| **Dejesus v BSD 80 Broad St., LLC** |
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| 2020 NY Slip Op 31820(U) |
| May 26, 2020 |
| Supreme Court, New York County |
| Docket Number: 152864/2015 |
| Judge: David Benjamin Cohen |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 58**

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ANTONIO DEJESUS,

Index No. 152864/2015

Plaintiff,

-against-

BSD 80 BROAD STREET, LLC, 80 BROAD STREET PROPERTY INVESTORS II, LLC, SWEET CONSTRUCTION, CORP., THE SWEET CONSTRUCTION GROUP, LTD and SWEET CONSTRUCTION OF LONG ISLAND, LLC,

Defendants.

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SWEET CONSTRUCTION, CORP., THE SWEET CONSTRUCTION GROUP, LTD and SWEET CONSTRUCTION OF LONG ISLAND, LLC,

Third-Party Plaintiffs,

-against-

CLEANING CONTRACTORS CORP.,

Third-Party Defendant.

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**David B. Cohen, J.**

Motion sequence numbers 003, 004, 005 and 006 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a worker on September, 25, 2014, when, while working at a construction site located at the 26th floor of 80 Broad Street, New York, New York (the Premises), he allegedly fell from an unsecured ladder.

In motion sequence number 003, plaintiff Antonio DeJesus moves, pursuant to CPLR 3212, for summary judgment as to liability on the complaint against defendants BSD 80 Broad Street, LLC (BSD) and 80 Broad Street Property Investors II, LLC (80 Broad) and defendant/third-party plaintiff Sweet Construction, Corp. (Sweet).

In motion sequence number 004, defendants/third-party plaintiffs Sweet, The Sweet Construction Group, LTD. and Sweet Construction of Long Island (collectively, the Sweet Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and all cross claims against them, as well as for summary judgment in their favor on their third-party claim for contractual indemnification against third-party defendant Cleaning Contractors Corp. (CCC).

In motion sequence number 005, 80 Broad moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them, as well as for summary judgment in their favor on their cross claim for contractual indemnification against the Sweet Defendants.

In motion sequence number 006, BSD moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, as well as summary judgment in its favor on its cross claim for common-law indemnification against 80 Broad, and its third-party claims for contractual and common-law indemnification against the Sweet Defendants.

**BACKGROUND**

On the day of the accident, the Premises was owned by BSD. The prior owner of the Premises was 80 Broad. 80 Broad hired Sweet as the general contractor for a project at the Premises that entailed the renovation and buildout of the Premises' 26th floor to a new tenant's specifications (the Project). Sweet, in turn, hired CCC to perform post-construction cleanup for the Project at the Premises. Plaintiff was an employee of CCC.

***Plaintiff's Deposition Testimony***

Plaintiff testified that on the day of the accident, he was employed as a laborer by CCC. His work that day included mopping, dusting the ventilation system, and washing windows (*id.* at 41). Plaintiff was solely supervised and directed by "Al" and Jose Avilas, both CCC employees (plaintiff's tr at 32).

The Premises was "a big empty office space. There was no furniture in it" (*id.* at 43). Most of the construction had been completed, and there was no scaffolding or heavy machinery remaining on site. There were "tools around" and the electrician subcontractors were still installing wiring in the area where plaintiff was working (*id.* at 44). Initially, Avila directed plaintiff to clean the windows but then directed plaintiff to "[g]et a rack and go up the ladder and clean the top of the vents" (*id.* at 50). Plaintiff testified that the ceiling was "approximately 15 feet" high, and the vents hung from the ceiling (*id.* at 54). Avila provided plaintiff with a six-foot A-frame ladder (the Ladder) to clean to top of the ventilation ducts. Plaintiff could not recall if the Ladder had rubber feet.

The accident happened shortly after plaintiff returned from his lunch break. In order to reach the top of the ducts, plaintiff had to climb to the fifth rung of the ladder, the last step from the top. On that rung, his head and shoulders were above the top of the ductwork, and he was able to use a rag to perform his cleaning work. He was able to do so successfully multiple times as he moved along the duct. Plaintiff testified that the top of the duct was covered, not only in dust, but in "debris" consisting of small pieces of "sheetrock and cement" (*id.* at 65) and "little rocks" (*id.* at 64).

At the time of the accident, plaintiff set the ladder on the marble floor, climbed the Ladder to the fifth rung (the last from the top) and then he testified as follows:

> "I started cleaning, I'm reaching, and when I swept off the dust, the ladder went out from my feet, it went one way and I fell the other way. The ladder went towards the right and I went to the left"

(*id.* at 106). Plaintiff testified that, when he fell from the ladder, his back hit the wall first and then he "landed on [his] whole right side" injuring his right knee, hip, elbow, shoulder and the right side of his neck and head when he hit the floor (*id.* at 131).

