Rosenblatt v Briarwood MP LLC
2020 NY Slip Op 32135(U)
June 29, 2020
Supreme Court, Kings County
Docket Number: 500122/17
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of June, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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LOIS M. ROSENBLATT, PUBLIC ADMINISTRATOR OF QUEENS COUNTY FOR THE ESTATE OF ELIZANDRO E. RAMOS, DECEASED,

PLAINTIFF,

- AGAINST -

BRIARWOOD MP LLC, PAV-LAK CONTRACTING INC., AGL INDUSTRIES, INC. AND CRANES EXPRESS, INC.,

DEFENDANTS.

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BRIARWOOD MP LLC AND PAV-LAK CONTRACTING, INC.,

THIRD-PARTY PLAINTIFFS,

-AGAINST-

CRV PRECAST CONSTRUCTION LLC,

THIRD-PARTY DEFENDANT.

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AGL INDUSTRIES, INC.,

SECOND THIRD-PARTY PLAINTIFF,

-AGAINST-

CRV PRECAST CONSTRUCTION LLC,

SECOND THIRD-PARTY DEFENDANT.

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DECISION/ORDER

INDEX NO. 500122/17

MOTION SEQUENCE NOS. 16-20

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CRANES EXPRESS, INC.,

THIRD THIRD-PARTY PLAINTIFF,

-AGAINST-

CRV PRECAST CONSTRUCTION LLC,

THIRD THIRD-PARTY DEFENDANT.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.[1]
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	317-340, 368-376, 341-366, 377-378, 380-415, 416-441
Opposing Affidavits (Affirmations)	447, 455, 464, 471-473, 452-454, 459-461,445, 456-458, 465-466,474-476, 442-443, 462, 467-469, 477-479, 444, 448-451, 470, 480-482
Reply Affidavits (Affirmations)	486,487,488-489, 498-502,484-485, 490-491, 495-497, 492-494

Upon the foregoing papers, defendants/third-party plaintiffs Briarwood MP LLC (Briarwood) and Pav-Lak Contracting Inc. (Pav-Lak) move, in motion (mot.) sequence (seq.) 16, for an order, pursuant to CPLR 3212, granting them summary judgment: dismissing the claims asserted against them by plaintiff Lois M. Rosenblatt, Public

[1]New York State Courts Electronic Filing Document Numbers

Administrator of Queens County for the Estate of Elizandro E. Ramos, deceased (plaintiff), as well as all cross claims asserted by defendant/second third-party plaintiff AGL Industries, Inc. (AGL) and defendant/third third-party plaintiff Cranes Express, Inc. (Cranes); or summary judgment on their claims for indemnification against third-party defendant CRV Precast Construction, LLC (CRV), and against AGL on their cross-claims for indemnification. CRV moves, in mot. seq. 17, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the third-party contractual indemnification claims asserted against it by AGL and Cranes. Plaintiff moves, in mot. seq. 18, for an order, pursuant to CPLR 3212, granting her partial summary judgment against all defendants on the issue of their liability pursuant to Labor Law §§ 240 (1) and 241 (6). AGL moves, in mot. seq. 19, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as asserted against it; or 1) against CRV on its third-party claims for indemnification and breach of the covenant to procure insurance; and 2) against Cranes on its cross claim for indemnification; and 3) dismissing all cross claims asserted against it. Lastly, Cranes moves, in mot. seq. 20, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it; or granting it summary judgment against CRV on its third-party claims for indemnification.

Background

Plaintiff commenced the instant action by electronically filing a summons and verified complaint in this court on January 4, 2017. She filed an amended verified complaint on January 17, 2017. The pleadings indicate that plaintiff's decedent was a

construction worker who was killed in a fall at a construction site located at 81-10 135th Street in Queens, New York on November 22, 2016. Plaintiff further alleges therein that defendants are the property owners, construction contractors hired by the property owners to complete a construction project, or their agents, and, therefore, are subject to the New York Labor Law's absolute vicarious liability provisions.

Plaintiff asserts causes of action sounding in common-law negligence and Labor Law § 200 against defendants. Additionally, plaintiff alleges that defendants violated Labor Law §§ 240 (1) and 241 (6). Plaintiff claims that defendants, as owners, contractors or their agents, are vicariously liable for such violations without regard to fault, and that her decedent, who was performing construction work at all relevant times, therefore qualified for the protections of Labor Law §§ 240 (1) and 241 (6). Plaintiff also claims that the Labor Law violations as well as the common-law duty to keep the premises safe proximately caused her decedent's death, and she thus seeks damages.

The record indicates, as established by several investigations conducted by both administrative and law enforcement authorities, that, at relevant times, the decedent was working as a steel worker employed by CRV. Briarwood, who owned the subject property and intended to construct a building thereon, hired Pav-Lak as the general contractor to oversee the construction project. Pav-Lak then hired AGL to fabricate and

erect the steel structure.[2] AGL hired CRV to erect the structure and CRV, in turn, hired Cranes to lease and operate a hoisting crane (the "subject crane") at the site.

CRV's workers, before the accident, had rigged a steel beam which weighed more than 6,000 pounds to the subject crane using a sling. The beam was intended to be placed at the base of the subject building's fourth floor. The record establishes that the sling, chosen and attached to the crane by CRV workers, was inadequate for the task, as it was designed for loads no heavier than 3,000 pounds. The crane operator, a Cranes employee, hoisted the beam to the fourth floor, where the decedent and a fellow CRV worker were waiting to position it horizontally and attach it to the structure. The other worker temporarily attached one end of the beam to the structure, but the decedent, who was standing on the hoisted beam, was unable to attach the other end. Several attempts to do so failed. The crane operator was directed to reposition the beam, for another attempt. While doing so, the sling ripped, causing the steel beam to fall. Decedent was still standing on the beam and fell to his death. The beam fell on top of the cab of the crane, crushing it, and killed the operator.[3] The crane operator's estate representative has brought a suit as well, under Ind. # 506180/2017.

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[2]AGL disputes that it was responsible for erecting the steel, and claims it was only hired to fabricate the steel, but the written agreement between it and Pav-Lak specifies otherwise.

[3]The parties have submitted video recordings, but the court bases its findings solely on the written record, as interpreting images is the jury's province. Further, until the videos can be uploaded to the court's electronic filing system, they cannot be part of the record.

Plaintiff, who was awarded letters of administration for decedent's estate by the Surrogate's Court following the accident, thereafter commenced the instant action. She contends in this action that defendants had a duty to provide safe equipment to protect workers against elevation-related hazards. However, plaintiff avers, the equipment provided (especially, the subject sling) was either defective, poorly maintained and/or inadequate for this task. Plaintiff further contends that defendants had a duty to ensure that all hoisting and crane operations complied with the applicable provisions of the Industrial Code, 12 NYCRR ch. I, subch. A. Lastly, plaintiff maintains that defendants breached the common-law duty to keep the premises safe for workers.

