SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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GLADSTON PHINN and DORET PHINN,

Plaintiffs,

-against-

AJD CONSTRUCTION CO., INC., JM3 CONSTRUCTION, LLC and HOMEPORT I, LLC

Defendants.

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IAS PART 6

Present:

Hon. Judith N. McMahon

DECISION AND ORDER

Index No. 750031/2017

Motion No. 001
002
003
004
005
006

AJD CONSTRUCTION CO., INC., and HOMEPORT I, LLC

Third-Party Plaintiffs

-against-

DYER INSULATION, H&R ERECTORS, LLC and TOTAL SAFETY CONSULTING, LLC,

Third-Party Defendants

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The following papers numbered 1 to 27 were marked fully submitted on November 11, 2019:

	Papers Numbered
Total Safety Consulting, LLC's Notice of Motion for Summary Judgment Affirmation in Support, with Supporting Exhibits Motion Sequence No. 001 (Dated September 30, 2019).....	1
AJD Construction Co., Inc., and Homeport I, LLC's Affirmation in Opposition to Total Safety Consulting, LLC's Motion for Summary Judgment Motion Sequence No. 001	

FACTS

Plaintiffs commenced this action by filing a Summons and Complaint on March 2, 2017. Plaintiff Gladston Phinn ("Plaintiff") alleges that he suffered severe personal injuries as the result of an accident that took place on May 11, 2015 during the construction of a mixed

commercial/residential building located at 7-8 Navy Pier Court in Staten Island, New York ("Building" or "Project"). At the time of the incident, Plaintiff was working as a union spray fire-proofer for Third-Party Defendant Dyer Insulation ("Dyer") and assigned to perform work on the Project. The Building was developed by Defendant/Third-Party Plaintiff Homeport I, LLC ("Homeport") and Defendant/Third-Party Plaintiff AJD Construction, Co., Inc. ("AJD") served as the general contractor. Under the agreement between AJD and Homeport, AJD was to serve as the general contractor for the entirety of the Project.

AJD hired and entered into agreements with several subcontractors for the Project, including: Dyer, who was hired to perform fire insulation work; Defendant JM3 Construction LLC ("JM3"), the carpentry subcontractor; Third Party-Defendant H&R Erectors, LLC ("H&R), an ironworker and structural steel subcontractor who installed cabling and mesh protection; and Third-Party Defendant Total Safety Consulting, LLC ("TSC") who served as Site Safety Manager.

Defendants AJD and Homeport initiated a third-party action by filing a Summons and Complaint against Dyer and TSC on June 11, 2018. TSC and Dyer both filed answers with cross-claims against all co-defendants for contribution, common law indemnification and contractual indemnification. ADJ and Homeport filed an amended third-party complaint, adding H&R as a third-party defendant, on January 3, 2019. TSC and Dyer filed answers to the AJD and Homeport's amended third-party Complaint that included cross-claims against all co-defendants (to which AJD and Homeport filed an answer). H&R filed an answer with cross-claims against all co-defendants on March 18, 2019. Plaintiffs' Note of Issue was filed on August 1, 2019 and all parties were directed to file all summary judgment motions within 60 days.

Plaintiff's Testimony

Plaintiff worked for Dyer as a union spray fire-proofer and was the Dyer foreman on the Project. Plaintiff supervised a crew of workers, completed his OSHA 30-hour certification and gave "toolbox" safety talks to his crew each day before starting work. On May 11, 2015, Plaintiff arrived at the Building at approximately 7:00 A.M. and had a toolbox talk meeting with his crew. Plaintiff was going to be using a pump machine that began on the first floor and was fed through a hole cut on the second floor where he was going to be spraying. Plaintiff observed three to four cables and a "mesh" (netting) were put up on the perimeter of the second level where he was working. The cables and mesh appeared to be intact, but the second floor was now "loaded" with sheetrock that was not there when Plaintiff left work on Friday May 9th (Plaintiffs' Affirmation in Support, Exhibit K, Page 40).

After conducting the toolbox talk with his crew, Plaintiff sprayed from approximately 7:30 AM to 8:30 A.M. before stopping to have coffee. At approximately 9:00 A.M., Plaintiff resumed working and completed spraying the overhead beam that he was working on. Plaintiff then turned the gun he was spraying with off and rested it on a pile of sheetrock. When Plaintiff got ready to move his body, his left foot got caught in the hose and he lost his balance, causing him to "head right for the rail." (46). Plaintiff stated he was trying to reach for something to balance himself and his hands touched the cables. After his hands touched the cables, Plaintiff didn't know what happened next and only knew something happened to him when he woke up in the hospital.

Testimony of Plaintiff's Co-Worker, Troy Miller

Plaintiff's crew member, Troy Miller ("Miller"), was the sole eyewitness of Plaintiff's accident. Miller was working on a scissor lift that was elevated to a height equal to where Plaintiff was working on the second floor and he was approximately fifteen feet away from Plaintiff. Miller

was preparing for the crew to move to the next work space and was cutting down excess hose from columns in the area. Plaintiff was spraying and called out to Miller a first time, to which Miller replied "huh?", then Plaintiff called out to him a second time and Miller responded "Yes, Phinn, how can I help you?" (Plaintiffs' Affirmation in Support, Exhibit L, 27-28). Miller described the next set of events:

> "He places his hand on the wire. The wire gives way almost immediately, and then the process of events goes from there. He tried to hold on. There was also some netting or something that was there, entangled, what was going on. It would have been plastic netting, so I think it was more for visual effect, but I can't speak as to the mind state of what they were doing with that... He placed his hand on the wires, so he wanted to tell me something, to go handle some type of errand. I was pretty much waiting for him to say what he needed to say. I guess in mid-breath, you know, he starts tumbling; because the wire basically crumbled right under him. He was kind of trying to get his foot out of the hose tangle. There was lots of hose there, because he kind of needed it in order to perform - - to move properly. And he places his hands there. He's pulling his foot out. And as he does that, you know, the wire buckles..." (28).

Miller did not believe Plaintiff put all of his weight on the cable before he fell. According to Miller, the cabling on the second floor looked the same as other cabling in the Building, explaining that it passed a normal eyes test. Miller recalls briefly speaking to AJD supervisory personnel during the course of the job and explained that "beforehand, it's random stuff 'oh you guys are going to be over here' or whatever. You know, taking minor direction. And then after that, we were off to our own devices." (112).