***Deposition Testimony of Kristen Smith (BSD's Property Manager)***

Kristen Smith testified that on the day of the accident, she was BSD's property manager. Her duties included day-to-day building management, as well as "[k]eeping an eye on any construction projects that we have going on" at the Premises (Smith tr at 14). With respect to construction work, her duties generally included negotiating contracts, coordinating with contractors, and making sure that the work is on schedule.

Smith testified that 80 Broad was the owner of the Premises until September 12, 2014, which is when BSD purchased the Premises. BSD's purchase of the Premises also included the assumption of the leases of the then-current tenants of the Premises. As part of the purchase, BSD and 80 Broad discussed then-ongoing construction at the Premises, including the Project. According to Smith, the Project was basically finished by the time BSD purchased the Premises. Smith testified that BSD never paid any of the Project's contractors. Instead, 80 Broad was "responsible for completing the project and paying their contractors" (*id.* at 28). She also testified that her duties as a property manager did not involve dealing with any of the contractors or subcontractors on the Project, though she had the authority to stop work if there was an unsafe condition that needed to be corrected. In addition, she was never informed of plaintiff's accident. She did not learn of the accident until the instant action was commenced.

***Deposition Testimony of Peter Rosenthal (Savanna Asset Management's Director of Development, on behalf of 80 Broad)***

Peter Rosenthal testified that on the day of the accident he was the director of development for non-party Savanna Asset Management (Savanna). Rosenthal testified that he was familiar with 80 Broad, as it was "one of the single-purpose entities that was set up on the purchase of the [Premises]" (Rosenthal tr at 10). Savanna is a real estate development company. Rosenthal was involved in the design and construction of "various portions of the interior" of the Premises (*id.* at 15).

During the time that 80 Broad owned the Premises, Swig Equities (Swig) was its property manager and its project manager. Rosenthal was shown a copy of a contract, which he identified as 80 Broad's contract with Sweet for the Project at the Premises. He confirmed that, as per the contract, Swig, on behalf of 80 Broad and the incoming tenant (non-party Hudson Yards), arranged for the Project's build-out, including hiring Sweet as the general contractor. Rosenthal also testified that was unaware of whether Swig continued to oversee the Project after the Premises was sold.

***Deposition Testimony of Stephen Schimmel (CCC's Owner)***

Stephen Schimmel testified that on the day of the accident, he was the owner of CCC. CCC performs, amongst other things, "post-construction cleaning, which consists of working for general contractors at the end of a project" (Schimmel tr at 17). Most of CCC's work is post-construction work (*id.* at 23). He described CCC's work as generally "white glove cleaning" which consists of "[v]acuuming, dusting, cleaning bathrooms, cleaning glass partitions, doors, walls, furniture millwork" (*id.* at 19).

Schimmel further explained that, though the methods are largely the same (i.e. mopping, dusting), post-construction cleaning and general household/commercial cleaning are different

from one another because for construction-related cleaning because "we're looking for construction-related material and dust and dirt" which is more of a "heavy-duty" job (*id.* at 20).

CCC performed post-construction cleaning at the Premises, and provided its own equipment at the Project, including four- and six-foot A-frame ladders. Finally, Schimmel testified that CCC's workers were verbally instructed to never step above the third rung of the six-foot ladders.

***Deposition Testimony of Robert DiSarro (Sweet's Superintendent)***

Robert DiSarro testified that on the day of the accident, he was Sweet's superintendent for the Project at the Premises. His duties included coordinating the trades and scheduling the work. He would also walk the Premises and had the authority to stop work. DiSarro was present at the Project daily. He had a laborer by the name of Ivan Medina. Medina was responsible for the day-to-day cleaning of the Premises during the Project.

DiSarro was aware of the sale of the Premises. He testified that it did not change or affect the work he was doing at the Project. "I still had to build the job. Whatever happened in the background, I don't know" (DiSarro tr at 41). He did speak a few times with Smith, the new property manager. Smith never directed his work. Mostly, she brought noise complaints to his attention.

According to DiSarro, the ceiling on the 26th floor was approximately 13 feet high, and the ducts hung down below the ceiling. DiSarro testified that six-foot ladders were sufficient to reach the ductwork.

DiSarro did not witness the accident. He learned of it at the end of the day of the accident. His understanding of the accident, as told to him by Medina, was that plaintiff slid

down the ladder, was unharmed, and continued working. According to DiSarro, Medina did not see the accident either. DiSarro wrote an incident report based on Medina's information.