Defendants interposed answers with cross claims and commenced three third-party actions against CRV, decedent's employer. The cross claims and third-party claims, in essence, allege the right to contribution and/or indemnity, as well as damages for alleged breaches of their trade contracts with regard to insurance.

Extensive discovery and motion practice ensued, and on July 25, 2018, plaintiff filed a note of issue and certificate of readiness, indicating that all discovery was complete. However, several items of discovery remained outstanding, and extensive post-note of issue discovery continued. The parties to this action and to the action stemming from the same accident brought by the representative of the deceased crane operator all consented to extend the time to file dispositive motions until November 22, 2019. This court so-ordered that stipulation, and these five summary judgment motions

ensued in this action, and five similar motions were made in the other action. All of the motions were argued and submitted together.

Briarwood and Pav-Lak's Arguments Supporting Their Summary Judgment Motion (Mot. Seq. 16)

Briarwood and Pav-Lak, in support of their summary judgment motion, first assert that the record establishes that neither of them committed a negligent act or omission in connection with the plaintiff's claims. Therefore, they reason, any claim which requires a finding of their negligence, e.g., plaintiff's common-law negligence and Labor Law § 200 claims, as well as all cross claims for common-law indemnification and/or contribution, must be dismissed.

Here, Briarwood and Pav-Lak argue, the record reflects that no premises defect contributed to the accident. Instead, they claim, the accident resulted from the means and methods of decedent's work. Specifically, they contend that decedent's failure to secure his safety line, coupled with an inadequate sling to hoist the subject beam, caused the accident. They assert that, after decedent attempted to hoist the beam, the poorly-rigged hoist then failed and caused decedent to fall. Thus, they reason that only the means and methods of the work led to the accident.

Briarwood and Pav-Lak note the legal standard for liability for construction accidents resulting from the means and methods of the work: only the parties that exercised supervisory authority over the work are subject to liability pursuant to common-law negligence or Labor Law § 200. They allege that the authority exercised must be

specific to the work and that the general authority to supervise construction and inspect the premises is insufficient for liability purposes. Here, they continue, the record establishes that they exercised no authority over the subject work. They highlight that they were not involved with either the steel erection or with rigging the subject sling and the rigging of the crane. Furthermore, they assert that they had no authority to supervise or control the choice of slings used by CRV or its agents in rigging the crane or hoisting the beams.

Briarwood and Pav-Lak maintain that their witnesses' deposition testimony corroborates these arguments. Moreover, they stress that AGL's deposition witness explicitly averred that only CRV's employees and/or agents were responsible for sling selection and beam hoisting. The same witness, they continue, also testified that CRV was responsible for ensuring that CRV's workers supervised the hoisting activities as an added safety measure. These CRV workers had the authority and responsibility to order the hoisting to stop upon observing an unsafe condition. Briarwood and Pav-Lak add that Crane's witness also testified that only a CRV employee would put the beams on the crane, which involved choosing the slings and placing the beams into them. Additionally, this witness testified that CRV owned all of the slings which were at the site. Furthermore, they emphasize that the three CRV employees produced for depositions gave testimony consistent with the notion that CRV had exclusive control over the

selection and use of the slings, including the subject sling. This testimony, they continue, also establishes that only CRV's employees supervised the task of beam hoisting.

Briarwood and Pav-Lak conclude that the record establishes that the failure to choose and use an adequate sling directly caused the accident. They further assert that the record indicates that this failure was wholly within CRV's and its agents' responsibility. Hence, Briarwood and Pav-Lak argue that no negligence-based claim is viable as asserted against them, and such claims must therefore be dismissed.

Next, Briarwood and Pav-Lak contend that they are entitled to summary judgment and an order of conditional contractual indemnification on their claims against AGL and CRV. They assert that a party is entitled to contractual indemnification in instances where the intent to indemnify is clearly established by the language and purpose of the relevant written agreement. Pav-Lak alleges that its written agreement with AGL covers the structural steel installation. Also, Pav-Lak points out that a provision of this written agreement requires AGL to defend and indemnify Pav-Lak for all bodily injury claims arising within the scope of the work. Pav-Lak notes that the indemnity clause states that the obligation to indemnify is to the fullest extent permitted by law. Pav-Lak also claims that the requirement in their contract with AGL to also defend and indemnify Briarwood makes Briarwood a third-party beneficiary of their written agreement with AGL. Briarwood and Pav-Lak conclude that the written agreement to indemnify is in effect, and

is valid and enforceable, thus entitling them to a conditional judgment of contractual indemnification against AGL.

Similarly, Briarwood and Pav-Lak contend that Pav-Lak's written agreement with CRV[4] requires CRV to indemnify both entities for any bodily injury claims arising from work done by CRV or its employees. They maintain that the record shows that CRV and its agents were performing the work that led to decedent's death, and such work was negligently performed. They note that the indemnity clause states that the obligation to indemnify is to the fullest extent permitted by law. Briarwood and Pav-Lak again conclude that the written agreement to indemnify is in effect, and is valid and enforceable, therefore entitling them to a conditional judgment of contractual indemnification against CRV.

Also, Briarwood and Pav-Lak assert that they are entitled to summary judgment and an order of conditional indemnification on their claims for common-law indemnity against CRV. They reiterate that the record establishes that they are free of negligence and that CRV engaged in a negligent act when its employees used an inadequate sling to rig the crane. Accordingly, they argue that CRV should be required to indemnify them under the law of common-law indemnification, as they are directly sued in this action, and their liability (if any) stems from CRV's negligence.

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[4]This document is referenced in the contract between Pav-Lak and AGL (Doc # 66, Page 16, ¶ 39). The actual document is in Doc. 334, the last few pages.

Lastly, Briarwood and Pav-Lak argue that they are entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims because decedent was the sole proximate cause of his injuries. They acknowledge that these statutes place a nondelegable, absolute duty of care on owners and contractors, who are subject to liability thereunder without regard to fault. However, they contend that an injured worker or his representative is not entitled to recover damages under these statutes if the worker's actions were the sole proximate cause of the accident. Here, they continue, the record establishes that decedent was provided with adequate equipment to protect against falls, namely, a safety harness and lanyard. However, they claim, that decedent did not attach ("tie off") the lanyard to a fixed location. They assert that it was his responsibility to do so. They maintain that decedent would not have fallen had he done so. Therefore, they conclude that decedent's failure to secure the lanyard to a fixed point was the sole proximate cause of the accident and his injuries. Consequently, Briarwood and Pav-Lak argue that plaintiff has no viable Labor Law §§ 240 (1) or 241 (6) claims against them and dismissal should result.

