SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 158112/2015

ROY PHILLIPS,

MOTION DATE 02/21/2020

Plaintiff,

MOTION SEQ. NO. 001 002 003 004 005

- v -

ONE EAST 57TH STREET, LLC,743 FIFTH HOLDINGS, LLC,SHAWMUT DESIGN & CONSTRUCTION,

DECISION + ORDER ON MOTION

Defendant.

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ONE EAST 57TH STREET, LLC, SHAWMUT DESIGN & CONSTRUCTION

Third-Party
Index No. 595264/2016

Plaintiff,

-against-

ORANGE COUNTY IRONWORKS LLC, LONG ISLAND CONCRETE INC., GABRIEL STEEL ERECTORS, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 232, 255, 256, 257, 275, 276, 277, 278, 286, 287, 288, 289, 299, 300, 301, 302, 303

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 226, 233, 291, 292, 293, 294, 295, 296, 304, 305, 306, 307, 308

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 228, 229, 230, 235, 253, 254, 260, 261, 274, 285, 309, 310, 311, 312

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 227, 234, 236, 258, 259, 284, 297, 313, 314, 315, 316

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 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, 224, 225, 231, 237, 238, 239, 240, 241, 251, 252, 265, 266, 267, 268, 269, 270, 271, 273, 279, 280, 281, 282, 283, 317, 318, 319, 320, 321, 322, 323

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, it is

ORDERED that plaintiff Roy Phillips' motion (Motion Seq. 004), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as those parts of the Labor Law § 241 (6) claim predicated upon alleged violations of Industrial Code 12 NYCRR 23-1.7 (f) and 23-1.21 (b) (4) (i) and (ii), is granted as against defendants/third-party plaintiffs One East 57th Street, LLC (One East) and Shawmut Design & Construction (Shawmut) (together, defendants); and it is further

ORDERED that third-party defendant Long Island Concrete, Inc.'s (LIC) motion (Motion Seq. 001), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it is denied; and it is further

ORDERED that the branch of third-party defendant Orange County Ironworkers, LLC's (OCI) motion (Motion Seq. 002), pursuant to CPLR 3025, seeking to amend its third-party answer to include cross claims against third-party defendant Gabriel Steel Erectors, Inc (GSE) is granted with respect to OCI's proposed claims against GSE for contractual indemnification and breach of contract for the failure to procure insurance; and the remainder of this branch of OCI's motion is otherwise denied; and it is further

ORDERED that the branch of OCI's motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment on its counterclaim for breach of contract for the failure to procure insurance against GSE is granted, as limited in the decision, to that part of plaintiff's claim that does not run afoul of the antisubrogation rule; and the motion is otherwise denied; and it is

further

ORDERED that GSE's motion (Motion Seq. 003), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, as well as dismissing plaintiff's Labor Law § 241 (6) claims, is granted to the extent of dismissing defendants' common-law indemnification and contribution and breach of contract claims for the failure to procure insurance claims against it; and the motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion (Motion Seq. 005), pursuant to CPLR 3212, seeking summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim with respect to those claims abandoned by plaintiff, and that branch of defendants' motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion (Motion Seq. 005), pursuant to CPLR 3212, seeking summary judgment in their favor on their third-party complaint as against LIC, OIC and GSE is granted to the extent of granting defendants' breach of contract for the failure to procure insurance claim as against OCI, and the motion is otherwise denied; and it is further;

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

NON FINAL DISPOSITION

MEMORANDUM DECISION

This is a Labor Law action to recover damages for personal injuries allegedly sustained by a union ironworker on July 30, 2015 when, while working at a construction site located at 743 Fifth Avenue, New York, New York (the Premises), he fell from an allegedly insufficiently secured ladder.

In Motion Sequence 001, third-party defendant Long Island Concrete, Inc. (LIC) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

In Motion Sequence 002, third-party defendant Orange County Ironworks, LLC (OCI) moves, pursuant to CPLR 3025 (b), to amend its answer to the third-party complaint to add cross claims against third-party defendant Gabriel Steel Erectors, Inc. (GSE), and then, pursuant to CPLR 3212, for summary judgment in its favor on the newly pleaded cross claims.

In Motion Sequence 003, GSE moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, as well as the third-party complaint and all cross claims against it.

In Motion Sequence 004, plaintiff Roy Phillips moves, pursuant to CPLR 3212, for summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against defendants/third-party plaintiffs One East 57th Street, LLC (One East) and Shawmut Design & Construction (Shawmut) (together, defendants).

In Motion Sequence 005, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims, and all claims and cross claims as against them, and for summary judgment in their favor on their third-party claims against LIC, OCI and GSE.

The above motions are hereby consolidated for disposition.

BACKGROUND

On the day of the accident, the Premises was owned by One East. One East hired Shawmut as the general contractor for a project at the Premises that entailed the building of a new two-story building (the Project). Shawmut hired LIC to excavate the Premises and OIC to perform steel fabrication and installation. OIC, in turn, subcontracted its installation work to GSE. Plaintiff was an employee of GSE.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as an ironworker by GSE. GSE was tasked with setting up a crane at the Premises during the overnight hours at the Project. His shift began at 10:00 p.m. and ended at 6:00 a.m. It was GSE's first night on the site. That night, plaintiff's duties included setting up the crane and moving steel columns from trucks on the street level into the "hole," an excavated pit that would, ultimately, become the Premises' basement (the "Hole") (plaintiff's tr at 36). Plaintiff testified that he was solely directed at the Project by GSE's foreman, Mark Banta.

Plaintiff arrived at the Premises at 10:00 p.m. GSE was the only trade present at that time, although a Shawmut superintendent and a site safety person were also present. Prior to plaintiff's arrival, a fiberglass extension ladder (the Ladder) had been placed on the concrete floor of the Hole leading to street level. Plaintiff was unsure of the Ladder's length but stated that it "had to be more than 12 feet" (*id.* at 48). The Ladder was the sole accessway into the Hole. Plaintiff did not know who the Ladder belonged to, or who had placed it there.

At the beginning of the shift, Banta directed that plaintiff use the Ladder to access the Hole. Plaintiff checked the Ladder and saw that the top was "tied off," i.e. secured to a handrail at street level (*id.* at 42 and 175). He and several other GSE workers used the ladder several

times to access the Hole prior to the accident. The Ladder "felt secure when [he] went down" (*id.*).