***Deposition Testimony of Ivan Medina (Sweet's Laborer)***

Ivan Medina testified that, on the day of the accident, he was employed by Sweet as a laborer at the Project. His duties included daily cleaning during the Project, as well as "a little bit of demo, safety" (Medina tr at 15).

Medina explained that he did not witness the accident itself. He was about 12 feet from the accident site, around the corner, and he heard a "commotion" – a loud sound that sounded like a ladder falling (*id.* at 28). He did not hear anyone scream. He walked around the corner and saw an 8- to 10-foot A-frame ladder "tilted on the wall," "leaning on a side" (*id.* at 29, 30). He noted that plaintiff looked like he was "walking it off" – i.e. moving around to lessen pain (*id.* at 32). He spoke with plaintiff, who indicated that he was "all right" and declined medical assistance (*id.* at 39). Medina then contacted DiSarro, who came to the worksite and spoke with Medina and plaintiff's foreman. They spoke briefly regarding plaintiff, confirming that he did not need medical assistance.

Medina did not fill out an incident report. He was shown a copy of the incident report that DiSarro prepared, which listed Medina as a witness. Medina testified that he did not see the accident and did not know whether plaintiff fell from the Ladder or "slid" down the ladder, as was stated in the incident report (*id.* at 48). He did not recall whether the floor was wet, and he did not perform an inspection of the accident site, or ever specifically inspect the Ladder.

***Deposition Testimony of Jose Avila (CCC's Foreman)***

Jose Avila testified that he was CCC's foreman at the Project on the day of the accident. His duties included speaking with the general contractor, obtaining the required materials and

equipment for CCC's workers, and directing those workers at the Project. Avila also drove the company van to the Project. The van carried CCC's tools, including hard hats, gloves, vests and 6, 8 and 10-foot tall A-frame Ladders. For the Project, Avila recalled that he brought the six and eight-foot ladders up to the Premises, and he left the 10-foot ladder in the van.

CCC's work at the Project was post-construction cleaning, which Avila described as "rough cleaning, not fine" cleaning (Avila tr at 29). He described "fine cleaning" as "the final . . . white glove [cleaning]. When you are delivering [] the construction to the customer" (*id.* at 30).

When he arrived at the Project, Avila spoke with Sweet's superintendent. Avila testified that there were "so many people" from other trades on site at the time, including painters and electricians (*id* at 53). CCC, itself, had 5 to 10 workers at the Project on the day of the accident, including plaintiff. CCC was instructed to vacuum, dust, mop and clean floors and windows and to clean the ventilation ductwork.

As to plaintiff's work, Avila testified that he directed plaintiff to dust the ducts, and he "gave him what he's going to use" to perform that work (*id.* at 62). Plaintiff was using a six-foot fiberglass ladder that had rubber feet, in order to access a work area that was "ten, 12 feet" above the floor (*id.* at 97).

Avila testified that he did not witness the accident and "never saw [plaintiff] fall or anything" (*id.* at 48), but he did hear something. Specifically, Avila testified that he "heard a hard sound" and "went to see what happened (*id.* at 69). He saw plaintiff leaning "on the wall holding onto the ladder" (*id.* at 69). He asked if plaintiff was hurt and plaintiff said "I'm fine" and continued working (*id.* at 69). In addition, Avila testified that he specifically asked plaintiff "did you fall?" to which plaintiff responded "no, nothing" (*id.* at 70). Avila then watched

plaintiff work for a few moments and confirmed that plaintiff was able to climb back up the Ladder and continue dusting the vents. Plaintiff continued to work and left with the other CCC laborers at the end of the day.

Finally, Avila testified that plaintiff could have asked him for a taller ladder, but he did not do so.

***The Accident Report***

An accident report (the Accident Report), dated September 25, 2014, was prepared by DiSarro. It provides, in pertinent part, the following:

> "As per [Sweet's] laborer, Ivan Medina, a ladder tipped over and hit wall. [Plaintiff] slid down ladder. His foreman and 2 other workers asked if he was ok. He declined any medical help and continued working. He said he was ok."

(plaintiff's notice of motion, exhibit 8; Doc No. 210).

**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 003, 004, 005 and 006)***

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants. BSD, 80 Broad and Sweet separately move for summary judgment dismissing the same.

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]).

As an initial matter, BSD, as the owner at the time of the accident, and Sweet, as the general contractor are proper Labor Law defendants. 80 Broad argues that, as the prior owner, it is not a proper Labor Law defendant because it sold the Premises prior to plaintiff's accident.