OSHA and BEST

After Plaintiff fell, OSHA performed an inspection and a Citation and Notification of Penalty was issued by the US Department of Labor against AJD for a finding of a "serious" violation. The OSHA citation notes that the violation was corrected during inspection and AJD was fined for $4,505.00. According to the OSHA citation,

> "29 CFR 1926.502(b)(3): Guardrail systems were not capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge.
>
> a) A guardrail system of cable & plastic mesh was furnished along open-sided floors within 7+8 Navy Pier Court in Staten Island, NY for worker protection from fall(s). The guardrail system along interior edge(s) of the mezzanine deck in building 7 was not sufficiently secured against failure upon application of downward force of a leaning worker; exposing worker(s) to a fall of 17 feet. Conditions were noted on or about 5/11/2015." (Plaintiffs' Affirmation in Support, Exhibit N).

Additional investigations were conducted, including one by the NYC Department of Buildings, BEST Squad. BEST Inspector Bavaro explained in an incident report that a worker was on the second floor when he leaned against the vertical netting. The incident report states:

> "The cables failed causing working (sic) to fall 15 feet in interior of building ... the vertical netting was observed to be defective. Multiple ECB violations were issued along with SWO's (Stop Work Orders. ECB Violation #35109082J issued for vertical safety netting not to code along with a SWO." (Plaintiffs' Affirmation in Support, Exhibit O).

According to the Notice of Violation and Hearing issued to AJD,

> "vertical safety netting not per code, damaged or inadequate... The vertical safety netting from the 1st floor through the 5th floor is inadequate along all exposure; netting loose, and not attached to zero cable; cables loose and not taut as required; only one "J" bold provided in many areas throughout the building on the cables themselves posing a serious hazard to workers."

Charles Drew, TSC's site safety manager, also performed an investigation and produced reports in connection with Plaintiff's accident. In the Supplemental Accident Report dated May 12, 2015, it states:

> ". . .the applicator hose was draped over the top of the perimeter cable and he approached perimeter edge to discuss with Troy Miller what they were going to do . . . Mr. Phinn grabbed and leaned on the perimeter cable to converse with Mr. Miller; the cable let go and Mr. Phinn fell forward grasping the cable and landed on the ground approximately 17 feet below." (Plaintiffs' Affirmation in Support, Exhibit JJ).

In the Accident Narrative prepared by Drew, it explains:

> "it was determined that the applicator hose was draped over the top of the perimeter cable and there had been only one Crosby clip on the top cable termination on the vertical column behind the block wall. The 2nd cable was frayed and broken inside it's column termination. Also, none of Dwyer's workers on site had attended a safety orientation." (Plaintiffs' Affirmation in Support, Exhibit KK).

Testimony of AJD Superintendent, Vincent Ruggiero

Vincent Ruggiero, AJD's construction superintendent on the Project, was onsite every day (including weekends) and was responsible for coordinating trades, quality control and running the day to day construction activities. Ruggiero testified that TSC was responsible for site safety on the Project and that TSC had someone on site each day. TSC Site Safety Manager Charles Drew would "walk the site daily, he would check for safety violations or deficiencies", report them back to Ruggiero and input his observations in a log (which he would provide to AJD). (AJD and Homeport's Affirmation in Support, Exhibit BB, Page 15). Drew was also responsible for checking the cabling systems daily to see if they were code-compliant. Ruggiero observed Drew checking the Building's perimeter cabling and Drew had previously reported issues with the cabling and net protection to him. Ruggiero testified that Drew was there to observe, report and advise, but did not physically repair deficiencies.

Ruggiero described the perimeter cabling as a four cable system with cables at zero, twenty, forty and sixty inches and orange safety netting hanging on the system. Ruggiero denied having any role testing the tautness of the cables after they were installed. Ruggiero testified that H&R, the subcontractor who installed the cabling at the Project, had a team of ten to fourteen workers on site with a foreman and was on site at the time of Plaintiff's accident. Ruggiero specifically recalled directing H&R to maintain the cables prior to Plaintiff's accident and stated that if a cable was not reinstalled properly, he would prefer the ironworker who was proficient in safety cables to do it properly. Ruggiero testified that as part of his and the site safety manager's daily routine, he would check the safety cables both visually and physically by pulling on them.

On May 9, 2011, JM3 received a delivery of sheetrock, which was present on the second floor during Plaintiff's accident. At the Project, subcontractors were told where to receive deliveries, typically at two or three central locations designated as "hoist ways" that were lines in the building used to load and unload materials and debris. Ruggiero believed he was the person who made these designations. Ruggiero testified that the location of Plaintiff's accident was not a designated hoist way and that a subcontractor would not be permitted to hoist materials there.

To hoist sheetrock into the area adjacent to where the accident occurred, cabling or netting would have to be removed or loosened. Whoever loosened or detached the cables was responsible for putting them back. Ruggiero did not recall having any conversation regarding the delivery of sheetrock taken by JM3 on May 9, 2015. When asked if someone from AJD was required to inspect that the cabling was replaced appropriately, Ruggiero testified that

> "the site safety manager would check behind any deliveries or anyone removing cables, and then, in turn, AJD would ensure that the site safety manager is doing his job, following or checking on the subcontractors. So yes, that's protocol." (AJD and Homeport's Affirmation in Support, Exhibit BB, Page 63).

On May 11, 2015, Ruggiero was informed of Plaintiff's accident and immediately went to the scene, where he did not observe anything clearly wrong with the cabling system. However, Ruggiero stated that the area Plaintiff was working in was in shambles and "there was hoses all over the place and ripped up, safety cables and fire spray material all over and didn't look like a pretty scene." (AJD and Homeports' Affirmation in Support, Exhibit DD, Page 43). Miller informed him that Plaintiff leaned over the railing system and lost his balance or tripped on the cabling.