Plaintiff explained that the accident occurred around 1:00 a.m. Plaintiff testified that he and his coworkers were leaving the Hole for a coffee break. He slung an aluminum folding chair over his shoulder and began to climb:

> "I made my way up the ladder. And when I got to just about street level . . . the bottom of the ladder kicked out, and I lost my balance, and I fell"
>
> (*id.* at 53).

Specifically, the bottom of the Ladder "kicked back" straight away from the wall (*id.*). Plaintiff tried to catch himself by grabbing onto the lip of the Hole at street level but failed. He then grabbed for the Ladder but could not arrest his fall. Plaintiff ultimately landed, feet first, at the bottom of the Hole. The Ladder did not fall over.

Plaintiff later heard from a coworker that the bottom of the Ladder was not secured at the time of the accident, but he did not personally know whether that was true.

Deposition Testimony of Aymen Daghfous (Shawmut's Assistant Project Manager)

Daghfous testified that at the time of the accident, he was Shawmut's assistant project manager for the Project. Shawmut was the general contractor for the Project. His duties as assistant project manager included "the management of the entire project," including selecting the subcontractors and hiring a site superintendent and a safety manager (Daghfous tr at 8). He was present at the Premises once or twice a week for meetings or to coordinate the trades.

Daghfous testified that Shawmut hired LIC to excavate the Hole to a depth of 12 to 13 feet and then lay the foundation. He also testified that Shawmut hired OCI to fabricate and

install structural steel, and that, while OCI fabricated the steel, it hired GSE to perform the installation. Daghfous explained that the steel installation began on the day of the accident.

Daghfous was present at the site on the day of the accident, but he did not witness it. Around 10:00 p.m., he walked the Premises. He gained access to the Hole via one of two approximately 16-foot long extension ladders that had already been set up. The ladders were the only way into the Hole. He did not know who owned or set up the ladders. He recalled that the ladders were secured at the top of the Hole, but he could not recall if they were secured at the bottom. Daghfous did not remember if Shawmut supplied any ladders at the Project. He did recall that LIC used its own ladders "during the excavation work and the foundation work" (*id.* at 52). He did not remember whether LIC's ladders were replaced at any point in time. When asked whether the Ladder could have been one of Shawmut's ladders, he testified that it was possible, but he did not know for certain.

After the accident, Shawmut's safety manager and project manager investigated and prepared an incident report. Daghfous was shown the report and confirmed its authenticity. He also confirmed that it stated that plaintiff "stretched out to get off of a ladder and onto the first floor street level when the bottom footing of the ladder shifted causing [plaintiff] to lose his footing" (*id*. at 67). Daghfous did not know what caused the Ladder's footing to shift, and he was unaware of any defect in the Ladder. Daghfous was then shown a series of photographs, dated several days after the accident, which depicted a ladder with markings he identified as being LIC's markings. He testified that he was not certain that the photographs were of the subject Ladder or whether the photographs were taken at the Premises.

At the time of the accident, when GSE was beginning its steel installation work, LIC was not at the Project. LIC's excavation work was complete and they had to wait on GSE's steel

installation to finish their foundation work. From Shawmut's daily reports, LIC had last been at the Premises – for work that required entering the Hole – on July 28, 2015, effectively one day before the accident (*id.* at 123).

Deposition Testimony of Thomas Perno (LIC's General Superintendent and Owner)

Perno testified that on the day of the accident, he was LIC's general superintendent. His duties included coordinating the job, scheduling, and safety on behalf of LIC. He also reviewed the contract between LIC and Shawmut.

LIC began excavation and foundation work in November 2014 and was finished sometime in January 2015. At the deposition, Perno was shown LIC's payroll reports and confirmed that LIC performed additional foundation work at the Premises from June 12, 2015 through July 24, 2015, approximately one week prior to the accident. LIC was scheduled to then return after the ironworkers had installed the metal decking to perform additional concrete installation on top of the decking.

LIC had ladders at the site, but only for its own workers during the foundation phase. The ladders were marked with the words "Long Island Concrete" written on them (*id.* at 65). LIC's ladders were tied off at the top of the Hole. At the bottom of the Hole, LIC workers installed a "cleat," a wooden 2-by-4 nailed to the concrete floor, to act as a stopper at the base of the ladder (*id.* at 122). According to Perno, Shawmut might have provided ladders at the Project, though he later testified that in his experience, a general contractor never provides equipment of that type for its subcontractors (*id.* at 151).

According to Perno, LIC's ladders were "put on a truck and removed" from the Premises at the end of their workday, every day (*id.* at 123). Perno then testified that he "[n]ever said that" the ladders were removed from the Premises at the end of each workday (*id.* at 138); and when

asked again whether LIC's ladder was removed from the site after it had finished its work, Perno responded: "It might have been on the job. I don't know" (*id.* at 138). According to Perno, if the ladder were left at the job site, it "should have been" removed from its cleat, untied from the top of the Hole, removed from the Hole and locked up at LIC's gang box every night (*id.* at 143).

Perno also testified that he did not regularly visit the Premises late at night (as LIC was not on site at that time), though, after additional questioning, he testified that he was present at the Premises on the night of July 15, and that he personally witnessed "steelworkers" installing a ladder that night (*id.* at 154). He did not know if those steelworkers were GSE workers (*id.* at 161).[1]

Deposition Testimony of Matthew Messing (OCI's Senior Project Manager)

Messing testified that on the date of the accident, he was OCI's senior project manager, assigned to the Project at the Premises. OCI was hired by Shawmut to fabricate steel beams and columns for the Project, and to install them. While OCI fabricated the steel, it hired GSE to erect the steel at the Premises.[2] Messing's duties included overseeing the project's day to day operations and scheduling meetings.

OCI's fabrication work was done entirely off-site. None of OCI's work occurred at the Premises, though Messing and OCI's project manager, John Villium, visited the project on one or two occasions.

OCI did not own any ladders. He was unaware of whether GSE had any ladders. He was also unaware of who owned the Ladder or who installed it at the Premises.

Deposition Testimony of Daniel North (GSE's Ironworker)

[1] Notably, GSE did not begin working at the Premises until July 29, two weeks later; and the record reflects no other steel workers hired at the Project.

[2] It should be noted that GSE and OCI are owned by the same individual, Daniel Teutel.