CRV's Arguments Supporting Its Dismissal Motion (Mot. Seq. 17)

CRV, in support of its motion to dismiss AGL and Cranes' third-party contractual indemnification claims, first asserts that it is not a party to any written indemnity agreement with either of these third-party plaintiffs. CRV highlights that, as decedent's employer, the Workers' Compensation Law generally bars third-party claims for

indemnity except when the indemnitor, here CRV, executes a written agreement to indemnify. Here, CRV maintains that there was no applicable written contract with either AGL or Cranes that both covered the work that led to the accident and contained a written indemnity clause.

Specifically, CRV argues with regard to Cranes that there was simply no written agreement in place for the date of the accident.[5] CRV asserts that not only there is no written agreement between it and Cranes, but the record contains no indication that a proposed written agreement was ever presented to it. CRV reasons that the absence of proof of a written agreement renders any contractual indemnification claim unsustainable. CRV acknowledges that there are written agreements between it and AGL. However, CRV claims that the agreements with AGL are "incomprehensible." CRV claims that these written agreements contain incorrect titles for the parties (e.g., one agreement defines AGL as both contractor and subcontractor) and refers to another entity as the "relevant party." Moreover, CRV continues, the indemnity provision does not provide indemnification for AGL. CRV concludes that any written agreement between it and AGL does not contain a written and enforceable promise to indemnify. Hence, CRV concludes that its motion to dismiss the third-party claims for contractual indemnification asserted by AGL and Cranes should be granted.

[5]The two parties' apparent custom was to execute a daily written crane rental and operation agreement, but the record contains no copy of the agreement for the applicable date.

Plaintiff's Arguments Supporting Her Partial Summary Judgment Motion (Mot. Seq. 18)

Plaintiff, in support of her partial summary judgment motion, first argues that she is entitled to partial summary judgment on the issue of Labor Law § 240 (1). Plaintiff observes that this statute is meant to be construed as liberally as possible to protect construction workers. Next, plaintiff argues that the subject sling was a safety device used to hoist the subject beam and to protect workers (such as decedent) from gravity-related risks, such as the risk of a heavy hoisted beam falling, and, consequently causing decedent to fall and sustain injuries. Plaintiff contends that the sling unquestionably proved inadequate for the task, failed, and, as such, the Labor Law § 240 (1) violation is clearly established by the record.

Specifically, plaintiff emphasizes that decedent was performing work which required him to be elevated. Thus, plaintiff claims, the subject beam was the functional equivalent of a scaffold. Also, plaintiff notes that the hoisting device was inadequate, as the subject beam exceeded the subject sling's safe hoisting capacity by more than 3,000 pounds, and failed, which caused decedent's fall and injuries. Plaintiff concludes that decedent was thus a protected worker performing a protected activity while subject to an elevation-related risk, the safety devices provided to protect against the risk of falling failed, and therefore the Labor Law § 240 (1) violation, according to plaintiff, has thus been established. Defendants, plaintiff submits, are "owners" or "contractors," as those terms are used in the statute, and she thus claims to have demonstrated prima facie

entitlement to summary judgment as a matter of law as to defendants' Labor Law § 240 (1) liability.

Moreover, plaintiff contends that any "sole proximate cause" or "recalcitrant worker" defense lacks merit. First, plaintiff maintains that the record contains no indication that decedent disobeyed any instructions while he was working with the subject beam. To the contrary, plaintiff continues, the record suggests the opposite, namely, that decedent complied with all applicable supervisory directions. Plaintiff acknowledges that decedent was not "tied off" when the accident occurred, but claims that a court, after a statutory violation has been established, cannot properly find that an injured worker's foolish omission (such as this one) constituted the "sole" proximate cause of the accident. Indeed, plaintiff adds, to find otherwise would render meaningless the word "sole" since the statutory violation also directly contributed to the accident. Accepting these affirmative defenses in the instant matter, plaintiff urges, would be tantamount to finding a contributory negligence defense to Labor Law 240 (1), which courts have clearly held does not exist. In sum, plaintiff repeats that the sling failure constituted a Labor Law 240 (1) violation, which directly led to the accident and decedent's death, and, as such, decedent's unwise acts cannot be the accident's "sole" proximate cause. Hence, plaintiff concludes that defendants have not overcome her prima facie case and demonstrated the existence of triable issues of fact, and her partial summary judgment motion as to Labor Law § 240 (1) should be granted.

Also, plaintiff argues that she is entitled to partial summary judgment on the issue of defendants' Labor Law § 241 (6) liability. Plaintiff reiterates that the defendants are "owners" or "contractors" as those terms are used in the statute and that decedent was unquestionably a worker engaged in construction work when the accident occurred. She also cites three Industrial Code sections, one forbidding misuse of slings in beam hoisting and two requiring regular crane inspections of cranes, which, according to plaintiff, are both applicable to the instant facts and sufficiently specific to support the Labor Law § 241 (6) claims. Plaintiff further contends that the record establishes that the subject sling was misused and that the crane was not properly inspected. Plaintiff therefore reasons that the Industrial Code provisions were violated and such violations proximately caused the accident. Accordingly, plaintiff concludes that she has established prima facie entitlement to judgment as a matter of law with respect to defendants' liability pursuant to Labor Law §241 (6).

Lastly, just as she argued with regard to Labor Law § 240 (1), plaintiff claims that her decedent's alleged foolish acts cannot constitute the "sole" proximate cause of his accident and death in connection with the Labor Law § 241 (6) claims. She reiterates that the Industrial Code violations are evident from the record and contributed to the accident, and, therefore decedent's alleged negligence could not have been the "sole" proximate cause of the accident. Plaintiff claims that there are thus no factual issues about defendants' liability pursuant to Labor Law § 241 (6). Consequently, plaintiff concludes

that she is entitled to partial summary judgment as to defendants' liability under both Labor Law §§ 240 (1) and 241 (6).

AGL's Arguments Supporting Its Summary Judgment Motion (Mot. Seq. 19)

AGL, in support of its summary judgment motion, first argues that it is not a defendant properly subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6). AGL claims that those statutes apply only to property owners and general contractors, and, that here, it is neither. AGL argues that it was Pav-Lak's subcontractor, and, as such, its work was limited to fabricating (not hoisting, installing or erecting) the steel beams, and providing other building materials. AGL claims that once CRV began erecting the steel, it was finished with its task and had no involvement in the construction activities and had no agents or employees present on the work site. Moreover, AGL alleges that it had no authority to supervise or control plaintiff's work, and, accordingly, is not vicariously liable pursuant to the Labor Law as an agent of the property owner or the general contractor. Indeed, AGL continues, the record establishes that only CRV was responsible for directing decedent's work and (along with Pav-Lak) ensuring site safety. AGL adds that only CRV's employees were responsible for and involved in the improper selection of the inadequate sling and the unsafe rigging of the crane. AGL reiterates that it had no agents or employees on the site at relevant times, and thus did not observe the acts and/or omissions leading to the accident. AGL reasons that it is thus not an owner, contractor or agent of either of them as those terms are understood for Labor Law §§240 (1) and 241 (6) purposes. Accordingly, AGL continues, it is not subject to vicarious liability pursuant

to those statutes. Therefore, AGL concludes, it is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as asserted against it.