80 Broad is correct that it cannot be construed as an owner. The meaning of "owner" under Labor Law § 240(1) is not limited to the titleholder. Instead, it "has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" (*Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008] quoting *Copertino v. Ward*, 100 A.D.2d 565, 566 [2d Dept 1984]). While it is undisputed that 80 Broad contracted to have work performed for its benefit (i.e. the Project's build-out that fulfilled its obligations to its tenant), it cannot be said that 80 Broad had any interest in the Premises on the day of the accident. Accordingly, for the purposes of the Labor Law, 80 Broad was not an owner at the time of plaintiff's accident.

That said, it must also be determined whether 80 Broad can be considered as an agent of the owner for the purposes of the Labor Law, so as to be potentially liable for plaintiff's accident under the statute.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] 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. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Nascimento v Bridgehampton Constr. Corp*, 86 AD3d 189, 193 [1st Dept 2011]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

*Additional Facts Relevant to this Issue*

80 Broad, as seller, and BSD, as purchaser, entered into an "Agreement of Purchase and Sale" for the Premises, dated June 26, 2014 (the Sale Agreement). As relevant, it provides the following:

> "19. Continued Operations: Leasing
>
> * * *
>
> "19.1.3 [BSD] acknowledges that there is certain tenant improvement work being performed at the Property ("TI Work") pursuant to certain existing Leases. [BSD] agrees that as of the Closing Date, [BSD] shall be responsible for completing all TI Work as set forth on Exhibit 19.1.3. Purchaser shall receive a credit on Closing for the estimated cost to complete such TI Work as set forth on Exhibit 19.1.3"

(plaintiff's notice of motion, exhibit 11, p. 53). Exhibit 19.1.3 of the Sale Agreement contains the following:

> "26th floor – Hudson Yards . . . [80 Broad] to complete the work if not completed prior to Closing. The Leasing costs shall be placed in escrow at closing for [80 Broad] to complete the work."

(*id.*, exhibit 11, p 107).

Here, by the terms of the Sale Agreement, 80 Broad kept and maintained the duty to complete the Project after the transfer of title to BSD. In addition, the record reflects that 80 Broad's project manager, general contractor and subcontractors continued their work at the Project subject to their contracts with 80 Broad. Further, there is no evidence that 80 Broad assigned its obligations under those contracts to BSD. Therefore, because 80 Broad retained the authority to complete the Project and retained its contractual authority over its contractors on the Project, 80 Broad also retained for itself the requisite authority to control and supervise the Project.

80 Broad's argument that it did not actually exercise its supervisory authority is unpersuasive, as it retained the right to exercise that authority (*Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013] ["[A] defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"]). Similarly, 80 Broad's argument that it did not retain the authority to complete the work is belied by the plain language of the Sale Agreement's exhibit 19.1.3, wherein it was stated that 80 Broad would "complete the work if not completed prior to Closing" (plaintiff's notice of motion, exhibit 11, p. 107). Accordingly, for the purposes of the Labor Law, 80 Broad effectively became a statutory agent of BSD with respect to the Project and may be liable for plaintiff's accident under the statute.

Turning now to the nature of plaintiff's work, defendants argue that plaintiff's work as a cleaner was not a protected activity within the ambit of the Labor Law. Rather, defendants argue, plaintiff's work consisted of routine maintenance or cleaning.

> "[A]n activity cannot be characterized as 'cleaning' under the [Labor Law], if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance

> and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other"

(*Soto v J. Crew Inc.*, 21 NY3d 562, 568-69 [2013]).

Applying these factors here, plaintiff's work constitutes protected cleaning under the Labor Law. Plaintiff's work at the Project was a targeted one-off post-construction cleaning service, not the kind of repeated daily routine maintenance provided by the plaintiff in *Soto*. Plaintiff's work also involved a significant elevation risk – i.e. cleaning the tops and sides of ventilation ducts 10-to-12 feet above the floor. This work was directly related to an ongoing construction project (*see e.g. Bedoya v Hackley School*, 57 Misc3d 1203[A], 2017 NY Slip Op 51220[U], *2 [Sup Ct, Westchester County 2017] [finding that post-construction cleaning, specifically the dusting of the tops of "door frames, light fixtures and 10 to 13 foot tall windows" to fall within the statutory definition of "cleaning"]). That plaintiff did not need specialized equipment or expertise to perform his work does not change this court's determination, since the presence or absence of any one of the four *Soto* factors is not necessarily dispositive (*Soto*, 21 NY3d at 569). Accordingly, given the totality of the circumstances, plaintiff's work at the Premises falls within the protections of the Labor Law.