North testified that on the day of the accident, he was employed by GSE as an ironworker at the Project. GSE's work at the Project included the installation and erection of structural steel. North was a "connector" at the Project, responsible for climbing the steel as it is installed, connecting pieces lifted by the crane and "bolt[ing] the building together as we go" (North tr at 14). Mark Banta was his foreman.

North was present at the site at the time of the accident, but he did not witness it. He testified that, when they first arrived, the work site already had "a temporary steel railing and then [the Ladder] off to the right-hand side to access the [Hole]" (North tr at 29). North also testified that the Ladder was there before GSE arrived on site. GSE did bring a ladder to the Premises; however, that ladder was used to access "the top of the sidewalk shed" and not to access the Hole (*id.* at 31).

North did not witness the accident. North was on the street level at the time of the accident when he heard a crash and yelling. He ran over to the Hole and saw plaintiff on the floor of the Hole with the Ladder next to him. His coworker, "Chester" was also in the Hole. Chester said that the Ladder's "bottom kicked out" while plaintiff was climbing (*id.* at 43).

North did not know who owned the Ladder, but he believed that it was an LIC ladder, as "[t]hey were the only other trade on the job site at the time" (*id.* at 46). North was shown a photograph depicting a red ladder with the words "Long Island Concrete" written on the side in marker. He testified that the ladder in the photograph looked like the Ladder, but he did not know whether it was, in fact, the Ladder.

The Incident Reports

Shawmut and GSE prepared incident reports of plaintiff's accident.

The GSE Report

Mark Banta, GSE's foreman, prepared an incident report on the day of the accident (the GSE Report). The GSE Report included two witness statements, one by Banta and one by Chester Goodleaf, plaintiff's coworker.

Banta's witness statement included the following:

> "[Plaintiff] was climb [*sic*] ladder to get back to street level. When he almost reached the top, the base of the ladder slid out, then knocking him off the ladder to the basement floor about 12 feet"

(plaintiff's notice of motion, exhibit 16; Doc No. 108).

Goodleaf's witness statement included the following:

> "[Plaintiff] climbed up the ladder, when he got near the top, the ladder kicked out making [plaintiff] lose his balance and fall off the ladder"

(*id.*). In addition, Goodleaf stated:

> "A ladder was set up to access the basement floor. It was not set correctly as the sliding portion was locked below the stationary section causing the bottom to slide out when [plaintiff] climbed up"

(*id.*). The GSE Report itself noted that the "site access ladder was not tied off at the base" and that, to remedy the issue, Banta "removed the ladder and replaced it, then tied it off properly" (*id.*).

The Shawmut Report

Omar Jackson of Shawmut prepared an incident report on the day of the accident (the Shawmut Report). As relevant, the Shawmut Report stated the following, in pertinent part:

> "At approximately 1:40 am, [plaintiff] was in the process of ascending the extension ladder. The ladder was tied-off. [Plaintiff] stretched out to get off the ladder . . . when the bottom footing of the ladder shifted causing [plaintiff] to lose his footing"

(plaintiff's notice of motion, exhibit 14; doc no 104).

DISCUSSION

"[T]he proponent of a summary judgment motion must make 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 004 and 005)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants. Defendants cross-move for summary judgment dismissing the same claim as against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

One East is the owner of the Premises and Shawmut is the general contractor for the Project. Accordingly, they are proper Labor Law defendants.

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants because the safety device, i.e. the Ladder, failed to protect him from falling while he performed his work. To that effect, the

Ladder shifted and "kicked out" while he was climbing up, which caused him to fall to the floor below and become injured. Plaintiff's testimony that the ladder kicked out is supported by the GSE Report, Goodleaf's witness statement, and the Shawmut Report. "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Garcia v Church of St. Joseph of the Holy Family of City of N.Y.*, 146 AD3d 524, 525 [1st Dept 2017] ["Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1)"]; *accord Lizama v 1801 University Assoc., LLC*, 100 AD3d 497, 498 [1st Dept 2012]).

In opposition, defendants argue that plaintiff was required to show that the Ladder he fell from was defective in some manner. This is incorrect. "It is sufficient for the purposes of liability under Section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424, 425 [1st Dept 2019], *quoting Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]).

Defendants also argue that plaintiff was the sole proximate cause of his accident because plaintiff carried a folding chair slung over his shoulder while he climbed the Ladder. This argument is also unpersuasive. A plaintiff cannot be the sole proximate cause of his accident where a defendant "failed to provide an adequate safety device in the first instance" (*Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]; *see also Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762 [2d Dept 2006]). Accordingly, the alleged negligence on plaintiff's part – carrying a folding chair while climbing the insufficiently secured Ladder – goes to comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the

statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]). "[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]).

In its opposition, GSE argues, without any support, that the Ladder was not a safety device because it was a permanent part of the structure of the Premises (*see e.g. Gelo v City of New York*, 34 AD3d 636, 637 [2d Dept 2006]). GSE supplies no evidence that the Ladder was a part of the building's permanent structure (such as a fire escape ladder, or a permanent stairway). In addition, the GSE Report noted that the Ladder was removed and replaced after the accident, underscoring its temporary nature. Accordingly, this argument is unpersuasive.

OCI's argument that the Labor Law does not protect a worker if that worker is exiting the work site for a coffee break is, likewise, unpersuasive (*see, e.g. Beharry v Public Storage, Inc.*, 36 AD3d 574 [2d Dept 2007] [Labor Law 240 (1) applied to worker who, while returning to his job site from a coffee break, was injured while climbing the "functional equivalent of a ladder"]).

Thus, plaintiff is entitled to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to summary judgment dismissing the same.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 003, 004 and 005)

Plaintiff moves for summary judgment in his favor on the Labor Law § 241 (6) claim against defendants. One East, Shawmut and GSE cross-move for summary judgment dismissing said claim against defendants.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross*, 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Initially, although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, with the exception of sections 23-1.7 (f) and 23-1.21 (4) (i) and (ii), plaintiff does not move for summary judgment in his favor as to those alleged violations, nor does he oppose their dismissal. Therefore, the court deems these uncontested provisions abandoned.

Thus, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

Industrial Code 23-1.7 (f)

Industrial Code 12 NYCRR 23-1.7 (f) provides in pertinent part, as follows:

> "(f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

Section 23-1.7 (f) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Miano v Skyline New Homes Corp*., 37 AD3d 563, 565 [2d Dept 2007]; *Atkins v Baker*, 247 AD2d 562, 562 [2d Dept 1998]).