Also, AGL argues that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed as against it. AGL maintains that such claims are only applicable in two situations: where the allegedly liable party supervised or controlled the work that produced the injury, or when the allegedly liable party either created or had actual or constructive notice of a dangerous premises condition that produced the injury. Here, AGL reiterates that only CRV employees supervised the hoisting activities. Also, AGL posits that, to the extent plaintiff argues that decedent's accident and death was caused by a hazardous premises condition, the record establishes that AGL neither created the alleged hazard nor had notice of it. Indeed, AGL continues, the sling and all related equipment were owned or maintained by entities other than AGL. In sum, AGL concludes that neither basis for Labor Law § 200 liability applies to it, and, accordingly, it is not liable under that statute. Hence, AGL urges the court to grant it summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims.

Next, AGL argues that it is entitled to summary judgment against CRV on its third-party claims, requiring CRV to indemnify it on two independent grounds. First, AGL references common-law principles, namely, that the record establishes 1) it is free of negligence regarding the subject accident; and 2) the accident unquestionably resulted from CRV's negligent acts and omissions (i.e. failure to safely and properly rig the crane hoisting the subject beam). Under common-law principles, AGL continues, since it faces

vicarious liability for CRV's negligence, it is entitled to indemnification from CRV, the actually negligent party. Lastly, AGL acknowledges that, usually, the Workers' Compensation Law prohibits common-law indemnity claims against an injured worker's employer except, as here, where the workplace accident results in the worker's death.

Secondly, AGL claims that it is entitled to summary judgment granting it contractual indemnification against CRV. AGL acknowledges that some of the documents submitted as reflecting the agreement between it and CRV contain typographical errors and incorrect references. However, AGL argues, it and CRV (among other parties) unquestionably executed a clear and explicit written indemnity agreement. This agreement, argues AGL, identifies CRV as the "Lower Tier Subcontractor" and specifies that such subcontractor agrees to hold AGL (among other parties) harmless for any claims arising from work such Lower Tier Subcontractor (i.e. CRV performed). AGL asserts that the subject indemnity agreement is applicable, enforceable, clear, and was in full force and effect at all relevant times. Hence, AGL concludes that it is entitled to a judgment requiring CRV to indemnify it under the written agreement as the accident and claims clearly arose from CRV's work.

Lastly, AGL argues that it is entitled to summary judgment dismissing all cross claims asserted against it. First, AGL asserts, the cross claims are conclusory, as they assert no facts suggesting that AGL's acts or omissions led to the subject accident. AGL maintains that the cross claims are asserted without any factual basis, but merely because plaintiff accused the co-defendants of liability. AGL characterizes such an assertion as

insufficient for a sustainable cross claim and submits that the cross claims should be dismissed on this ground. Alternatively, AGL contends that the record belies any factual basis for a cross claim against it. AGL reiterates that the record contains nothing suggesting that AGL's acts or omissions contributed to the accident. Rather, AGL continues, the record establishes that CRV's negligence precipitated decedent's death.

Regarding the cross claims against it for contractual indemnification, AGL argues that it is not a party to any written indemnity agreement with any co-defendant other than Pav-Lak. Accordingly, AGL claims that any contractual indemnification cross claims by other co-defendants should be dismissed on this ground. Pav-Lak's indemnification cross claim, AGL continues, constitutes an impermissible attempt under the General Obligations Law to have other parties indemnify it for its own negligence. Alternatively, AGL claims that Pav-Lak improperly seeks indemnity from AGL for the negligent acts of CRV, a lower subcontractor that AGL did not select.[6] Lastly, AGL claims that any breach of contract cross claims must be rejected as the record shows it procured general liability insurance as the written agreement required. These reasons, AGL concludes, entitle it to summary judgment dismissing all cross claims asserted against it, and, coupled with its other arguments, AGL contends that its summary judgment motion should be granted in its entirety.

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[6]The contract between Par-Lak and AGL (Doc 66) states (Page 16) that AGL will contract with CRV "for the full erection of the structural steel . . . precast concrete plank including all required grouts, rigging, cranes, permits, flagmen, etc. that is associated with this work."

Cranes' Arguments Supporting Its Summary Judgment Motion (Mot. Seq. 20)

Cranes, in support of its summary judgment motion, first suggests that it is not subject to liability under either Labor Law § 240 (1) or Labor Law § 241 (6) because it is neither an owner, contractor or agent of either of them. Specifically, Cranes posits that it neither owned the subject property nor was a statutory contractor. Instead, Cranes continues, it merely leased the subject crane for use by CRV and its employees. Cranes points out that, except for the crane operator, only CRV's agents and employees used the subject crane, and claims that the record shows no indication that the crane operator negligently operated the crane. Also, Cranes adds that it never supervised or controlled the work done by CRV, its agents or employees, which includes decedent, at any relevant time. Cranes further notes that CRV's agents or employees positioned the subject crane after receiving it, and that a CRV flagman[7] and nobody else directed the crane's operation. Moreover, Cranes states that the applicable written rental agreement specifies that only CRV had the authority to give instructions concerning the crane's operation. Cranes also highlights that the accident occurred only because the subject sling, which CRV's employees chose and installed, failed. In sum, Cranes concludes that it neither meets the criteria for absolute statutory liability, nor engaged in any wrongful act or omission, and is not subject to liability under either Labor Law § 240 (1) or Labor Law § 241 (6).

[7]The court uses "flagman" and "signalman" interchangeably.

Similarly, Cranes argues that plaintiff has no viable Labor Law § 200 or common-law negligence claims against it. Cranes submits that such claims are viable only against a party that either supervised and controlled the injured worker's tasks, or either created or had notice of a premises hazard on the premises that led to the accident. Here, Cranes asserts, the record shows that only CRV employees chose and rigged the subject sling to the crane. Its operator, Cranes adds, only operated the crane if given instructions by the CRV flagman. Cranes concludes that the record shows that it exercised no control over decedent or his fellow workers. Cranes also notes that, to the extent the subject sling is considered a hazardous premises condition, the record establishes that the crane operator was unaware that CRV employees were using the subject sling (which Cranes characterizes as inadequate and improper). Indeed, Cranes continues, the record shows that the operator was in the cab of the crane, 60 feet away from CRV's employees, when the employees attached the sling (which Cranes further characterizes as badly worn, untagged and undersized) to the crane and placed the beam. In sum, Cranes argues that it did not direct any aspect of decedent's work, had no knowledge that CRV employees would use an improper and inadequate sling for rigging, and is thus not properly subject to plaintiff's Labor Law § 200 and common-law negligence claims, which, it concludes must be dismissed.

