the Court held that the party seeking indemnification from

[1] Notwithstanding the fact that the Court did not entertain the branch of Argus's motion seeking dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims, as it was defective and untimely, the Court would have denied that application, as Argus, like Lenny's, made no showing as to notice.

the plaintiff's employer had made a *prima facie* showing that the plaintiff was not unemployable in any capacity, and the plaintiff's employer "failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury" (*id*. at 501). The Court reasoned that "[a]lthough experts who examined plaintiff averred that the accident had caused various brain conditions including seizures, persistent headaches, and depression, defendants have not shown that plaintiff is no longer employable in any capacity" (*id*. [internal quotation marks and citation omitted]). Even more recently, the First Department dismissed a claim for grave injury, holding that "evidence that a plaintiff suffered certain brain conditions, such as depression and post-concussion syndrome, does not constitute grave injury absent proof that the individual was rendered unemployable in any capacity" (*Alulema v ZEV Elec*, 168 AD3d 469 [1st Dept 2019]).

Trimond submits a portion of Plaintiff's deposition testimony in which he concedes that, as of the date of deposition, January 7, 2019, none his treating doctors had told him he cannot go back to work (NYSCEF doc No. 123 at 58). Trimond also submits an expert report from Dr. William Head (Head), who performed a neurological and psychiatric examination on Plaintiff. Head concluded, after speaking with Plaintiff, measuring his extremities, and testing his range of motion, that "there was no objective sign" of brain injury or disability (NYSCEF doc No. 131 at 14-15). Additionally, Trimond submits a report from Argus's medical examiner, Ronald Brisman (Brisman), who stated that "[t]here is no permanent injury to the brain, cervical or lumbar spine from the above" (NYSCEF doc No. 132).

Trimond also submits a vocational rehabilitation report from Richard Schuster (Schuster). Schuster found that, "[g]iven his comments as well as the medical records, it is assumed that [Plaintiff] is capable of no more than sedentary light work, with additional restrictions in employment entailing climbing, balancing, stooping, kneeling, crouching, crawling, reaching,

handling, fingering, feeling, weather changes, cold and humid weather, vibrations, or hazards" (NYSCEF doc No. 133 26-27).

Argus and Lenny's submit reports from Plaintiff neurologist, Dr. Mehrdad Golzad (Golzad), in which Golzad concludes that Plaintiff's work status is "totally disabled" due to post concussion syndrome and traumatic brain injury (NYSCEF doc No. 216). Argus and Lenny also submit a report from Plaintiff's expert, Mary Hibbard (Hibbard), a psychologist, who concludes that Plaintiff is "fully disabled by his TBI related cognitive, physical, and emotional sequelae" (NYSCEF doc Nos. 161 and 215 at 16).

Here, there is a question of fact as to whether Plaintiff suffered a grave injury under the *Aqua Club* standard which requires that Plaintiff must be unemployable in any capacity. Trimond made a *prima facie* showing that Plaintiff was employable in a sedentary capacity through the report of Schuster. This conclusion is supported by the reports of Head and Brisman. However, Argus and Lenny's raise an issue of fact as to grave injury through the reports of Golzad and Hibbard, both of whom concluded that Plaintiff was "totally disabled." While it may have been more analytically convenient if Golzad and Hibbard had used the legally magic words regarding Plaintiff's inability to work in any capacity, that is what is implied by the phrase "totally disabled." This testimony as to Plaintiff's alleged total disability distinguishes the present case from *Aramburu* and *Alulema*, where there was no such testimony.

As Plaintiff's ability to work in any capacity is an issue of fact, ripe for further probing before a jury, Trimond's application to dismiss any Argus and Lenny's contribution and common-law negligence claims on the basis that Plaintiff did not suffer a grave injury must be denied. Moreover, Lenny's application, pursuant to CPLR 3025 (a), for leave from the court to amend the third-party complaint to incorporate Plaintiff's claim that he suffered a grave injury is

granted. "It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay" (*Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011] [internal quotation marks and citation omitted]). Trimond is unable to show prejudice here.