Testimony of Tony Nemati

Tony Nemati served as the Project Director for Homeport, which was not involved with construction but maintained a daily presence on the job site. Nemati, who was on the job site each

day from 7AM to 1PM, was responsible to "make sure the construction is going correctly as per quotes and regulation, the material that's getting used is the right material" and get the answer to any questions among the architect or engineer. (AJD and Homeport's Affirmation in Support, Exhibit FF, Page 15). Nemati dealt with issues, meetings and discussions or procedures with the *subcontractors*. Nemati attended AJD's weekly meetings held at its trailer with relevant subcontractors, where Nemati would discuss "job coordination" with AJD.

Nemati and Ruggiero would walk the Project and discuss safety issues they observed. According to Nemati, "if it something matter of life and death, I stop it right there." (AJD and Homeport's Affirmation in Support, Exhibit GG, Pages 90-91). If Nemati saw a work-related activity or something he deemed to be unsafe, he would "first of all, stop it right there and call the site safety and GC supervisor." (AJD and Homeport's Affirmation in Support, Exhibit FF, Pages 16-17). AJD was responsible for remediating the problem. Though he wouldn't perform inspections on the cabling, Nemati would look at it and also touch it and lean on it to see if the cable was loose. If an issue existed, AJD decided who would perform necessary repairs.

On May 11, 2015, Nemati went to the scene of Plaintiff's accident after Ruggiero informed him by phone. He was informed that plaintiff was spraying underneath the ceiling and he leaned over the cable and fell down. Nemati testified that

> "what I saw was the hose that the gentleman was spraying, the fire stopping was over the cable from the first floor to the second floor and it was looped. . . the hose was going around on the cable which was ripped down. The hose, the fire spraying hose." (AJD and Homeport's Affirmation in Support, Exhibit FF, Pages 46-47).

Nemati requested to be updated when the condition was repaired and recalls talking to site safety, "going back and forth seeing the things getting repaired." (AJD and Homeport's Affirmation in Support, Exhibit FF, Page 51).

Testimony of Charles Drew

Under the agreement between TSC and AJD ("TSC Agreement"), TSC was required to provide a Safety Manager, whose main purpose was to assist the project management team in improving the effectiveness of the safety initiatives at the construction project. Charles Drew was on site each day to "observe what is going on on-site, to report it to those that need the information and can make any changes or corrections that need to be made, and to record it." (TSC's Affirmation in Support, Exhibit BB, Page 14). Drew would generally report any safety hazards or conditions to the general contractor or individual trades responsible for the condition. Drew would alert Ruggiero about any issues or concerns and what had to be done to correct or improve the condition.

Drew would walk the site several times a day, perform a visual inspection of the cabling to check if the cabling was "taut" and determine if perimeter cabling or barricades were in place to avoid exposing someone to an injury or fall. Drew would pull on the cabling and check if it was properly connected if he observed that it was sagging. If the cabling was not taut, he would verbally inform someone at AJD that it needed to be tightened or secured. Drew would also record discussions in a daily logbook, "especially if it was something that wasn't immediately taken care of or something that posed an immediate hazard." (29-30).

Each day, Drew discussed with Ruggiero or Jimmy Constantino of AJD about what was going to take place on-site and performed an initial inspection between 7:00 AM and 8:00 AM. On May 11, 2015, Drew arrived at the Project between 6:30 A.M. and 7:00 A.M. During his initial

inspection, Drew observed a hose carrying the spray-on insulation was drooped over the top of the perimeter cable.[1] Drew saw Plaintiff and Miller working on the second floor and told them

> "you gentlemen need to remove the hose 'cause it can't be on top.' They said, 'we are cleaning up and we are removing the hose from the area.' 'Okay, thank you.'" (66-67).

Drew did not observe them remove the hose from the area or perimeter.[2] Drew also did not recall if he reported the condition to anyone other than Plaintiff and Miller. Drew stated that he would have noted this in his logbook "if I had gone back and it wasn't removed." (68). After Plaintiff's accident, Drew conducted an investigation, spoke to Miller and did a walk-through of the area with OSHA and Dyer safety director, Bryan Livesey. (The contents of Drew's reports are discussed above).

Testimony of Robert Cranmer

Robert Cranmer served as the head foreman for H&R on the Project and was present on the jobsite almost every day. H&R was hired by AJD to erect steel at the Project and provided plans for the work to be conducted, including for the installation of perimeter safety cabling. Cranmer described how the perimeter cabling was generally installed; the cabling was attached to steel posts (measuring approximately 60 inches in length and three inches by four inches in height) and contained holes to accommodate the cable running through. After installing the steel posts, H&R would install the steel cable by weaving the cabling through holes and the posts. The cables would be fastened with cable clamps, which are u-shaped bolts, with a "clevis". The "clevis" is a "malleable clamp" that "sandwiches the two cables together" and is also known as a Crosby Clamp. (H&R's Affirmation in Support, Exhibit O, Page 37). Cranmer believed that at the time

[1] Drew testified that it is not good practice to put hoses or material on top of the perimeter cable because "you are putting tension on the cable. The cable is not meant to support anything. It's there to support the weight of a man in case it goes taut or stop the weight of a man." (63-64).
[2] Drew also did not tell them to remove the hose from the perimeter cable "immediately" or give them any time frame in which they needed to remove it.

of Plaintiff's accident, OSHA regulations required two malleable clamps for each termination. H&R provided the cables it installed and the cable clamps. H&R would then "inspect it all" and rectify any deficiencies that he or Ruggiero observed.

Cranmer testified that after performing the original installation, H&R declined to perform maintenance on the cables, which includes retightening cables after they become loosened or damaged after other trades disturbed them. Cranmer personally witnessed other trades disturbing the cabling by removing it for accessibility or various reasons. AJD would then direct JM3 to reinstall the cable and Cranmer observed JM3 disconnecting and reassembling the safety cable "almost daily." (97).[3]

On May 11, 2015, Cranmer went to the scene of Plaintiff's accident and saw "it looked like the cable was loosened by somebody to perform other duties" (60-61) and that "the cable disconnected. Like, it was wrapped around a column." (61). Cranmer went to the second floor and observed normal construction debris, the fireproofer's hose over the top of the cables, and the cable that had collapsed. Cranmer discussed the accident with people on the job and learned that the cable gave way after Plaintiff leaned out over the edge.