Next, Cranes asserts that all cross claims asserted against it must be dismissed. It reiterates that the record establishes that it committed no negligent act or omission regarding this matter. Accordingly, Cranes reasons, any claim for common-law

indemnification against it lacks merit. As to contractual indemnification, Cranes notes that only CRV had a written agreement with it and thus asserts that any contractual indemnification claim asserted against it by any party other than CRV is wholly meritless. In sum, Cranes contends that none of the cross claims asserted against it are supported by the record, and, therefore, it is entitled to summary judgment dismissing all cross claims.

Lastly, Cranes argues that it is entitled to indemnification, either contractual or pursuant to common-law principles, from CRV.[8] Cranes acknowledges, as to contractual indemnification, that the record does not contain a copy of its written agreement with CRV. Nevertheless, Cranes continues, the record contains evidence of its extensive past dealings with CRV, and, therefore, the custom and practice between them is established, which demonstrates CRV's intent to indemnify Cranes for any incidents arising from the operation of the subject crane. Cranes also points out that appellate authority suggests that the absence of a copy of the written agreement is of no moment given the evidence of their custom and practice. Alternatively, Cranes asserts that it is entitled to common-law indemnification from CRV and claims that the record shows it was free of negligence. Also, Cranes reiterates that the record contains ample evidence suggesting that the accident was proximately caused by CRV's negligence, namely, that CRV's employees chose to use an inadequate sling for hoisting the subject beam. Cranes argues that perusing the record establishes that it was CRV's unsafe work practices that caused the

[8]Cranes' third third-party complaint is Doc. 115.

accident, and, thus, under common-law principles, it is required to indemnify Cranes for its legal fees and costs incurred in defending plaintiff's claims. Hence, Cranes concludes that it is entitled to summary judgment requiring CRV to indemnify it in connection with this action. The court notes here that while CRV filed its answers to the other third-party complaints, its answer to Cranes' third-party complaint is not e-filed except as an Exhibit to a motion (Doc. 425).

Plaintiff's Arguments Opposing Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 16)

Plaintiff, in opposition to Briarwood and Pav-Lak's summary judgment motion, first asserts that the asserted "sole proximate cause" and "recalcitrant worker" defenses are inapplicable to the instant facts. Specifically, plaintiff observes that there is no serious dispute that the subject sling was inadequate for hoisting the beam and that the sling failed, which caused the beam (and decedent) to fall. Plaintiff therefore reasons that it is evident from the record that CRV's use of the sling and its failure constitutes Labor Law §§ 240 (1) and 241 (6) violations. Plaintiff further contends that by establishing such violations of the applicable statutes, decedent's foolish conduct (i.e., his failure to attach his harness and lanyard to a stable horizontal steel beam) cannot, as a matter of law, be considered the "sole" proximate cause of his injuries. At the very least, plaintiff claims, the Labor Law violations were also proximate causes of the accident. Thus, plaintiff concludes, the sole proximate cause defense lacks merit.

Plaintiff points out that Briarwood and Pav-Lak do not contest that they are subject to vicarious liability under the Labor Law as an owner and a general contractor, respectively. She reiterates that vicarious liability under Labor Law §§ 240 (1) and 241 (6) is absolute, and, therefore, Briarwood and Pav-Lak are vicariously liable for CRV's violations of the statute even if Briarwood and Pav-Lak bore no responsibility for them. Plaintiff posits that, as the sole proximate cause defense is inapplicable, not only should Briarwood and Pav-Lak's motion be denied regarding Labor Law §§ 240 (1) and 241 (6), but that it is plaintiff who is entitled to partial summary judgment as to those statutes.

AGL's Arguments Partially Opposing Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 16)

AGL, in partial opposition to Briarwood and Pav-Lak's motion, first asserts that Pav-Lak has not established AGL's clear intention to indemnify Pav-Lak (and/or Briarwood) for claims arising from accidents such as the instant one. AGL acknowledges that its written agreement with Pav-Lak contains a provision whereby AGL agrees to hold Pav-Lak harmless for liability arising from work within the agreements' scope and reiterates that its "presence" on the construction site was limited to the delivery of steel beams, concrete planks and other items it agreed to supply.[9] AGL further notes that the subject written agreement with Pav-Lak explicitly specifies this. AGL claims that the record establishes beyond serious dispute that its agents or employees were not involved

[9]The contract between AGL and Pav-Lak is located at Doc. 66. AGL agreed to fabricate steel beams and to provide numerous other items needed for the project.

in the steel erection work. Indeed, AGL continues, Briarwood and Pav-Lak's own arguments indirectly concede this point, as their contention is that only CRV's employees were responsible for the hoisting and installation of the beams. AGL reasons that such an argument acknowledges that the accident did not arise from AGL's work, which, again, was limited to steel beam fabrication and delivery. AGL concludes that, since the accident did not arise from its work, the subject indemnity provision contained in its written agreement with Pav-Lak is inapplicable and that neither Briarwood nor Pav-Lak is entitled to contractual indemnification from AGL herein.

Alternatively, AGL contends that Pav-Lak is not entitled to summary judgment as to its claim for contractual indemnification because Pav-Lak is attempting to have AGL hold it harmless for its own negligence, an impermissible result under the General Obligations Law (GOL). AGL alleges in this regard that the relevant written agreements among the several contractors establish that Pav-Lak was ultimately responsible for construction site safety. AGL claims that the accident happened because of Pav-Lak's failure to properly monitor acceptable construction site practices. Therefore, reasons AGL, Pav-Lak is attempting to obtain indemnification for its own negligence. AGL submits that, to the extent that the relevant indemnity provision may be read as described, the provision violates the GOL (General Obligations Law) and is also void as against public policy. Thus, argues AGL, the motion should be denied to the extent that Briarwood and Pav-Lak seek summary judgment directing AGL to indemnify them for the instant claims.

CRV's Arguments Opposing Briarwood and Pav-Lak's Summary Judgment Motion (Mot. Seq. 16)

CRV, in opposition to Briarwood and Pav-Lak's motion, asserts that these movants have no right to contractual indemnification. Specifically, CRV claims that there was no written agreement generated for the work CRV performed at relevant times herein and it cannot properly be found that CRV expressed an intent to indemnify either Briarwood or Pav-Lak. Additionally, CRV argues that Briarwood or Pav-Lak's contractual indemnification position requires that the record support a finding that they committed no negligent acts or omissions, and that CRV's negligent acts or omissions contributed to the subject accident. CRV maintains that such a finding would presently be premature.