V. Lenny and Argus's Claims Against Trimond

A. Contractual Indemnification

Trimond seeks summary judgment dismissing Argus and Lenny's claims for contractual indemnification against it. Lenny's seeks summary judgment on its claim against Trimond for contractual indemnity. The contract between Lenny's and Trimond refers to Lenny's as "Owner" and contains a "hold harmless provision" which states, in relevant part:

> "The Contractor agrees to defend, indemnify and hold the Owner harmless from any liability or claim for damage because of bodily injury, death, property damage, sickness, disease or loss and expense arising from [Trimond's] negligence."

Trimond argues that this provision is void under NY General Obligations Law § 5-322.1 (1), which provides:

> "A covenant, 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 therewith, 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. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent."

While Trimond argues that this provision violates the law, as it lacks the limiting language "to the fullest extent of the law" found in many construction industry indemnification provisions, and which has been held to protect such provisions from coming afoul of section 5-322.1 (1) of the General Obligation Law (*Brooks v Judlau Contracting*, 11 NY3d 204, 210 [2008]). Trimond cites to *Picaso v 345 E. 73 Owners Corp*., where the First Department held the relied-upon indemnification provision contained "no language limiting indemnification to damages arising from accidents caused by [the putative indemnitor's] negligence, or precluding indemnification for damages caused by [the putative indemnitee's] own negligence."

Lenny's argues that, since there is no evidence that it was negligent, the indemnity provision is not void and unenforceable. In support, Lenny's cites to *Mathews v Bank of Am*. (107 AD3d 495 [1st Dept 2013]). In *Matthews*, the First Department held that "since there is no evidence" that the putative indemnitee "was negligent, the indemnity provision is enforceable" (*id*. at 496). Here, as there has been no determination as to negligence, both Triond and Lenny's application for summary judgment on Lenny's application for contractual indemnification is premature. For the same reason, Trimond's application for dismissal of Argus's application must be denied.

B. Common-Law Indemnification

As neither Lenny's nor Argus has shown an entitlement to dismissal of Plaintiff's Labor Law § 200 and common-law negligence claim, their applications for summary judgment on their common-law indemnification claims is premature (*McCarthy v Turner Constr., Inc*., 17 NY3d 369, 374, 375 [2011] [internal quotation marks and citation omitted]).

C. Breach of Contract For Failure to Procure Insurance

Lenny's and Argus both argue that they are entitled to summary judgment against Trimond on their claims for breach of contract for failure to procure insurance. Trimond's seeks dismissal of the breach of contract for failure to procure insurance claims as against it. The gravamen of the breach claims is that Trimond's contract with Lenny's obligated Trimond to get general liability insurance in the amount of $1,000,000 naming Lenny's and Argus as additional insureds. However, Trimond procured a policy with a "Fall from Heights" exclusion that prompted Trimond's insurer, Preferred Contractors Insurance Company and its claims administrator Golden State Claims Adjusters, to disclaim coverage to Lenny's and Argus (NYSCEF doc No. 213).

Typically, an insurer's denial of coverage is insufficient to show that a breach of contract for failure to procure insurance (*Perez v Morse Diesel*, 10 AD3d 497 [1st Dept 2004]). However, a question of fact remains here as to whether the insurance purchased here was illusory in that it did not cover falls from height. Thus, as a question of fact remains on the breach of contract claims remains, Trimond, Lenny's, and Argus's applications on this issue must be denied.

CONCLUSION

Based on the forgoing, it is

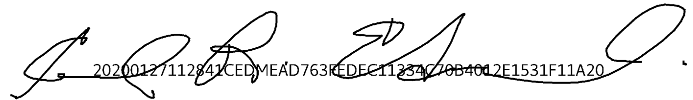
ORDERED that the motion of third-party defendant/second third-party defendant Trimond Construction Inc. motion for summary judgment dismissing the third-party complaint and the second third-party complaint is denied; and it is further

ORDERED that defendant/third-party plaintiff Lenny's 40th Street LLC cross-motion for summary judgment is granted only to the extent that Lenny's has leave from the court, pursuant to CPLR 3025 (a), to amend the third-party complaint to incorporate the claim that Plaintiff is totally disabled such that he has sustained a "grave injury" under the Workers Compensation Law; and it is further

ORDERED that defendant/second third-party plaintiff Argus Realty 202 LLC's (Argus) cross motion is denied; and it is further

ORDERED that Plaintiff's motion for partial summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims is granted; and it is further

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.



1/27/2020			
DATE		**CAROL R. EDMEAD, J.S.C.**	

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