Here, it is uncontested that the Ladder was provided as a means of access from the street level into and out of the Hole. In addition, because it shifted, causing plaintiff to fall, the Ladder was not a safe means of access from the street to the lower level. Accordingly, defendants violated this Industrial Code provision, and such violation was a proximate cause of plaintiff's accident. Defendants' unsupported argument that the Ladder was, in fact, a safe means of access is unpersuasive.

Thus, plaintiff is entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim based on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (f), and defendants are not entitled to dismissal of the same.

Industrial Code 12 NYCRR 23-1.21 (b) (4) (i) and (ii)

Industrial Code 12 NYCRR 23-1.21 (b) (4) (i) and (ii) governs the installation and use of ladders. These provisions provide in pertinent part, as follows:

> "(i) Any portable ladder used as a regular means of access between floors or other levels in any building . . . shall be nailed or otherwise securely fastened in place.
>
> "(ii) All ladder footings shall be firm."

Initially, section 23-1.21 (b) (4) (i) and (ii) are sufficiently specific to support a Labor Law § 241 (6) claim (*see Kinsler v Lu-Four Assoc.*, 215 AD2d 631 [2d Dept 1995]).

Here, testimony establishes that the Ladder was a portable extension ladder that was used as a regular means of access between the street level and the Hole. In addition, while the Ladder was secured at the top with rope, it was not nailed or otherwise securely fastened at the bottom, which allowed the Ladder to shift and kick out while plaintiff was climbing. Accordingly, section 23-1.21 (b) (4) (i) was violated.

As to section 23-1.21 (b) (4) (ii), Goodleaf's witness statement, which reflects that "the sliding portion [of the Ladder] was locked below the stationary section causing the bottom to slide out," establishes that the Ladder's footing was not firm in violation of the Industrial Code (plaintiff's notice of motion, exhibit 16; doc no 108).

In opposition, defendants fail to raise a triable issue of fact as to whether the Ladder was properly secured, or that the Ladder had a firm footing to prevent it from sliding.

Thus, plaintiff is entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim based on alleged violations of Industrial Code 12 NYCRR 23-1.21 (b) (4) (i) and (ii), and defendants and GSE are not entitled to summary judgment dismissing the same as against defendants.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 005)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. 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" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]; *see also Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007] [liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed"]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff's accident was caused when an improperly secured ladder shifted, causing plaintiff to fall. Accordingly, the accident was caused by the means and methods of the work at the Project – i.e. the manner that the Ladder was installed and maintained. Each defendant's argument for summary judgment is discussed in turn.

One East

There is no evidence in the record that One East supervised or controlled the installation or maintenance of the Ladder. Accordingly, One East is entitled to summary judgment dismissing this claim as against it.

Shawmut

To the extent that the parties argue that Shawmut had the general authority to control the work at the Project because no contractors could access the work site without Shawmut's authorization, and because Shawmut had the general authority to inspect the jobsite and stop work if there was a dangerous condition, such control has long been held to be insufficient to establish liability under Labor Law § 200 (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] ["[T]he mere fact that a general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control"]

[internal quotation marks omitted]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where a defendant "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200"]; *Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210 [1st Dept 1998] [section 200 properly dismissed where owner had no control "over the manner in which the work in question was done . . . [or] supervised the use of the machine whose negligent alteration and operation is said to have caused plaintiff's injury"]; *accord O'Sullivan v IDI Constr. Co., Inc.,* 28 AD3d 225, 226 [1st Dept 2005]; *affd* 7 NY3d 805 [2006]).

To the extent that the parties argue that Shawmut may be liable under Labor Law § 200 because it might have provided the Ladder to GSE, such argument is unpersuasive. A general contractor, such as Shawmut, may be liable for equipment that it provides to a subcontractor, but only if that equipment is defective in some manner (*see Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138–39 [2d Dept 2016] [a general contractor may be liable "[w]hen a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use"]). Here, however, there is no evidence that the Ladder, itself, was defective. Rather, the Ladder was insufficiently secured. Importantly, there is no evidence in the record that Shawmut actually installed or secured the Ladder (*Naughton*, 94 AD3d at 11).

Finally, OCI argues that Shawmut was responsible for providing necessary lighting, and that it must not have done so, because plaintiff testified that the bottom of the Ladder was not well lit. That said, plaintiff does not allege that his accident was caused by insufficient lighting.

Accordingly, Shawmut is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claim as against it.

OCI's Motion to Amend its Answer to GSE's Third-Party Complaint and for Summary Judgment (Motion Sequence Number 002)

OCI moves, pursuant to CPLR 3025 (b), to amend its answer to the third-party complaint to add cross claims against GSE for common-law indemnification, contribution, contractual indemnification, and the failure to procure insurance.

Leave to amend a pleading "'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 [1st Dept 2014], quoting *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp*., 59 NY2d 755, 757 [1983]).

> "Mere delay in seeking to amend a pleading does not warrant denial of the motion, in the absence of prejudice. The type of prejudice necessary to warrant denial of the motion requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"

(*Tri-Tec Design, Inc.*, 123 AD3d at 420 [internal quotation marks omitted]). Further, a motion to amend should be granted unless the proposed amendments are "palpably insufficient or clearly devoid of merit" (*WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518, 519 [1st Dept 2019] [internal quotation marks and citation omitted]).

Here, GSE articulates no surprise or prejudice sufficient to prevent OCI's making of this motion. That said, the court must determine whether each claim that OCI seeks to add is insufficient or devoid or merit. As will be explained below in detail, OCI is entitled to amend its answer only to include cross claims for contractual indemnification and breach of contract for the failure to procure insurance.

Defendants' Contractual Indemnification Claim Against LIC (Motion Sequence Number 001 and 005)

Defendants move for summary judgment in their favor on their claim for contractual indemnification as against LIC. LIC moves for summary judgment dismissing said claim against it.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia*, 259 AD2d at 65).

Additional Facts Relevant to this Claim

Shawmut and LIC entered into a contract on November 24, 2014 (the Shawmut/LIC Agreement) for concrete fabrication and installation services at the Project. The Shawmut/LIC Agreement included an indemnification provision (the LIC Indemnification Provision), which provides in pertinent part, the following:

> "To the fullest extent permitted by applicable law, [LIC] agrees to defend, indemnify and hold harmless [Hublot] . . . [Shawmut] and anyone else required by the Contract Documents, from and against and any all claims . . . arising out of or resulting from any work of and caused in whole or in part by any act or omission of [LIC] . . ."