Similarly, CRV argues that neither Briarwood nor Pav-Lak has established prima facie entitlement to a judgment of common-law indemnification against it. CRV claims in this regard that common-law indemnification is available only against entities that had the right to direct or control the methods of the subject work and that there is no indication in the record that CRV qualifies as such an entity. CRV further reasons that if Briarwood and Pav-Lak argue that decedent was the sole proximate cause of his accident, they cannot concurrently suggest that CRV was negligent and that such negligence led to the accident. At best, CRV adds, Briarwood and Pav-Lak's summary judgment motion as to indemnification is premature and must be denied.

AGL's Arguments Partially Opposing CRV's Summary Judgment Motion (Mot. Seq. 17)

AGL, in partial opposition to CRV's motion, first asserts, contrary to CRV's

contentions, that there is a clear written agreement, applicable and in effect at all relevant times, containing CRV's intent to indemnify AGL for claims arising from CRV's work. AGL submits copies of the relevant documents, notes that the deposition testimony of a CRV co-owner also establishes CRV's intent to indemnify AGL in this context, and posits that the subject written agreement is enforceable to the fullest extent permitted by law. Lastly, AGL states that the record is replete with items establishing that the subject accident was precipitated by CRV's negligent methods. Accordingly, AGL concludes that CRV's motion, insofar as it seeks summary judgment dismissing AGL's cross claim for contractual indemnity against CRV, must be denied.

Similarly, AGL argues that CRV's motion must be denied to the extent it seeks summary judgment dismissing AGL's claims for common-law indemnity and contribution. AGL points out that decedent's death falls squarely within the exceptions to the Workers' Compensation Law bar against common-law indemnity or contribution claims against an injured worker's employer. AGL reiterates that the record establishes beyond serious argument that CRV was responsible for all aspects of the crane rigging and the hoisting of the beams and stresses that the subject sling was unquestionably inadequate, its failure caused the accident and decedent's death and that CRV employees both selected the sling and rigged the crane. AGL again notes that its involvement in the subject construction project was limited to delivering steel beams and other materials, and, as such, reasons that it cannot have been negligent as to the hoisting of the beams or the erection of the steel structure. AGL argues that the record establishes that it is

defending a claim not caused by its negligence, but by CRV's negligence, and thus CRV's summary judgment motion must be denied to the extent it seeks to dismiss AGL's claims for contribution and common-law indemnity from CRV.

Cranes' Arguments Partially Opposing CRV's Summary Judgment Motion (Mot. Seq. 17)

Cranes, in partial opposition to CRV's motion, first asserts that CRV's motion papers do not substantively dispute Cranes' claims for common-law indemnification and notes that CRV has advanced no arguments against such claims. Cranes submits that its claims for common-law indemnification survive even if CRV's motion is granted and AGL's claims are dismissed.

Next, Cranes disputes CRV's assertion that there was no written agreement between them that contains a standard indemnity clause whereby CRV agreed to indemnify Cranes for claims arising out of the operation of the subject crane. Cranes acknowledges that the actual written daily crane rental agreement for the date at issue cannot be located. However, Cranes avers that CRV's deposition witness testified to a working relationship with Cranes for more than eight years. Cranes adds that the record establishes (with an apparent concession by CRV) that Cranes would, daily, transmit a draft written crane rental agreement to CRV and that a CRV principal would execute the same at the end of the day. Cranes also notes out that during the course of the above mentioned extensive working relationship, CRV never objected to the language of the standard form, written, daily crane rental agreement. Indeed, Cranes continues, the only

dispute in this record it has with CRV about the regular daily crane rental customs and practices is that Cranes asserts that CRV, as the renter, would execute the written daily crane rental agreement at the beginning of the work day, and that CRV maintains that the agreement was signed at the end of the work day. In any event, Cranes argues, there is no dispute either that the subject agreement was executed for the date of the plaintiff's accident or that it contained an indemnity clause whereby CRV agreed to indemnify Cranes for claims arising out of operation of the subject crane.

Cranes reiterates that the applicable appellate authority provides that the contractual indemnification claim based on the missing written (daily) agreement is nevertheless viable, and the failure to produce the agreement is not fatal to the claim. Cranes maintains that the subject indemnity provision is applicable, enforceable and was in effect at all relevant times. Cranes further contends that the crane, including the crane operator it provided to CRV, was wholly under CRV's supervision and control at all relevant times. Indeed, Cranes continues, the record reflects that the subject crane operator always followed the CRV flagman's commands. Cranes also adds that the record contains no indication that Cranes committed a negligent act or omission regarding the accident. Cranes reasons that, based on the foregoing, plaintiff's claims against it are wholly vicarious and stem from CRV's acts or omissions. Therefore, Cranes argues, the subject indemnity provision is active, and CRV is thus required to defend and indemnify it in the main action. Hence, Cranes concludes that CRV's motion insofar as it seeks to dismiss its third-party claims, must be denied.

Briarwood and Pav-Lak's Arguments Opposing AGL's Summary Judgment Motion (Mot. Seq. 19)

Briarwood and Pav-Lak, in opposition to AGL's summary judgment motion, first argue that plaintiff's Labor Law §§ 240 (1) and 241 (6) claims should not be dismissed as against AGL. They acknowledge that such claims are viable against owners, contractors and their agents. Assuming that AGL is not an owner or contractor, they continue, the record establishes, at the very least, that factual issues exist as to whether AGL is an agent of the general contractor, Pav-Lak.

Briarwood and Pav-Lak note that, despite AGL's protestation, the written agreement between them specifies that AGL is responsible for both delivery of fabricated steel (and other items) as well as its installation. Moreover, they continue, the written agreement specifies that AGL had the right and responsibility to supervise site safety, including hoisting operations. They claim that AGL thus had the right to supervise and control the hoisting of the steel beams, the work that precipitated the accident. Therefore, they reason that AGL's right to supervise and control the work that brought about the accident renders it an agent, subject to absolute vicarious liability, pursuant to Labor Law §§ 240 (1) and Labor Law 241 (6). Also, they add that AGL's failure to exercise its right to supervise and control the subject steel beam hoisting work, by instead delegating such work to CRV, is of no moment, as AGL is still a Labor Law agent because it had the right to supervise and control the work that brought about the injury. Briarwood and Pav-Lak thus conclude that, at the very least, a factual issue exists as to whether AGL was an agent

of Pav-Lak, and thereby subject to absolute vicarious liability pursuant to Labor Law §§ 240 (1) and 241 (6). Accordingly, they argue that AGL's summary judgment motion should be denied to the extent it seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims.