After the accident, H&R Owner Justin Hager contacted Cranmer, who confirmed that he installed the cable and he showed Hager the "safety cable release form." During his deposition, Cranmer was shown a document that he stated contained his signature which stated

> "Safety cable in Building 7, second and third floors, Quadrants A, B, C, and D now installed and now acceptable and now the responsibility of AJD Construction to maintain."

Cranmer testified that the document meant "H&R installed the cable, it was done properly and it's acceptable and it was now the responsibility of AJD to maintain it." (53).

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[3] Cranmer was unaware of any other trades or contractors other than H&R and JM3 ever installing or reinstalling perimeter cables. H&R never had to dismantle any cables in order to load equipment since "we were done when we put the cable in that area." (58).

Testimony of Damon Simpson

Damon Simpson was the foreman for JM3 and responsible for scheduling JM3 workers and supervising the delivery and installation of materials. (JM3's Affirmation in Support, Exhibit HH, Page 9). Under the agreement between AJD and JM3 ("JM3 Agreement"), JM3 was responsible for framing, sheetrock and the kitchen's trim work. Simpson testified that he did not perform any inspections of the cable and mesh protection present at the Project. According to Simpson, JM3 employees would remove the cabling to receive a delivery and were responsible for reinstalling it, which involved pulling the netting back and putting the "clip" back that was attached to the columns. Simpson, who was responsible for ensuring the netting and cabling were reinstalled, would look at the cabling, ensure that all four clips were reinstalled and perform a tautness test by pulling on it and pushing on it. Generally, AJD supervisors would inform Simpson if they felt something was not safe. Simpson did not recall a specific delivery made on May 9, 2011.[4] According to Simpson, AJD would designate the hoist area, which was at the front of the Building near Water Street, and the area where Plaintiff fell was not near an area where sheetrock had been unloaded. Simpson also denied that the protection that came down was the same protection that JM3 had removed to receive the delivery on May 9th.

Motions No. 001-006

TSC moves for an Order pursuant to CPLR §3212 seeking summary judgement and dismissal of all third-party and cross-claims asserted against it. (Motion No. 001). Dyer moves for an Order pursuant to CPLR §3212 granting it summary judgment, dismissing the Amended Third-Party Complaint and all cross-claims against it with prejudice. (Motion No. 002). AJD and Homeport move for an Order pursuant to CPLR §3212 granting it summary judgment, dismissing

[4] Simpson did not recall if anyone from AJD came on May 9, 2011 to check the location where they removed the protection to make room for the delivery.

Plaintiff's causes of action for (1) violations of Labor Law §241(6), (2) violations of Labor Law §200 and (3) negligence, in addition to Plaintiff Doret Phinn's fifth cause of action for loss of service to the extent that it is premised on Labor Law §§200, 241(6) and/or common law negligence. AJD and Homeport seek to dismiss all cross-claims against them and move for summary judgment on their cause of action for (1) indemnification against Dyer, H&R and JM3 and (2) failure to procure insurance against H&R and Dyer (Motion No. 003).

Plaintiffs move for partial summary judgment on liability under Labor Law §240(1) against AJD and Homeport and requests that the matter be set down for a hearing on damages (Motion No. 004). Third-Party Defendant H&R seeks an Order dismissing all third-party complaints and cross-claims against them pursuant to (1) CPLR §3212; and (2) CPLR §3126(3) due to spoliation of evidence (Motion No. 005). JM3 moves for an Order granting it summary judgment dismissing Plaintiffs' complaint against it and dismissing any and all cross-claims and third-party claims. (Motion No. 006).

DISCUSSION

Summary Judgment

"Summary judgment is a drastic remedy which should only be employed where there is no doubt as to the absence of triable issues." (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept., 2011]). Under CPLR §3212, a motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and the motion "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." (*see* CPLR §3212). When deciding a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. (*see Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept., 2011]). The

function of the court is not to determine matters of credibility or to resolve issues of fact, but rather to determine whether such issues exists. (*see Kolivas v. Kirchoff*, 14 AD3d 493, 493 [2d Dept., 2005]).

Labor Law §240

Labor Law §240(1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, 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 purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on the workers themselves." (*Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 124 [2015] (internal citations omitted)). The Court of Appeals has held that "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). In the crucial case of *Ross v. Curtis-Palmer Hydro-Elec. Co.*, the Court of Appeals held that

> Labor Law § 240 (1)'s list of required safety devices (e.g., "scaffolding," "hoists," "braces," "irons" and "stays"), all of which are used in connection with elevation differentials, evinces a clear legislative intent to provide "exceptional protection" for workers against the "special hazards" that arise when the work site either is itself elevated or is positioned below the level where "materials or load [are] hoisted or secured". The "special hazards" . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]).

Section 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." (*Panek v. County of Albany*, 99 NY2d 452, 457 [2003] (internal citations omitted)). In *Saint v. Syracuse Supply Co.*, the Court of Appeals stated "section 240(1) imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks." (*Saint v. Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]; *see Castro v. Malia Realty, LLC*, 177 AD3d 58, 65 [2d Dept., 2019]). The "absence of appropriate safety devices constitutes a violation of the statute as a matter of law" (*Paul v. Village of Quogue*, 2019 N.Y. App. Div. LEXIS 9096, *3, 2019 NY Slip Op 09014 [2d Dept., 2019]) and when a safety device is provided, an issue is raised as to whether it constitutes proper protection under the statute. (*see Elkins v. Robbins & Cowan, Inc.*, 237 AD2d 404, 405 [2d Dept., 1997]).

Under Labor Law §240, the plaintiff has the burden of showing that an elevation-related risk exists, and that the owner or contractor did not provide adequate safety devices. (*Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 [2007]). ". . . A plaintiff must establish a violation of the statute and that the violation was a proximate cause of his injuries." (*Bahrman v. Holtsville Fire Dist.*, 270 AD2d 438, 439 [2d Dept., 2000]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law §240 (1)." (*Scofield v Avante Contr. Corp.*, 135 AD3d 929, 931 [2d Dept., 2016]).

The Court of Appeals has held "owners and general contractors absolutely liable for any breach of the statute even if "the job was performed by an independent contractor over which [they] exercised no supervision or control." (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369,

374 [2011] (internal citations omitted). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured." (*see Sanders v Sanders-Morrow*, 2019 N.Y. App. Div. LEXIS 8453, *4, 2019 NY Slip Op 08436, 1 [2d Dept., 2019] (internal citations omitted).