As to the specifics of the accident, plaintiff has established that the ladder moved while he was standing on top of it (*see 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)"]). However, plaintiff has not established as a matter of law that he, in fact, fell.

To that end, while plaintiff testified that the ladder shifted, causing him to fall from the ladder and "land[] on [his] whole right side" (plaintiff's tr at 131), Avila testified that, shortly after the accident, he asked plaintiff "did you fall?" and plaintiff responded "no" (Avila tr at 70). This testimony calls into question the basic assertion that plaintiff was caused to fall when the ladder shifted – i.e. whether plaintiff's injuries "flow[ed] from the application of the force of gravity" (*John v Baharestani*, 281 AD2d at 118) – and raises a question of fact as to both plaintiff's and Avila's credibility. The resolution of such an issue is inappropriate on summary judgment (*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 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"]).

In addition, this testimony establishes two versions of plaintiff's accident, one where he fell – and, therefore, the Labor Law would apply – and one where he did not fall. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]).

Next, plaintiff's argument that he did not fall but, rather, was injured by the force of gravity acting on the Ladder (rather than on him) runs counter to his own testimony and is raised for the first time in his reply papers. It is, therefore, unpersuasive.

Finally, given the above questions of fact regarding the specifics of plaintiff's accident and the cause of his injuries, the court cannot, at this time, reach a determination on defendants' sole proximate cause arguments.

Thus, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 240 (1) claims against BSD, 80 Broad and the Sweet Defendants, and BSD, 80 Broad and the Sweet Defendants are not entitled to summary judgment dismissing the same.

***The Labor Law § 241 (6) claims (Motion Sequence Numbers 004, 005, and 006)***

BSD, 80 Broad and the Sweet Defendants each move for summary judgment dismissing the Labor Law § 241 (6) claims as against them. In his affidavits in opposition to each motion, plaintiff affirmatively states that he does not oppose the parts of these motions seeking dismissal of the section 241 (6) claims.

Thus, BSD, 80 Broad and the Sweet Defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim as against them.

***The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 004, 005 and 006)***

BSD, 80 Broad and the Sweet Defendants each move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as 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]).

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 alleges that he was injured when the Ladder shifted, causing him to lose his balance and suffer injuries. Accordingly, as alleged, plaintiff's accident was caused by the means and methods of his work.

BSD 80 Broad and the Sweet Defendants argue that, assuming plaintiff's accident occurred as alleged, they cannot be liable for the accident because they did not exercise actual supervision or control over the injury producing work – i.e. plaintiff's use of the Ladder.

Here, there is no evidence that BSD, 80 Broad or the Sweet Defendants actually controlled or supervised the use of plaintiff's ladder. Rather, testimony establishes that plaintiff was supervised and directed solely by CCC's foreman, Avila.

Notably, plaintiff affirmatively states that he does not oppose the dismissal of his common-law negligence and Labor Law § 200 claims as against BSD, 80 Broad and the Sweet Defendants.

To the extent that BSD, 80 Broad and Sweet argue that one another had the authority to supervise and control the work because they had representatives at the Premises that had the authority to stop work if they saw an unsafe condition, such authority is insufficient to establish liability under Labor Law § 200 (*see 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"]; *see also 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]; *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]).

Thus, BSD, 80 Broad and the Sweet Defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim as against them.

***The Sweet Defendants' Contractual Indemnification Claim Against CCC (Motion Sequence Number 004)***

The Sweet Defendants move for summary judgment in their favor on their third-party contractual indemnification claim as against CCC.

"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).

As an initial matter, CCC argues that Sweet is a dissolved corporation and does not have the legal capacity to sue CCC for any claim that first arose after its dissolution in 2009 (*see e.g.*

Business Corporation Law § 1006[b]).[1] However, a party challenging a corporation's capacity to sue must "raise this defense in their answers, or in a motion to dismiss made prior to answering" (*FBB Asset Mgrs., Inc. v Freund*, 2 AD3d 573, 574 [2d Dept 2003]). The failure to do so "waived that defense" (*id.*). Here, CCC answered the third-party complaint (Sweet's notice of motion, exhibit D, Doc No. 235). A review of CCC's third-party answer establishes that it does not raise Sweet's capacity to sue as an affirmative defense (*id.*).[2] Accordingly, CCC's argument that Sweet lacks the capacity to sue was waived. Therefore, the court will address the merits of Sweet's claim.