(LIC's notice of motion, exhibit P, § 5 [P]; Doc No 87 [the LIC Indemnification Provision]).

In addition, the Shawmut/LIC Agreement's Contract Documents include a rider explicitly requiring that LIC include One East as an additional insured (*id.*, exhibit P, rider D, ¶ 5 ["The following entities shall be included as additional insured . . . One East 57th Street, LLC"]). Indeed, LIC does not dispute this point, nor does it discuss the Shawmut/LIC indemnification provision at all.

Rather, it appears that LIC's primary argument is that plaintiff's accident did not arise from the work or acts or omissions of LIC, because LIC was not present at the time of the accident, and because GSE and OCI had an explicit duty to provide a safe ladder for plaintiff's use. This argument is unpersuasive. Whether GSE and OCI had a duty to plaintiff – be it to provide a safe ladder, or to sufficiently inspect the ladder – would not absolve LIC of liability under the LIC Indemnification Provision if LIC was the entity that owned, installed and/or secured the Ladder that plaintiff used at the time of his accident.

To that end, questions of fact exist as to whether LIC owned, installed or secured the Ladder. Plaintiff and North testified that the Ladder was installed prior to GSE starting its work at the Project, giving rise to an inference that the Ladder was owned, installed and secured by LIC. On the other hand, Perno testified that the Ladder could not have been one of LIC's ladders (either because LIC's ladders were removed from the site entirely, or because they were stowed at LIC's gang box). Perno also testified that he witnessed another contractor installing the Ladder two weeks prior to plaintiff's accident, indicating that the Ladder may have been owned, installed and secured by another company.

The court notes that Perno's deposition was clearly contentious and his testimony was occasionally internally contradictory. Ultimately, though, the determination of whether his testimony is credible is a determination to be made by the jury, not the court (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 [1986] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"]).

LIC's argument that Perno unequivocally established that the Ladder could not have been LIC's is also unpersuasive. Perno's testimony that LIC would normally remove and/or lock up its ladders at the end of its shift does not establish that LIC did, in fact, do so. Indeed, Perno was not present at the time of the accident, and he did not testify that he had personal knowledge of how (or whether) LIC's ladders were stowed at the Project on any given day (let alone on the day of the accident).

LIC's argument that it would be entirely speculative to determine that the Ladder belonged to LIC is, likewise, unpersuasive. To that end, there is testimony that the Ladder was set up prior to GSE's arrival at the site, and there is also testimony that, aside from LIC's own subcontractors, no other contractors worked at the Project prior to GSE's work. Accordingly, it cannot be said that it would be sheer speculation – and thus improper for a jury to consider – whether the Ladder was owned, set up and/or secured by LIC.

Finally, despite LIC's extensive argument regarding its purported lack of negligence, whether LIC was actually negligent is not at issue because the LIC Indemnification Provision does not contemplate LIC's negligence (*Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1020 [2d Dept 2011] ["Since the contract did not require as a condition for contractual indemnification

that the acts or omissions be negligent or wrongful, whether those acts or omissions constituted negligent conduct was not relevant" to the claim for contractual indemnification]).

Accordingly, LIC has not established its entitlement to dismissal of the contractual indemnification claim against it. In addition, defendants have failed to establish, as a matter of law, that the Ladder was, in fact, owned, installed and/or secured by LIC. Accordingly, defendants are not entitled to summary judgment on their claim for contractual indemnification against LIC.

Thus, LIC is not entitled to summary judgment dismissing defendants' contractual indemnification claim as against it, and defendants are not entitled to summary judgment in their favor on the same claim.

OCI's Contractual Indemnification Cross Claims Against GSE (Motion Sequence 002)

OCI moves to amend its third-party answer to add a cross claim against GSE for contractual indemnification, and simultaneously moves for summary judgment on said claim.

Additional Facts Relevant to this Issue

The OCI/GSE Agreement

OCI and GSE entered into a contract dated January 5, 2015 (the OCI/GSE Agreement) wherein GSE agreed to perform structural steel installation at the Project. The OCI/GSE Agreement included an indemnification provision (the GSE Indemnification Provision) which states, as relevant, the following:

> "To the fullest extent permitted by law, [GSE] shall indemnify and hold harmless [Hublot], [Shawmut], [OCI and] all other additional insureds as required by [OCI's] contract . . . from and against claims . . . arising out of or resulting from the performance of [GSE's] work for [OCI] at the [Project] . . . but only to the extent caused in whole or in part by negligent acts or omissions of [GSE] . . ."

(OCI's notice of motion, exhibit L, § 1.01 [the GSE Indemnification Provision]; Doc No 127).

The OCI/GSE Agreement also included an insurance procurement provision that required GSE to obtain primary insurance in the amount of $2 million, and excess coverage in the amount of $5 million (*id.* at § 1.04). Notably, while GSE procured $2 million in primary coverage, it only procured $3 million in excess coverage (GSE's opposition, exhibit E; Doc No 206 [the GSE Excess Policy]).

The Insurance Correspondence

By letter dated May 13, 2016, GSE's primary insurer, SNIC, determined that "OCI would be entitled to defense and indemnity as an additional insured under [the GSE Primary Policy] . . . subject to the terms and conditions of the SNIC policy on a primary and non-contributory basis" (OCI's notice of motion, exhibit L, p. 3; Doc No 128). SNIC advised OCI to notify GSE's excess carrier.

By letter dated June 11, 2019 – over three years later – counsel for OCI requested that GSE's excess carrier, Starr Indemnity & Liability Company (Starr), provide coverage to OCI in this action, pursuant to the OCI/GSE contract (OCI's notice of motion, exhibit M; Doc No 129). According to OCI's counsel, Starr has not responded to OCI's letter.

As an initial matter, GSE argues that, because SNIC has agreed to indemnify both GSE and OCI, this claim is barred by the antisubrogation rule. Under that rule:

> "[A]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. . . . In effect, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor – if that third party also qualifies as an insured under the same policy – for damages arising from the same risk covered by the policy"

(*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016] [internal quotation marks and citations omitted]).

Here, it is unquestioned that GSE is a named insured, and OCI is an additional insured, under the GSE Primary Policy, and that SNIC, GSE's insurer, is providing defense and indemnification to OCI with respect to plaintiff's accident at the Premises. Therefore, at least with respect to the GSE Primary Policy, any claim for indemnification would be barred by the antisubrogation rule, as, effectively, SNIC would be standing in the shoes of its additional insured (OCI) to sue its insured (GSE).