Plaintiffs' Motion for Summary Judgment Against AJD and Homeport Under Labor Law §240(1)

The Court finds that Plaintiff met its prima facie burden under Labor Law §240(1). Plaintiff was clearly subject to an elevation-related risk while working on the second floor near an opening protected by perimeter safety cables. *(see Striegel v. Hillcrest Heights Dev. Corp.*, 100 NY2d 974, 978 [2003]). Plaintiff has also made a prima facie showing that Defendants AJD and Homeport, as general contractor and owner respectively, failed to provide him with adequate safety devices or guardrail system. The perimeter safety cables in place failed to shield Plaintiff from harm flowing from the application of force of gravity to him. There is extensive documentation of the inadequate safety deceives, including the OSHA violation, BEST incident report and stop work orders. According to the Notice of Violation and Hearing issued to AJD,

> "vertical safety netting not per code, damaged or inadequate... The vertical safety netting from the 1st floor through the 5th floor is inadequate along all exposure; netting loose, and not attached to zero cable; cables loose and not taut as required; only one "J" bold provided in many areas throughout the building on the cables themselves posing a serious hazard to workers."

Plaintiff has further made a prima facie showing that Defendant AJD and Homeport's failure to provide adequate safety devices was a proximate cause of his injuries. *(see Striegel v. Hillcrest Heights Dev. Corp.*, 100 NY2d 974, 978 [2003]). The documentation discussed above states that Plaintiff was caused to fall when the inadequate cabling failed. Plaintiff's and Troy Miller's testimonies also show that Plaintiff suffered his injuries when the perimeter cabling gave way and Plaintiff fell seventeen feet. Though Plaintiff and Miller diverge on how Plaintiff

came into contact with the cabling, Plaintiff was still caused to fall when the inadequate cabling failed.

The Court is unpersuaded by AJD and Homeports' arguments in opposition. AJD and Homeport maintain that an issue of fact exists as to whether Plaintiff was the sole proximate cause of his accident since there is testimony that he leaned on the cabling, cut a hole through the netting to feed his hose, or leaned the hose on the cabling. In contrast to the cases cited, Defendants have failed to submit evidence demonstrating that there was no evidence of a violation of Labor Law §240(1) and that Plaintiff's actions were the sole proximate cause of his injuries. (*see Scofield v Avante Contr. Corp.*, 135 AD3d 929, 931 [2d Dept., 2016]; *Montgomery v. Fed. Express Corp.*, 4 NY3d 805, 806 [2005]). Even if Plaintiff is found to have cut a hole in the netting, leaned on the cabling while talking to Miller or leaned the hose on the cabling, Plaintiff would still not be the sole proximate cause since the evidence shows Plaintiff fell when the cabling failed. Furthermore, if Plaintiff took actions that compromised the cabling, AJD and Homeport were ultimately responsible for ensuring that the cabling was up to code.

Defendants have also failed to present an issue of fact as to whether AJD and Homeport failed to provide adequate safety devices and as to whether their failure to provide such was the proximate cause of Plaintiff's injuries. The Court has considered Defendants' remaining arguments in opposition and finds them to be unavailing.

Therefore, Plaintiffs are entitled to partial summary judgment against AJD and Homeport under Labor Law §240(1).

JM3 and Labor Law §240

JM3 seeks to dismiss Plaintiffs' causes of action and any cross-claims asserted against it under Labor Law §240 and maintains that it is not liable as an "agent" under the statute. The

Court of Appeals has ruled that "unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law." (*Walls v. Turner Constr. Co.*, 4 NY3d 861, 864, 831 [2d Dept., 2005]. *See also Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 696-697 [2d Dept., 2016]; *Bakhtadze v. Riddle*, 56 AD3d 589, 590 [2d Dept., 2008]). The determinative factor is whether the party had the right to exercise control over the work, not whether it did in fact exercise such right. (*see Bakhtadze v. Riddle*, 56 AD3d 589, 590 [2d Dept., 2008]).

The Court finds that JM3 has met its prima facie burden by submitting evidence that it did not exercise control over the work being done by Plaintiff or at the Project generally. (*see Torres v. LPE Land Dev. & Constr.*, Inc., 54 A.D.3d 668, 669 [2d Dept., 2008]; *Everitt v. Nozkowski*, 285 A.D.2d 442, 443 [2d Dept., 2001]).

However, the Court also finds that Plaintiff has raised a triable issue of fact as to whether JM3 was a statutory agent under Labor Law §240; in the seminal case of *Russin v. Louis N. Picciano & Son,* the Court of Appeals held

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. *When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. . .* Our interpretation of the statutory "agent" language appropriately limits the liability of a contractor as agent for a general contractor or owner for job site injuries to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created." (*Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] (internal citations omitted) (emphasis added)).

In *Marquez v. L&M Dev. Partners, Inc.,* the Second Department found that "where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor." (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2d Dept., 2016]. *See also Santos v*

Condo 124 LLC, 161 A.D.3d 650, 653 [1st Dept., 2018]). The Court finds that an issue of fact exists as to whether an agency was created for AJD and Homeport's duty to conform to Labor Law §240 as to the perimeter cabling.

It is already established above that AJD and Homeport, as the general contractor and owner respectively, had a duty to provide adequate safety devices under Labor Law §240. Ample evidence shows that AJD would direct JM3 to remove and reinstall the perimeter cabling at the Project. Therefore, an issue of fact exists as to whether AJD and/or Homeport delegated their duty under Labor Law §240 by directing JM3 to remove and reinstall the cabling in connection with a delivery. Since a delivery of sheetrock was made two days before Plaintiff's fall and there was sheetrock present near the location of Plaintiff's accident, a question of fact exists as to whether the cabling near the accident was removed and reinstalled. If in fact the cabling was removed and reinstalled, issues of fact exist as to whether this was done properly and if JM3 was responsible for this process.

Since JM3 may be found to be an agent for AJD and/or Homeport with respect to the cabling, JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims against it based on Labor Law §240 must be denied.