Next, Briarwood and Pav-Lak assert that AGL's summary judgment motion should likewise be denied to the extent that it seeks to dismiss their contractual indemnification cross claims against AGL. They reiterate that they exercised no supervision or control over steel beam hoisting, and there was no hazardous premises condition that contributed to the accident. Therefore, they reason that the record establishes that they did not commit any negligent act or omission. They add that they are not seeking indemnification for their own negligence and conclude that their attempt to seek indemnification does not run afoul of the GOL. Moreover, they emphasize that the subject written agreement specifies that AGL is responsible for all steel installation, and that the indemnity provision applies to claims arising from such work. They argue that AGL's decision to subcontract out the steel installation to CRV is irrelevant for indemnity purposes. In sum, Briarwood and Pav-Lak claim that the record establishes that the subject written indemnity clause in Pav-Lak's favor is applicable, enforceable, and was in effect at all relevant times. They thus argue that they are entitled to judgment on their contractual indemnification cross claim against AGL and conclude that AGL's summary judgment motion should be denied to the extent it seeks to dismiss their contractual indemnification cross claim against it.

Cranes' Arguments Opposing AGL's Summary Judgment Motion (Mot. Seq. 19)

Cranes, in opposition to AGL's motion, first asserts that the record does not support AGL's common-law indemnification cross claim against it. Cranes claims that the record contains no evidence that it committed a negligent act or omission that led to the accident. Cranes further submits that AGL, in the arguments supporting its motion, has not identified any evidence that Cranes committed a negligent act or omission that led to the accident. It observes that common-law indemnification doctrine requires a proposed indemnitee (in this instance, AGL) demonstrate that the alleged indemnitor (here, Cranes) committed a wrongful act or omission. Cranes notes in this regard that the record is replete with evidence that CRV and its employees, and only CRV and its employees, committed negligent acts, namely, the selection of the inadequate sling which failed and caused the subject steel beam and decedent to fall. Cranes reiterates that its crane operator did not exercise any independent judgment and only operated the subject crane in accordance with the directions given by a CRV agent, the flagman.

Moreover, Cranes continues, the record contains no evidence that the subject crane operator failed to properly control the subject crane or even that the subject accident stemmed from crane operation at all. Cranes further notes that AGL was contractually responsible for the erection of the steel structure (even though such work was contracted out to CRV) as well as for the steel beam fabrication and delivery, and AGL must show that it committed no negligent act or omission to obtain contractual indemnification. Cranes posits that AGL has failed to make such a showing and has failed to show either

that it was not negligent or that Cranes was negligent. Cranes concludes that AGL is not entitled to common-law indemnification from it and that AGL's summary judgment motion should be denied as to its cross claim for common-law indemnification against Cranes.

Lastly, Cranes reiterates that it has asserted a contribution and common-law indemnification cross claim against AGL, which, in turn, seeks summary judgment dismissing this cross claim. However, Cranes again maintains that AGL has not demonstrated that it did not commit a negligent act or omission that led to the subject accident. Cranes claims that AGL's failure to make such showing means the contribution and common-law indemnification cross claim should not be dismissed. Hence, Cranes concludes that AGL's summary judgment motion seeking to dismiss Cranes' contribution and common-law indemnification cross claim should be denied.

CRV's Arguments Opposing AGL's Summary Judgment Motion (Mot. Seq. 19)

CRV, in opposition to AGL's motion, first states that the record does not support AGL's contractual indemnification third-party claim against it. CRV acknowledges that it is a party to a written trade contractor agreement with AGL. However, CRV claims that the agreement, executed in at least two parts, contradicts itself and does not contain a coherent, unambiguous indemnity clause. Indeed, CRV continues, the clause states that "contractor" shall hold "contractor" harmless, and the agreement erroneously identifies AGL as both "contractor" and "subcontractor." Also, adds CRV, the written agreement references an entity named PCM Group that is otherwise unidentified. CRV thus states

that the written agreement "makes absolutely no sense" and certainly does not eliminate all factual issues as to whether it is required to indemnify AGL. Therefore, CRV concludes that AGL's summary judgment motion should be denied to the extent it seeks contractual indemnification from CRV.

Next, CRV maintains that it did not breach the covenant to secure and maintain general commercial liability insurance that covers AGL as an additional insured. CRV attaches a copy of the relevant insurance documents to the opposition papers and claims that the documents establish that AGL was in fact an additional insured on the applicable policy. Moreover, CRV asserts that it provided AGL with a certificate of insurance that establishes its additional insured status. CRV concludes that any third-party claim against it asserted by AGL for breach of a covenant to procure insurance is proven meritless by the record, and that AGL's motion, to the extent it seeks summary judgment as to this issue, must be denied.

Lastly, and alternatively, CRV argues that any motion that seeks summary judgment regarding indemnification, either contractual or common-law, must be denied as premature, as such may only be rendered against a party that committed a wrongful act and that the record does not presently support a finding that CRV committed such an act. Therefore, CRV reasons, it would be premature for this court to award an indemnification judgment against it and to dismiss CRV's indemnification claims against the third-party

plaintiffs.[10] CRV concludes that AGL's motion must be denied to the extent it seeks such relief.

AGL's Arguments Partially Opposing Cranes' Summary Judgment Motion (Mot. Seq. 20)

AGL, in partial opposition to Cranes' summary judgment motion, first asserts that Cranes has not demonstrated entitlement to summary judgment dismissing AGL's common-law indemnification cross claim. AGL suggests that Cranes committed a negligent act which contributed to decedent's death. Specifically, AGL avers, local and federal safety regulations prohibited the subject crane operator from hoisting the steel beam if workers were standing on it. Nevertheless, AGL submits that the operator did so, and that the record establishes that the operator could have and should have stopped lifting the beam, given the unsafe condition. AGL reasons that since it is now subject to vicarious liability for Cranes' negligent act, and since the record, it claims, establishes that it was not directly negligent, the requirements for asserting common-law indemnification are at least arguably presented. Accordingly, AGL asserts that Cranes' summary judgment motion must be denied to the extent it seeks to dismiss AGL's common-law indemnification cross claim.

***CRV's Arguments Opposing Cranes' Summary Judgment* Motion** (Mot. Seq. 20)

CRV, in opposition to Cranes' summary judgment motion, asserts that not only

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[10]While CRV alleges that it has asserted claims against Cranes and AGL, the pleadings do not support this. CRV is in this action solely as a third-party defendant. None of its three answers assert any counterclaims.

should that motion be denied as to CRV, but also that Cranes' contractual indemnification third-party claims against CRV must be dismissed. CRV reiterates that its professional relationship with Cranes involved having a CRV agent, daily, execute a written crane rental agreement. CRV submits that the record contains no copy of the agreement and that no such agreement was signed on the date of the accident. Therefore, CRV reasons, there was no written contract between CRV and Cranes in effect at relevant times and, specifically, no indemnity provision in effect. CRV thus reasons that Cranes, which asserts a contractual indemnification third-party claim, cannot prove its claim with competent evidence (i.e., a written indemnity provision both applicable and in effect at relevant times). Hence, CRV concludes that Cranes' contractual indemnification claim must be dismissed.