However, OCI argues that it is not seeking to subrogate its indemnification claim with respect to common policies between it and GSE. Rather, OCI seeks contractual indemnification with respect to any damages for which it may be liable to plaintiff in excess of such common policies (*see New York City Dept. of Transp. v Petric & Assoc., Inc.*, 132 AD3d 614, 615 [1st Dept 2015] [applying the antisubrogation rule only until the "limit of liability on the [] policy is exhausted"]). This is correct (*id., see also Bruno v Price Enters., Inc.*, 299 AD2d 846, 848 [4th Dept 2002] ["indemnification is barred by the antisubrogation rule up to the amount of the applicable insurance policy limits"). The remainder of OCI's claim would survive.

Importantly, even if the common policies apply fully to this action, there exists a demonstrated possibility that plaintiff's claim will exceed the limits of those policies – i.e. plaintiff's $8 million dollar demand (as compared to $5 million in maximum possible coverage) – it cannot be said that OCI's cross claim is "palpably insufficient or clearly devoid of merit" (*WDF, Inc.*, 170 AD3d at 519). Therefore, OCI is entitled to amend its answer to include a cross claim for contractual indemnification as against GSE, as limited to any damages in excess of GSE's procured insurance.

Turning to the actual indemnification provision's language, GSE's duty to indemnify is limited to incidents "arising out of or resulting from the performance of [GSE's] work for [OCI] at the [Project] . . . but only to the extent caused in whole or in part by negligent acts or omissions of [GSE] . . ." (OCI's notice of motion, exhibit L, § 1.01 [the GSE Indemnification Provision]; Doc No 127).

Here, it is uncontested that plaintiff's accident arose out of or resulted from GSE's work for OCI at the Project. However, in its motion papers, OCI does not raise or address whether plaintiff's accident was caused in whole or in part by GSE's negligence. It only raises specific, substantive arguments on this issue for the first time in its reply papers (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995] ["Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion"]). Accordingly, OCI has failed to meet its prima facie burden for entitlement to summary judgment on this claim.

In any event, as discussed above, a question of fact remains as to whether LIC or GSE (or, perhaps, both) was responsible for securing the Ladder. Accordingly, because questions of fact remain with respect to whether plaintiff's accident arose from any negligent acts or omissions by GSE, OCI is not entitled to summary judgment on this claim at this juncture.

Defendants' Contractual Indemnification Claim Against GSE (Motion Sequence Number 003 and 005)

Defendants move for summary judgment in their favor on their contractual indemnification claim against GSE. GSE moves for summary judgment dismissing the same.

As above, GSE argues that defendants are prevented by the antisubrogation rule from claiming contractual indemnification as against it because GSE is providing them with defense and indemnification through the SNIC and Starr policies (*see* GSE's notice of motion exhibits W

[correspondence from Starr confirming coverage on behalf of defendants). As discussed before, the antisubrogation rule applies only until the "limit of liability of the [] policy is exhausted" (*New York City Dept. of Transp.* 132 AD3d at 615). Therefore, defendants may only seek contractual indemnification for any claim above the coverage afforded by GSE's policies, should plaintiff's damages exceed such coverage.

GSE also argues that it has no duty to defend or indemnify One East, because its indemnification agreement does not explicitly reference One East. This is incorrect. While One East is not explicitly named in the OCI/GSE Agreement, the GSE Indemnification Provision plainly incorporates "all other additional insureds as required by [OCI's] contract" (OCI's notice of motion, exhibit L, § 1.01 [the GSE Indemnification Provision]; Doc No 127). The agreement between Shawmut and OCI provides, as is relevant here, that OCI was explicitly obligated to indemnify One East as an additional insured (GSE's notice of motion, exhibit M, rider D; Doc No. 147). Therefore, the GSE Indemnification Provision contemplates indemnification of One East, and One East is required to be an additional insured under the GSE Indemnification Provision.

GSE asks this court to ignore the specific contractual language in the GSE Indemnification Provision that requires GSE to indemnify any of OCI's additional insureds. Doing so would materially alter the GSE Indemnification Provision's language. A court "may not by construction add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.,* 143 AD3d 146, 156 [1st Dept 2016], *affd sub nom. Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire and Mar. Ins. Co.*, 31 NY3d 131 [2018] [internal quotation marks and citations omitted).

That said, as questions of fact remain with respect to whether GSE was negligent in securing the Ladder, neither defendants, nor GSE are entitled to summary judgment on this claim.

Defendants' Contractual Indemnification Claims Against OCI (Motion Sequence Number 005)

Defendants move for summary judgment on their contractual indemnification claim against OCI.

Shawmut and OCI entered into an agreement for work at the Premises that entailed the fabrication and installation of structural steel at the Premises (the Shawmut/OCI Agreement). The Shawmut/OCI Agreement included an indemnification provision (the OCI Indemnification Provision) that provided, in pertinent part, the following:

> "To the fullest extent permitted by applicable law [OCI] agrees to defend, indemnify and hold harmless [Hublot] . . . [Shawmut] and anyone else required by the Contract Documents, from and against any and all claims . . . arising out of, or resulting from any work caused in whole or in part by any act or omission of [OCI] or those employed by it at any level . . ."

(Defendants' notice of motion, exhibit W, § 5 [p]; Doc No. 218 [the OCI Indemnification Provision).

As with the Shawmut/LIC Agreement (discussed above), the Shawmut/OCI Agreement included a rider requiring OCI to name One East as an additional insured (*id.*, rider D). Accordingly, the OCI Indemnification Provision applies to One East.

Defendants argue that OCI must indemnify defendants because OCI was required, under the Shawmut/OCI Agreement, to ensure that "all construction tools [and] equipment . . . used in accomplishing the Subcontract Work, whether purchased . . . by [OCI] or provided by others, are in a safe, sound and good condition" (*id.* § 6).

That said, there is no dispute that the Ladder itself was in "a safe, sound and good condition" as there is no allegation or dispute that the Ladder, in and of itself, was unsafe, unsound or in disrepair. Rather, the issue before the court is whether the Ladder was properly secured, and if it was not, who had the responsibility to ensure that it was secured. As discussed above, a question of fact remains with respect to whether LIC or GSE (or, perhaps, both) owned, installed and/or secured the Ladder. If GSE is ultimately found to have responsibility for the securing of the Ladder, then, by the terms of the OCI Indemnification Provision, OCI would be required to indemnify defendants for plaintiff's accident. Such a determination cannot be made at this time.