Labor Law §200

"Labor Law 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work." (*People v. Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept., 2018] (internal citations omitted)). There are two broad categories of cases involving Labor Law §200: (1) where workers are injured as a result of dangerous or defective premises conditions at a work site ("dangerous condition" cases), and (2) those regarding the manner in which the work performed ("means and methods" cases). (*see id*). An entity "is not

deemed to be an agent of an owner or contractor for purposes of Labor Law § 200 if it "lacked sufficient control over the premises and the activity that brought about the injury" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept., 2015]).

Where a claim is based on alleged defects or dangers stemming from a subcontractor's methods or materials, a plaintiff must show that the owner or general contractor exercised some supervisory control over the operation. *Id.* The Second Department has held that

> ...when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed". Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed. *(Ortega v. Puccia*, 57 AD3d 54, 61-62 [2d Dept., 2008]). (Internal citations omitted).

Where the injured plaintiff's accident arose from an allegedly dangerous condition at the work site, liability will be imposed if the general contractor (1) had control over the work site and (2) either created the dangerous condition or had actual or constructive notice of it. (*see Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 822 [2d Dept., 2017]; *White v Village of Port Chester*, 92 AD3d 872, 876 [2d Dept., 2012]). To demonstrate entitlement to judgment as a matter of law in a dangerous condition case, a defendant must establish, prima facie, that it "lacked control over the premises containing the condition which caused the plaintiff's injury and, further, failed to establish, prima facie, that it neither created nor had actual or constructive notice of the alleged dangerous condition." (*Harsch v. City of New York,* 78 AD3d 781, 783 [2d Dept., 2010]).

The Second Department has also held that in a dangerous condition case, a defendant cannot meet its prima facie burden by solely relying on evidence demonstrating its lack of supervision or control of a plaintiff's work. In *Martinez v. City of New York*, the Second Department found that the Defendant City of New York failed to meet its prima facie burden by submitting evidence focused solely on its lack of supervision of, or control over, the plaintiff's work, since "that element is only relevant to owners in cases where the injury arises from the manner in which the work is performed." (*Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept., 2010]). The Second Department further noted that

> "similarly, where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it." (*Martinez v. City of New York*, 73 AD3d 993, 998 [2d Dept., 2010]).

When an accident allegedly involves both defects in the premises and the manner in which the work was performed, a defendant must address the proof applicable to both liability standards. (*see Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept., 2018]). In *Mitchell v. Caton on the Park, LLC,* the Second Department distinguished both types of cases and determined that defendant met its prima facie burden for the "means and methods" cause of action by submitting evidence showing it lacked authority to supervise or control plaintiff's work. *(see id.* (citing to *Venezia v. State of New York*, 57 AD3d, 522, 523 [2d Dept., 2008])). The Court also found that defendant demonstrated, prima facie, that it did not have control over the work site and that it did not create or have notice of the allegedly dangerous condition. (*see Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept., 2018]).

The Court notes that the Second Department has determined that "underlying both standards is the authority of the defendant to rectify any dangerous or defective condition

existing on the premises or to remedy any unsafe method or manner of work." (*Messina v City of New York*, 147 AD3d 748, 749 [2d Dept., 2017]).

TSC and Labor Law §200

The Court finds that TSC made a prima facie showing that it did not have control over the work site and therefore cannot be liable under Labor Law §200 and common-law negligence. Under Section I.d of the TSC Agreement,

> "under no circumstance will the Safety Professional have authority over decisions *or actions affecting the project production, scheduling, quality, workmanship or the correction of hazardous conditions.* The responsibility of production and related functions and correction of hazards will always be that of the client project superintendent, project manager or appropriate contractor or subcontractor personnel and the Safety Professional shall only have the authority to advise and make recommendations." (TSC Exhibit N, Page 1). (emphasis added).

The TSC Agreement further provides that the Safety Professional's "primary responsibility shall be to assist the project management team in improving the effectiveness of the safety initiatives at the construction project." (Page 1). Clearly, TSC's role was to make suggestions to AJD concerning safety concerns and TSC was actually barred from having authority over decisions or actions regarding workmanship or the correction of hazardous conditions. TSC therefore did not have control over the worksite under *Messina*. The testimony relied upon by TSC further shows that TSC did not have control over the work site; Ruggiero of AJD testified that Drew was responsible for performing inspections, making observations and reporting any conditions or safety hazards to AJD, but did not physically repair deficiencies. Furthermore, there is no evidence that Drew or TSC was charged with correcting dangerous conditions or unsafe methods.

TSC also cites to several cases in which the Appellate Division held that liability under Labor Law §200 does not apply to a safety company who, like TSC, is tasked with reviewing safety requirements and making recommendations, providing direction to contractors regarding

the correction of unsafe conditions, but does not have control or a supervisory role over the plaintiff's daily work. The Appellate Division had held that "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence." (*Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2d Dept., 2013] (internal citations omitted)). The Court is unpersuaded by AJD and Homeport's argument that such cases are inapplicable since they are "means and methods" cases; first, TSC does cite to some dangerous conditions cases and this Court has reviewed cases where the Appellate Division similarly held a safety company, like TSC, is not liable under a "dangerous condition" case. (*see Singh v. Black Diamonds LLC*, 24 AD3d 138, 139-140 [1st Dept., 2005]). More importantly, the cases cited by TSC still discuss factors relevant to the question of whether it controlled the work site, such as whether it had the ability to correct a dangerous condition.

As TSC met its prima facie burden, the burden shifts to Third-Party Plaintiffs to raise a triable issue of fact. Third-Party Plaintiffs argue that questions of fact remain as to whether (1) Drew took all necessary steps to ensure that safety protocols were being followed and (2) TSC performed its duties as a Site Safety Manager. The Court finds that even if these issues of fact exist, they are not relevant to the analysis of whether TSC controlled the work site. The Court is also unpersuaded by AJD and Homeport's argument that TSC had actual or constructive knowledge of the dangerous condition based on Drew's observation of the hosing being draped over the cabling; even if such an issue of fact exists, AJD and Homeport still have failed to rebut TSC's prima facie showing regarding their control over the worksite. AJD and Homeport have failed to submit evidence showing that TSC was responsible for, or even permitted to, correct an

unsafe condition or method. TSC also did not have authority to direct Dyer's employees to take or stop any action.