*Additional Facts Relevant to this Claim*

*CCC's Proposal*

On June 12, 2014 (several months prior to the accident), CCC sent a proposal for post-construction cleaning services to Sweet (the Proposal) (Sweet's notice of motion, exhibit N). The Proposal (which is signed only by CCC), references the Project at the 26th floor of the Premises, provides a scope of work and a proposed cost for CCC's services. It does not include an indemnification provision.

*The Sweet/CCC Agreement*

On October 29, 2014 (over a month after the accident), Sweet and CCC entered into a subcontract agreement for the Project (the Sweet/CCC Agreement) (*id.*, exhibit O). The

[1] Sweet's corporate status on the New York State Department of Corporation's website is "inactive – Dissolution by Proclamation / Annulment of Authority (October 28, 2009)" (CCC's affirmation in opposition, exhibit A; Doc No. 263).

[2] There are 10 affirmative defenses sounding in: (1) contribution, (2) assumption of risk, (3) recalcitrant worker, (4) sole proximate cause, (5) collateral sources, (6) Article 16 limitations of liability, (7) claims barred by workers' compensation, (8) statute of limitations, (9) failure to state a cause of action, and (10) anti-subrogation.

Sweet/CCC Agreement referenced the Project at the Premises and specifically indicated that the work was completed on September 27, 2014 (two days after the accident). It also referenced an "attached scope letter" (*id.*) that stated, in part, that CCC would "[p]rovide Final Construction Cleaning per [CCC's] work orders dated 9/25/14" (*id.*, at 1). The scope letter attached to the Sweet/CCC Agreement included an indemnification provision, that provides, as relevant, the following:

> "[T]o the fullest extent permitted by law, [CCC] shall defend and indemnify, and hold harmless, at [CCC's] sole expense, [Sweet], all entities [Sweet] is required to indemnify and hold harmless, the Owner of the property . . . and assigns of each of them from and against all liability or claimed liability for bodily injury . . . including attorney fees . . . arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through [CCC] or by anyone for whose acts [CCC] may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties"

(*id.*, exhibit O).

*The Locantore Affidavit*

In his affidavit, Frank Locantore stated that he was Sweet's project manager on the day of the accident. He did not describe his duties as the project manager but indicated that, as Sweet's project manager, he had a direct business relationship with CCC's owner, Schimmel. Locantore also explained that, prior to the Project, CCC had worked for Sweet on many similar jobs and that CCC had agreed, by contract, to defend and indemnify Sweet with respect to each of those prior jobs. Locantore does not provide any specific examples.

In support of his assertion that CCC and Sweet intended the Sweet/CCC Agreement to be retroactive, Locantore explained that "[b]y the summer of 2016, it was well understood between Mr. Schimmel and I that in order for CCC to perform [its work] CCC would first agree to defend

and indemnify Sweet based upon language within the contract" (Locantore Affidavit, ¶ 7; Doc No. 253), and that "[by] the summer of 2016, it was understood . . . that whether the contract was signed by CCC before or after CCC commenced working at a given project, it was the intention of [both parties] that the contractual provisions relating to indemnification and insurance procurement . . . were in full force and effect prior to CCC commencing work (*id.*, ¶ 8).[3]

Locantore further stated that, based on the above 2016 understanding, that "on or about September 22, 2014" Schimmel, on behalf of CCC, agreed "to enter into a contract, as he had done numerous times before, agreeing to defend and indemnify Sweet" (*id.*, ¶ 10), and that "[w]ithout his agreement, CCC would not have been permitted to appear on site and perform" its work (*id.*, ¶ 11).

Here, as plaintiff was performing work for CCC at the time of his accident, and CCC's foreman supervised plaintiff's work, plaintiff's claimed accident arose out of the work CCC performed on the Project. In addition, it cannot be said that any negligence on the part of Sweet caused the claimed accident. As a result, pursuant to the indemnification provision contained in the Sweet/CCC Agreement, Sweet would be entitled to a defense from CCC, and to contractual indemnity from CCC, provided that plaintiff ultimately succeeds in his Labor Law § 240 (1) claim, as discussed above.

However, in order for CCC to owe such indemnification to Sweet, it must first be determined whether the Sweet/CCC Agreement, which was not executed until October 29, 2014, was intended to apply retroactively to the date of the accident, September 25, 2014.

A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Condor Capital Corp. v CALS Inv'rs,*

[3] Notably, the accident occurred in 2014.

*LLC*, 179 AD3d 592, 592 [1st Dept 2020]; quoting *Ellington v EMI Music, Inc.*, 24 NY3d 239, 245 [2014]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Here, the Sweet/CCC Agreement contains no explicit language indicating that its indemnification provision (or, for that matter, any of its terms) have retroactive effect. Further, while the Sweet/CCC Agreement references CCC's work orders, it does not reference any prior agreement, general or specific, between the parties with respect to indemnification.