Moreover, no party has established as a matter of law whether there was a lack of inspection with respect to the Ladder, or if such lack of an inspection was a proximate cause of plaintiff's accident. Ultimately, defendants fail to identify or articulate any specific act or omission by OCI or GSE that would establish, as a matter of law, that the accident, in fact, arose from OCI's work, such that OCI must indemnify One East or Shawmut pursuant to the terms of the Shawmut/OCI Agreement.

Thus, defendants are not entitled to summary judgment in their favor on their contractual indemnification claim as against OCI.

The Common-Law Indemnification and Contribution Claims Against GSE (Motion Sequence 002 and 003)

OCI seeks to amend its answer to include cross claims for common-law indemnification and contribution against GSE and then moves for summary judgment on said claims. GSE opposes OCI's motion and separately moves for summary judgment dismissing defendants' and LIC's common-law indemnification and contribution claims as against it.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

As plaintiff was employed by GSE, Workers' Compensation Law § 11 applies to this case. Under section 11, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, [except] when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). A grave injury is defined as

> "[D]eath, 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 physical force resulting in permanent total disability"

Worker's Compensation Law § 11.

Here, plaintiff was employed by GSE. A review of the record establishes that plaintiff has not alleged a grave injury. Accordingly, OCI's claim against GSE for common-law indemnification is devoid of merit. Therefore, OCI's request to amend its answer to include

cross claims for common-law indemnification and contribution is denied and its motion for summary judgment on these cross claims is moot.

In addition, LIC does not oppose this branch of GSE's motion.

Finally, turning to defendants' and LIC's claims against GSE for common-law indemnification and contribution, defendants raise two arguments in opposition to dismissal of its claim, neither of which are successful. First, GSE does not have to establish the lack of a grave injury when none has been alleged by plaintiff. Secondly, defendants' argument that plaintiff's workers compensation payments may have been provided from some other, unknown worker's compensation insurance policy (rather that from GSE's policy, as demonstrated by the record) is purely speculative.

Thus, OCI is not entitled to amend its answer to include cross claims for common-law indemnification and contribution, and GSE is entitled to summary judgment dismissing defendants' and LIC's common-law indemnification and contribution claims as against it.

Defendants' Common-Law Indemnification and Contribution Claims Against LIC (Motion Sequence 001 and 005)

LIC moves for summary judgment dismissing the common-law indemnification and contribution claims against it. Defendants move for summary judgment in their favor on the same claims against LIC.

As discussed above, questions of fact remain as to whether the Ladder was owned, installed and/or secured by LIC and left at the site, allowing its use by plaintiff. Therefore, LIC cannot establish that it was free from any negligence with respect to plaintiff's accident. Similarly, because of the same questions of fact, defendants cannot establish that LIC was, in fact, negligent with respect to plaintiff's accident.

Thus, LIC is not entitled to summary judgment dismissing the common-law negligence and contribution claims as against it, and defendants are not entitled to summary judgment in their favor as to the same claims.

Defendants' Common-Law Indemnification and Contribution Claims Against OCI (Motion Sequence Number 005)

Defendants move for summary judgment in their favor on their claims for common-law indemnification and contribution as against OCI. Here, defendants have established that they were not guilty of any negligence, but have failed to establish that OCI itself was, as a matter of law, guilty of some negligence that contributed to plaintiff's accident (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d at 684-685).

Accordingly, Defendants are not entitled to summary judgment in their favor on their claim for common-law indemnification and contribution as against OCI.

Defendants' Breach of Contract for the Failure to Procure Insurance Claims Against LIC (Motion Sequence Number 001 and 005)

Defendants move for summary judgment in their favor on their breach of contract for the failure to procure insurance as against LIC. LIC moves for summary judgment dismissing the same.

Defendants concede that LIC procured insurance pursuant to its contractual obligations with respect to the Project at the Premises. However, LIC's insurer, Scottsdale Insurance Company, denied coverage because "the requirements for additional insured coverage pursuant to endorsement . . . have not been met" (defendants' notice of motion, exhibit AD; Doc No. 225). Therefore, defendants argue, LIC failed to procure insurance covering them for plaintiff's accident.

This argument is unpersuasive. If an insurance company refuses to indemnify under the coverage purchased, as is alleged here, a party is not liable to another for breach of contract for the failure to procure insurance when that party "fulfilled its contractual obligation to procure proper insurance on behalf of" that other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996]; *see also Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim because "[t]he insurer's refusal to indemnify Morse Diesel under the coverage purchased by Property Resources does not alter this conclusion"]). Here, defendants concede that LIC procured insurance that is applicable to plaintiff's accident. Whether defendants are properly additional insureds under LIC's policy is not an issue before this court.

Thus, defendants are not entitled to summary judgment in their favor on their third-party claim for breach of contract for the failure to procure insurance against them. Notably, while LIC moves for summary judgment dismissing this claim against it, it does not address, or raise any arguments in support, of this issue in its motion. Accordingly, it is not entitled to summary judgment dismissing this claim.

Defendants' Breach of Contract for the Failure to Procure Insurance Claim Against OCI (Motion Sequence Number 005)

Defendants move for summary judgment in their favor on their breach of contract for the failure to procure insurance as against OCI.

Additional Facts Relevant to this Issue

The Shawmut/OCI Agreement

Shawmut and OCI entered into a contract dated November 21, 2014 (the Shawmut/OCI Agreement) wherein OCI agreed to "[f]urnish and install a complete Structural Steel package" at the Premises (GSE's notice of motion, exhibit M, rider B; Doc No. 147). The Shawmut/OCI

Agreement included an insurance procurement provision that provides in pertinent part, as follows:

> "[OCI] shall obtain and maintain insurance . . . . [OCI's] insurance shall apply to any Subcontract Work furnished by or through [OCI] for [Shawmut] at any Project"

(*id.*, exhibit M, ¶ 9).

Such insurance was required to include commercial general liability coverage with a minimum of $1 million per occurrence (*id.*, ¶ 9 [B]).