The Court has also taken into account the arguments of co-Defendants and find that they are insufficient to rebut TSC's prima facie showing. Therefore, Defendants have failed to rebut TSC's prima facie showing and TSC cannot be liable under Labor Law §200 or common law negligence.

AJD, Homeport and JM3's Motions to Dismiss Causes of Action Under Labor Law §200

The Court finds that based on the finding that AJD and Homeport are strictly liable to Plaintiff under Labor Law §240(1), AJD and Homeport's Motions to dismiss Plaintiffs' causes of action under Labor Law §200 are moot. Similarly, the Court finds that JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims under Labor Law §200 is also moot.

Labor Law §241(6)

Labor Law §241(6) states that

> "[a]ll 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."

For a cause of action under Labor Law §241(6), "a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor." (*Davies v Simon Prop. Group, Inc.*, 174 AD3d 850, 853 [2d Dept., 2019]) and "the obligations under the statute are nondelegable, and the cause of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident." (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept., 2011]). A plaintiff "must allege that the property owners violated a regulation that sets forth a specific standard of conduct and not

simply a recitation of common-law safety principles." (*St. Louis v. Town of N. Elba*, 16 N.Y.3d 411, 414 [2011]).

The Court finds that Defendants AJD, Homeport and JM3 have met their prima facie burden in showing that Plaintiffs' causes of action under Labor Law §241(6) are either inapplicable, too general or not a valid basis for relief. (*see Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 1105 [2d Dept., 2010]), *Greenwood v. Shearson*, Lehman & Hutton, 238 AD2d 311, 313 [2d Dept.,1997]; *Ramirez v Metropolitan Transp. Auth.*, 106 A.D.3d 799, 801 [2d Dept., 2013]; *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept., 2008]). The Court further finds that Plaintiffs' arguments in opposition to be unpersuasive and fail to overcome Defendants' prima facie showing.

Therefore, Defendants AJD and Homeport's motion to dismiss Plaintiffs' causes of action based on Labor Law §241(6) is hereby granted. JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims against it under Labor Law §241(6) is hereby granted.

H&R's Motion Under CPLR §3212 and §3216

H&R seek an Order granting it summary judgment dismissing the Third-Party Plaintiffs' Complaint and all cross-claims against it pursuant to CPLR §3212 and CPLR §3126(3).[5] Third-Party Plaintiffs assert that H&R is liable for (1) negligence for breaching its duty to hire competent employees to perform its work, exercise reasonable care, and properly perform its work at the Project and (2) breach of contract for breaching it duty to perform their work in a manner that would not create a dangerous condition, hire competent employees and exercise reasonable due care under the circumstances. H&R argue that the testimony on their behalf shows that the ironworkers made a proper initial installation of the cabling and that AJD was

[5] H&R's motion to dismiss AJD and Homeport's causes of action for failure to procure insurance, contribution and indemnification are discussed below.

responsible for maintaining the cabling after it was installed. H&R argue that there is no evidence of what caused the cable to fail and there is a dispute amongst the parties as to whether the cable had been removed and reattached prior to Plaintiff's accident to allow for a delivery.

In viewing the evidence in the light favorable to the nonmoving party, the Court finds that H&R has not sufficiently met its burden for summary judgment; as stated above, summary judgment is a drastic remedy and the motion shall be denied if any party shows facts sufficient to require a trial of any issue of fact. (*see* CPLR §3212; *Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept., 2011]). As asserted by Third-Party Plaintiffs, there is an issue of material fact as to why the cable failed and if the cabling was removed and reinstalled prior to Plaintiff's accident. Ruggiero also testified that he specifically recalls directing H&R to reinstall or maintain cabling after it was loosened or removed by other trades. Despite H&R's assertions, an issue of material fact exists as to whether H&R maintained the cables after installation. The H&R release form is also insufficient to eliminate all issues of fact regarding whether H&R properly installed the cabling or maintained the cabling after installation. Such issues of material fact preclude the granting of summary judgment dismissal of Third-Party Plaintiffs' causes of action for negligence and breach of contract or any cross-claims on the same basis.

H&R also seek an Order granting it summary judgment under CPLR §3216, arguing that AJD and Homeport's Complaint should be dismissed against it for spoliation of evidence. H&R argues that dismissal is proper due to AJD and Homeport's failure to preserve the faulty cabling. AJD and Homeport argue in opposition that Cranmer of H&R conducted an investigation and took photographs of the area after the accident. According to AJD and Homeport, the cabling was discarded as part of a routine clean up over a year and a half before litigation commenced.

AJD and Homeport assert that dismissal is improper since they are similarly prejudiced by the discarding of the cable since they cannot submit the cable to their own expert.

Under CPLR §3216, "'striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct' and, thus, the courts must 'consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness.'" (*Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717, 718, [2d Dept., 2009]). A party seeking to impose sanctions for spoliation must show that another party intentionally or negligently disposed of critical evidence and fatally compromised its ability to prove its claim or defend the suit. *(see Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 524-525 [2d Dept., 2016]). "Furthermore, where the plaintiffs and the defendants are equally affected by the loss of the evidence in their investigation of the accident, and neither have reaped an unfair advantage in the litigation, it is improper to dismiss or strike a pleading on the basis of spoliation of evidence." (*Morales v City of New York*, 130 A.D.3d 792, 794 [2d Dept., 2015]).

Here, H&R have not submitted evidence showing that AJD and/or Homeport intentionally disposed of critical evidence. Even if AJD and Homeport negligently disposed of the cabling, H&R have failed to show that such negligence fatally compromised its ability to defend the suit. Therefore, it is inappropriate to dismiss the Complaint under CPLR §3216.

Contribution and Indemnification

TSC, H&R, JM3, AJD, Homeport and Dyer all seek an Order (1) granting summary judgment on their causes of action for indemnification, contribution, and common law indemnification and (2) granting dismissal of any causes of action for indemnification, contribution and common law indemnification made against them. Since all causes of action against TSC for Labor Law §200 and common law negligence are hereby dismissed, any causes

of action for indemnification, contribution and common law negligence on the basis of Labor Law §200 and common law negligence against TSC are also hereby dismissed.