Accordingly, there was no written contract in effect on the date of the accident that required CCC to indemnify Sweet (*see e.g. Vail v 1333 Broadway Assoc., LLC*, 105 AD3d 636, 637 [1st Dept 2013] [dismissal of the contractual indemnification claim was proper, because "there was no indemnification agreement in existence at the time of the accident, and nothing indicates . . . [that the] indemnification clause [was] to have a retroactive effect"]; *Temmel v 1515 Broadway Assoc., LP*, 18 AD3d 364, 365 [1st Dept 2005] [motion for contractual indemnification based on indemnification provision in agreement that post-dated plaintiff's accident was "devoid of any language demonstrating an intention by the parties that it be retroactively applies").

In support of its motion, Sweet argues that an indemnification clause in a contract executed after a plaintiff's accident may nevertheless be applied retroactively "where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date'" (*Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 443 [1st Dept 2003]; quoting *Stabile v Viener*, 291 AD3d 395, 396 [2d Dept 2002], *lv dismissed* 98 NY2d 727 [2002]). Sweet argues that the court

should, therefore, consider extrinsic evidence that Sweet and CCC intended for the indemnification provision to apply retroactively; specifically, the court should consider Locantore's affidavit.

However, Locantore's affidavit does not establish, as a matter of law, that the Sweet/CCC Agreement's indemnification provision was to apply retroactively. Locantore's posits that the parties – and specifically Schimmel – had an understanding in 2016 that all contracts would be retroactively applied, but plaintiff's accident occurred in 2014, well before this purported understanding was reached. In addition, Locantore's affidavit is conclusory and based on no evidence aside from his own self-serving assertion that CCC (or Schimmel) was aware of the Sweet/CCC Agreement's purported retroactive intent. Notably, Schimmel's testimony is silent as to his understanding of retroactive intent.

Moreover, while it is noted that that CCC commenced work prior to the execution of the Sweet/CCC Agreement, such commencement of work does not, in and of itself, establish that CCC agreed to contractually indemnify Sweet.

Further, the certificate of insurance indicating that Sweet is an additional insured under CCC's commercial general liability policy is dated November 4, 2014 – six weeks post-accident (annexed to plaintiff's notice of motion, exhibit 16). There is no contemporaneous evidence establishing that CCC had obtained or otherwise provided this certificate to Sweet prior to beginning its work, such that the court could extrapolate its intent to indemnify Sweet as of the day of the accident.

In sum, the Sweet/CCC Agreement contains no "express words or necessary implication [by which] it clearly appears to be the parties' intention to include past obligations" (*Perez Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464, 465 [1st Dept 2016]), and Sweet has put forth

no evidence that establishes, as a matter of law, that the Sweet/CCC Agreement "was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date'" (*Pena*, 304 AD2d at 443). Accordingly, as the Sweet/CCC Agreement was not in effect at the time of plaintiff's accident, its indemnification provision does not apply to plaintiff's accident.[4]

Thus, Sweet is not entitled to summary judgment in its favor on its contractual indemnification claim as against CCC.

The court notes that, while Sweet also seeks to dismiss all cross claims against it, it neither identifies such cross claims nor raises any arguments in support of such dismissal in its motion. Accordingly, Sweet is not entitled to summary judgment dismissing such claims.

***80 Broad's Contractual Indemnification Claim Against Sweet (Motion Sequence Number 005)***

80 Broad moves for summary judgment in its favor on its contractual indemnification claim against Sweet.

*Additional Facts Relevant to this Issue*

Sweet and 80 Broad entered into a "Construction Agreement," dated July 9, 2014, for the Project at the 26th floor of the Premises (the 80 Broad/Sweet Agreement). The 80 Broad/Sweet Agreement includes an indemnification provision that provides, in pertinent part, the following:

> "11. Indemnification, Insurance and Bonds
>
> "(a) To the fullest extent permitted by applicable law, [Sweet] agrees to indemnify, protect, defend and hold harmless [80 Broad] . . . any of the aforementioned parties respective affiliated companies, partners, members, successors, assigns, heirs, legal representatives . . . and agents . . . for, from and against all liabilities, claims, damages, losses . . . causes of action, suits judgments and expenses (including court costs, attorneys fees . . .) of any nature, kind or description of any person or entity, directly or indirectly arising out of, cause by, or resulting from (in whole or

[4] That CCC's insurer appears to have accepted the defense of 80 Broad is immaterial to this court's analysis of the validity of the Sweet/CCC Agreement's indemnification provision.