The Denial Letter

Shawmut requested that OCI's insurer, Indian Harbor Insurance Company (Indian Harbor), pick up its defense, and agree to indemnify Shawmut. Indian Harbor issued a "Denial of Coverage" on October 7, 2015, on the ground that OCI's policy only covered "Metal Works – shop – structural – load bearing," is "not rated for installation," and "specifically excluded from coverage . . . any claims arising from installation operations" (defendants' notice of motion, exhibit AC, p 2-3 and 5).

Here, because the scope of OCI's contracted for work included both furnishing and installing the steel, OCI was required to obtain insurance that applied to the furnishing and the installation of the steel for the Project at the Premises. A review of the denial letter (*id.*) and the policy itself (OCI's affirmation in opposition, exhibit 2; Doc No. 267) confirms that OCI did not procure insurance in defendants' favor that covered OCI's contracted for installation work in the first instance. Accordingly, OCI breached the insurance procurement provision of its contract with Shawmut.

Thus, defendants are entitled to summary judgment in their favor on their breach of contract for the failure to procure insurance claim as against OCI.

Defendants Breach of Contract for the Failure to Procure Insurance Claims Against GSE (Motion Sequence Number 003)

GSE moves for summary judgment dismissing defendants' breach of contract for the failure to procure insurance claim against it.

Importantly, defendants do not contest that GSE obtained insurance naming them as additional insureds, and do not otherwise oppose that branch of GSE's motion for summary judgment dismissing this claim, nor press the claim in their own motion for summary judgment (Motion Sequence 005).

Thus, GSE is entitled to summary judgment dismissing the breach of contract for the failure to procure insurance claim as against them.

OCI's Breach of Contract for the Failure to Procure Insurance Claim Against GSE (Motion Sequence Number 002)

OCI seeks to amend its answer to include a cross claim for breach of contract for the failure to procure insurance as against GSE and then moves for summary judgment in its favor on said claim.

OCI argues that GSE failed to procure the requisite insurance as required under the OCI/GSE Agreement. Specifically, while OCI concedes that GSE properly procured adequate primary insurance, it argues that GSE failed to procure adequate excess insurance (*see* OCI's notice of motion, exhibit L, § 1.01 and 1.04 [insurance requirements of $2 million primary, $5 million excess]).

In support of its position, OCI argues that Starr's (the excess carrier) failure to acknowledge OCI's request for coverage, in and of itself, establishes that GSE failed to obtain insurance. This argument is incorrect. GSE has provided a copy of the Starr policy, which provides excess coverage for GSE's work at the Premises (GSE's opposition, exhibit E; Doc No

206 [the GSE Excess Policy]). A review of that policy establishes that it applies specifically to losses in excess of GSE's primary insurance. In addition, it incorporates the additional insured terms of the primary insurance contract (*id.*). Whether Starr ultimately accepts, denies, or disclaims OCI's request for coverage is not an issue before this court. The sole issue, with respect to this claim, is whether GSE "fulfilled its contractual obligation to procure proper insurance on behalf of" OCI (*Martinez,* 227 AD2d at 299).

While GSE did procure excess insurance, GSE did not fulfill its contractual obligation because it failed to procure the requisite amount of insurance required in the OCI/GSE Agreement. The OCI/GSE Agreement required GSE to obtain $5 million in excess coverage. GSE's excess policy provides only $3 million in coverage, leaving a $2 million shortfall in OCI's expected excess coverage (*see* OCI's notice of motion, exhibit L, § 1.01 and 1.04 [insurance requirements of $2 million primary, $5 million excess]; GSE's opposition, exhibit E; Doc No. 206 [the GSE Excess Policy] [insuring up to $3 million in damages]). Accordingly, OCI's cross claim for breach of contract for the failure to procure insurance is not without merit (*Tri-Tec Design, Inc.*, 123 AD3d at 420), and OCI is entitled to amend its answer to include a cross claim for breach of contract for the failure to procure insurance.

Upon a review of the record provided to the court, OCI is also entitled to summary judgment in its favor as to liability on its cross claim for breach of contract for the failure to procure insurance against GSE, limited to the extent that OCI's damages exceed the amount of GSE's procured coverage.

Thus, OCI is entitled to amend its answer to include a cross claim for breach of contract for the failure to procure insurance and is further entitled to summary judgment on said claim, as

limited above, and GSE is entitled to summary judgment dismissing defendants' claim for breach of contract for the failure to procure insurance as against it.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff Roy Phillips' motion (Motion Seq. 004), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim, as well as those parts of the Labor Law § 241 (6) claim predicated upon alleged violations of Industrial Code 12 NYCRR 23-1.7 (f) and 23-1.21 (b) (4) (i) and (ii), is granted as against defendants/third-party plaintiffs One East 57th Street, LLC (One East) and Shawmut Design & Construction (Shawmut) (together, defendants); and it is further

ORDERED that third-party defendant Long Island Concrete, Inc.'s (LIC) motion (Motion Seq. 001), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint against it is denied; and it is further

ORDERED that the branch of third-party defendant Orange County Ironworkers, LLC's (OCI) motion (Motion Seq. 002), pursuant to CPLR 3025, seeking to amend its third-party answer to include cross claims against third-party defendant Gabriel Steel Erectors, Inc (GSE) is granted with respect to OCI's proposed claims against GSE for contractual indemnification and breach of contract for the failure to procure insurance; and the remainder of this branch of OCI's motion is otherwise denied; and it is further

ORDERED that the branch of OCI's motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment on its counterclaim for breach of contract for the failure to procure insurance against GSE is granted, as limited in the decision, to that part of plaintiff's claim that does not run afoul of the antisubrogation rule; and the motion is otherwise denied; and it is

further

ORDERED that GSE's motion (Motion Seq. 003), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, as well as dismissing plaintiff's Labor Law § 241 (6) claims, is granted to the extent of dismissing defendants' common-law indemnification and contribution and breach of contract claims for the failure to procure insurance claims against it; and the motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion (Motion Seq. 005), pursuant to CPLR 3212, seeking summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim with respect to those claims abandoned by plaintiff, and that branch of defendants' motion is otherwise denied; and it is further

ORDERED that the branch of defendants' motion (Motion Seq. 005), pursuant to CPLR 3212, seeking summary judgment in their favor on their third-party complaint as against LIC, OIC and GSE is granted to the extent of granting defendants' breach of contract for the failure to procure insurance claim as against OCI, and the motion is otherwise denied; and it is further;

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

5/29/2020
DATE

HON. CAROL R. EDMEAD, J.S.C.

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