The Court will now address Dyer's Motion seeking dismissal of AJD and Homeport's cause of action for common law indemnification, which Dyer argues is barred by Section 11 of the Worker's Compensation Act. According to the Court of Appeals,

> "Section 11 bars third-party lawsuits for contribution and indemnification against an injured employee's employer unless the employee suffered a 'grave injury', limited to death and the exclusive list of disabilities defined in the statute, or the employer agreed to contribution and indemnification in a written contract entered into with the third party prior to the accident." (*NY Hosp. Med. Ctr. Of Queens v. Microtech Contracting Corp.*, 22 NY3d 501, 505 [2014]).

Dyer entered into an agreement with AJD for indemnification; specifically, the agreement between AJD and Dyer ("Dyer Agreement") states

> "4.6 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damages, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which otherwise exist as to a part or person described in Section 4.6."

While the Court finds that Plaintiff did not suffer a "grave injury" as defined by the Workmen's Compensation Act, AJD and Dyer entered into a written indemnification agreement prior to Plaintiff's accident and therefore AJD's cause of action for common law indemnification is permissible. *(compare Owens v Jea Bus Co., Inc.*, 161 A.D.3d 1188, 1190 (2d Dept., 2018]; *Ascencio v. Briarcrest at Macy Manor, LLC*, 60 A.D.3d 606, 607-608 [2d Dept., 2009]).

The Court also denies Dyer's Motion to dismiss AJD and Homeport's cause of action for contractual indemnification on the basis that it violates General Business Law 5-322.1 by requiring Dyer to assume liability for the negligence of the owner and general contractor. "Although General Obligations Law §5-322 bars agreements that indemnify a party for its own negligence, since the indemnification provisions at issue here expressly state that they apply only "to the extent permitted by law," those provisions are enforceable" (*Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 796 [2d Dept., 2018] (internal citations omitted)). As Section 4.6 of the Dyer Agreement clearly contains the language of "to the fullest extent permitted by law", this provision is not prohibited by General Obligations Law §5-322. (*see Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 774 [2d Dept., 2010]).

The Court hereby holds the motions of TSC, Dyer, H&R, Homeport and AJD and JM3 seeking summary judgment on causes of action for contribution, indemnification (to the extent not discussed above) will be held in abeyance until the time of trial.

Failure to Procure Insurance Cause of Action

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with'". (Marquez v L & M Dev. Partners, Inc., 141 AD3d 694, 701 (2d Dept., 2016) (quoting *DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept., 2011]). "If such a showing is made, the promisor is liable to the promisee for the resulting damages for the promisor's failure to obtain the required insurance coverage, including the liability of the promisee to the plaintiff and the costs incurred in defending against the plaintiff's action (*see Keelan v. Sivan*, 234 AD2d 516, 517 [2d Dept., 1996] (internal citations omitted)). In *DiBuono v. Abbey, LLC,* the Second Department found that the

third-party plaintiff had met its prima facie burden by submitting a copy of the lease showing that the third-party defendant was required to maintain in full force and effect certain insurance policies and a letter from the defendant's insurer stating the plaintiff was not named as an insured party on any policies issued to the defendant. (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept., 2011]). The Court also found that the defendant failed to raise an issue of triable fact, since it did not submit any evidence showing it did procure an insurance policy naming the third-party plaintiff as an insured party. (*see id.*)

The Court finds that AJD and Homeport have not made a prima facie showing of its entitlement to judgment as a matter of law on their cause of action against H&R and Dyer for failure to procure insurance. The documents submitted by AJD and Homeport are not a sufficient basis for summary judgment at this time and they have failed to produce documents showing that the relevant insurance companies denied coverage or that AJD and Homeport are not named as insured parties.

The Court also finds that Dyer and H&R made a prima facie showing of its entitlement to dismissal of AJD and Homeport's cause of action for failure to procure insurance. The Court further finds that Defendants AJD and Homeport have also raised an issue of fact and therefore summary judgment is not proper at this time.

CONCLUSION

Accordingly, it is hereby:

ORDERED that Plaintiffs' Motion for summary judgment on their cause of action against Defendants AJD and Homeport under Labor Law §240(1) is granted; and it is further

ORDERED that AJD and Homeport's Motion to dismiss Plaintiffs' causes of action based on Labor Law §240(1) is denied; and it is further

ORDERED that JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims based on Labor Law §240(1) is hereby denied; and it is further

ORDERED that AJD and Homeport's Motion to dismiss Plaintiffs' causes of action based on Labor Law §200 is rendered moot; and it is further

ORDERED that JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims based on Labor Law §200 is rendered moot; and it is further

ORDERED that AJD and Homeport's Motion to dismiss Plaintiffs' causes of action against them based on Labor Law §241(6) are hereby granted; and it is further

ORDERED that Plaintiffs' causes of action against AJD and Homeport based on Labor Law §241(6) are severed and dismissed; and it is further

ORDERED that JM3's Motion to dismiss Plaintiffs' causes of action and any cross-claims against it based on Labor Law §241(6) are hereby granted; and it is further

ORDERED that Plaintiffs' causes of action and any cross claims against JM3 based on Labor Law §241(6) are severed and dismissed; and it is further

ORDERED that H&R's Motion to dismiss AJD and Homeport's causes of action for negligence and breach of contract under CPLR §3212 is hereby denied; and it is further

ORDERED that H&R's Motion to dismiss AJD and Homeport's Complaint under CPLR §3216 is hereby denied; and it is further

ORDERED that Dyer's Motion to dismiss AJD and Homeport's causes of action for common law indemnification and contractual indemnification is hereby denied; and it is further

ORDERED that Dyer's Motion to dismiss AJD and Homeport's cause of action for failure to procure insurance is hereby denied; and it is further

ORDERED that H&R's Motion to dismiss AJD and Homeport's cause of action for failure to procure insurance is hereby denied; and it is further

ORDERED that AJD and Homeport's Motion for summary judgment on their cause of action for failure to procure insurance against Dyer and H&R is hereby denied; and it is further

ORDERED that all other motions for summary judgment on causes of action and cross-claims for common law contribution, indemnification and contractual indemnification are held in abeyance until the time of trial.

Dated: January 13, 2020

ENTER:

J.S.C.

Hon. Judith N. McMahon
J.S.C.