> in part) (1) the work performed hereunder, or any part there of . . . (2) this agreement, or (3) any act or omission of [Sweet], any subcontractor (of any tier), anyone directly or indirectly employed by them, or anyone that they control . . .)"

(80 Broad's notice of motion, exhibit K, p. 6 [the 80 Broad/Sweet Indemnification Provision]).

Here, plaintiff's claims arise from his work at the Project at the Premises, which is the subject of the 80 Broad/Sweet Agreement. Accordingly, 80 Broad is entitled to contractual indemnification from Sweet.

Sweet's argument that 80 Broad has failed to establish its entitlement to judgment because it cannot establish that Sweet was negligent is unpersuasive. The 80 Broad/Sweet Indemnification Provision does not have a negligence component (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Further, while a question of fact exists as to the specifics of plaintiff's accident, and therefore, whether his accident may be covered under Labor Law § 240 (1), such a question does not impact whether the 80 Broad/Sweet Indemnification Provision is triggered, as the requirements thereunder to defend and indemnify arise upon the initiation of "claims . . . causes of action [and] suits . . . arising out of" Sweet's or its subcontractor's work (80 Broad's notice of motion, exhibit K, p. 6).

Thus, 80 Broad is entitled to contractual indemnification from Sweet.

***BSD's Contractual Indemnification Claim Against Sweet (Motion Sequence Number 006)***

BSD moves for summary judgment in its favor on its contractual indemnification cross claim against Sweet.

Initially, it is noted that BSD seeks indemnification under the 80 Broad/Sweet Indemnification Provision, as a "successor, assign [or] heir" of 80 Broad (*id.*). It is uncontested that BSD purchased the Property from 80 Broad, and Sweet raises no question of fact as to

BSD's status as a successor, assign or heir of 80 Broad. Accordingly, the 80 Broad/Sweet Indemnification Provision contemplated Sweet's defense and indemnification of BSD.

As discussed above, the 80 Broad/Sweet Indemnification Provision is triggered upon the initiation of "claims . . . causes of action [and] suits . . . arising out of" Sweet's or its subcontractor's work (*id.*). It is uncontested that plaintiff's causes of action arise out of Sweet's subcontractor's work. Therefore, 80 Broad is entitled to contractual indemnification from Sweet.

Sweet's argument that it was not negligent with respect to plaintiff's accident is immaterial as there is no negligence requirement in the 80 Broad/Sweet Indemnification Provision (*Correia*, 259 AD2d at 65).

Thus, BSD is entitled to contractual indemnification from Sweet.

***BSD's Common-Law Indemnification Cross Claims Against 80 Broad and Sweet (Motion Sequence Number 006)***

BSD moves for summary judgment on its cross claims for common-law indemnification as against 80 Broad and Sweet.

"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]).

Initially, because the court has determined that BSD is entitled to contractual indemnification from Sweet, BSD's common-law claim is academic and need not be addressed (*see Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017] ["As One City is entitled to contractual indemnification, its claim for common-law indemnification has been rendered academic"]).

Turning to BSD's claim as against 80 Broad, as discussed above, there is no evidence that 80 Broad was guilty of any negligence that brought about plaintiff's accident (*Perri*, 14 AD3d at 684-685). Accordingly, BSD is not entitled to summary judgment in its favor on its claim for common-law indemnification as against 80 Broad.

The parties remaining arguments have been considered and were found unavailing.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Antonio DeJesus's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim is denied; and it is further

**ORDERED** that the part of defendant/third-party plaintiffs Sweet Construction, Corp., The Sweet Construction Group, LTD. And Sweet Construction of Long Island (collectively, the Sweet Defendants) motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted, and the motion is otherwise denied; and it is further

**ORDERED** that the part of defendant 80 Broad Street Property Investors II, LLC's (80 Broad) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is

granted, and the part of its motion, pursuant to CPLR 3212, for summary judgment in its favor on its contractual indemnification cross-claim against the Sweet Defendants is also granted, and the motion is otherwise denied; and it is further

**ORDERED** that the part of defendant BSD 80 Broad Street, LLC's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it is granted, and the part of its motion, pursuant to CPLR 3212, for summary judgment in its favor on its contractual indemnification cross claim against Sweet is also granted, and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue; and it is further

Dated: May 26, 2000

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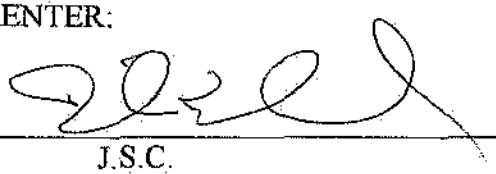

J.S.C.