Lastly, CRV argues that Cranes is not summarily entitled to common-law indemnification. First, CRV notes that common-law indemnification is available only against actually negligent parties and that the record does not establish that CRV was actually negligent. Next, CRV reiterates that decedent foolishly failed to attach his lanyard to a firm object to prevent falls, thereby making decedent the sole proximate cause of his injuries. CRV alternatively claims that no determination of actual negligence has occurred, and common-law indemnification would thus be premature. CRV concludes that Cranes' motion, to the extent it seeks common-law indemnification against CRV, must therefore be denied.

Briarwood and Pav-Lak's Arguments Partially Opposing Cranes' Summary Judgment Motion (Mot. Seq. 20)

Briarwood and Pav-Lak, in partial opposition to Cranes' motion, argue for denying Cranes summary judgment dismissing their contribution and common-law indemnity cross claims against Cranes. They first recount that it is undisputed that the accident occurred after the subject steel beam was hoisted while decedent stood on it. They further note that it is undisputed that a Cranes' employee initially hoisted the beam and continued hoisting after decedent climbed onto it. They cite the City of New York Building Code, which prohibits the hoisting of loads if a person is standing on it. Accordingly, they reason that Cranes' operator, by continuing to hoist the subject beam while decedent stood on it, violated the Building Code and committed a negligent act, which, they contend, contributed to the accident.

Briarwood and Pav-Lak reiterate that they are subject to absolute vicarious liability for this accident, despite not being responsible for either the methods of the work or the equipment used. Therefore, they reason that they are entitled to contribution and common-law indemnification against the parties that committed negligent acts. In this record, they continue, a factual issue at least exists as to whether Cranes' negligence qualifies as a basis for common-law indemnification and contribution. Therefore, they urge the court to deny Cranes' motion insofar as it seeks summary judgment dismissing their common-law indemnification and contribution cross claims.

Discussion

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and

competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

However, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County*

Fed. Sav. & Loan Assn., 32 NY2d 285, 290 [1973]). Summary judgment "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman,* 3 NY2d at 404`[internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

Motions to Dismiss

A motion to dismiss a complaint or a cause of action pursuant to CPLR 3211 (a) (1) may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* John R. Higgitt, *CPLR 3211 [a] [1] and [a] [7] Dismissal Motions—Pitfalls and Pointers*, 83 NY St BJ 32, 33-35 [Nov./Dec. 2011]). The evidence submitted in support of such a motion must be " 'documentary' " or the motion must be denied (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010], quoting David D. Siegel, Practice Commentaries,

McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). For evidence submitted under a CPLR 3211 (a) (1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010] [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta*, 73 AD3d at 84-85 [internal quotation marks omitted]). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)" (*Granada Condominium III Assn.*, 78 AD3d at 997 [internal quotation marks omitted]; *see Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta,* 73 AD3d at 86).[11]

On a motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the court must accept each and every allegation as true, without expressing any opinion as to whether plaintiff ultimately will be able to establish the truth of the averments (*219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506, 509 [1979]). The court's inquiry is limited to ascertaining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint (*Guggenheimer v*

[11]The court notes that the definition of "documentary evidence" in the Second Department is narrower than in the First Department. See "Rule 3211 (a) (1) Documentary Evidence in an Electronic Age," NYLJ, 8/15/18.

Ginzburg, 43 NY2d 268, 275 [1977]). When extrinsic evidence is introduced attacking the complaint, however, the truthfulness of the pleaded allegations is not assumed, and the inquiry is as to whether the pleader has a cause of action or defense, not whether he has properly stated one (*Rovello v Orofino Realty Co., Inc.,* 40 NY2d 633 [1976]).

Labor Law § 240 (1) and § 241 (6)

Labor Law § 240 (1) pertinently states that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross,* 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d

627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable. Therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall 's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer,* 65 NY2d at 524). One of the hazards contemplated by the statute is the risk that a worker will be injured by an object falling from a height (*see e.g. Thompson v Ludovico*, 246 AD2d 642, 642-643 [1998]; *see also White v Dorose Holding*, 216 AD2d 290, 290-291 [2d Dept 1995], *lv denied* 87 NY2d 806 [1996]; *Rocovich,* 78 NY2d at 514). To recover in a "falling object" case, a plaintiff must show that the object either was being "hoisted or secured" or "required securing for the purposes of the undertaking" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014], quoting

Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001] and *Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also demonstrate that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Lastly, this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

Next, Labor Law § 241 states, in applicable part, provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in

connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto,* 91 NY2d at 348; *Ross,* 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto,* 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated an Industrial Code provision that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d at 505) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d at 349). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross,* 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Here, there is no serious dispute that decedent, a steelworker, was performing construction work related to the erection of a building when the accident occurred.

Therefore, he was a protected worker performing a protected activity within the scope of Labor Law §§ 240 (1) and 241 (6). Labor Law § 240 (1) is applicable herein because the steel beam was "a load that required securing for the purposes of the undertaking at the time it fell" (*Narducci*, 96 NY2d at 268; *see also Orner v Port Auth.*, 293 AD2d 517, 518 [2d Dept 2002], *affd* 5 NY3d 731 [2005]; *Outar v City of New York*, 286 AD2d 671, 672 [2d Dept 2001]). Moreover, the record establishes that the subject sling was a device used in hoisting, was woefully inadequate, and that it failed, which led to the accident and decedent's death. Plaintiff has thus shown prima facie entitlement to judgment as a matter of law with respect to Labor Law 240 (1) (*Melchor v Singh*, 90 AD3d 866, 868 [2d Dept 2011] [proper protection issue is factual question except when safety device "collapses, moves, falls, or otherwise fails"]).

Contrary to defendants' and CRV's arguments, there is no merit to the argument that decedent was a recalcitrant worker. To the contrary, the record suggests that decedent's practice of standing on a steel beam, whether or not wise, was consistent with his supervisor's directions and instructions, and was his custom (*Walls v Turner Constr. Co.*, 10 AD3d 261, 262 [1st Dept 2004] [worker is recalcitrant only when such worker "disobeyed immediate specific instructions to use an actually available safety device or to avoid using a particular unsafe device"], *affd on other grounds* 4 NY3d 861, 862 [2005]; *see generally Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40). The argument that decedent was recalcitrant thus fails (*Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 170 [1st Dept

2001], citing *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96, 99 [1st Dept 2000]).

Similarly, there is no merit to the contention that decedent's failure to attach his lifeline/lanyard to a fixed structure was the "sole" proximate cause of his death. To be sure, if the injured worker's foolish conduct was the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach (*see Tomlins v DiLuna*, 84 AD3d 1064, 1065 [2d Dept 2011]; *Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 642 [2d Dept 2009]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2d Dept 2009]). However, where a violation of Labor Law § 240 (1) is a proximate cause of an accident, the injured worker's conduct, of necessity, cannot be deemed the sole proximate cause *(see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Triola v City of New York*, 62 AD3d 984, 986 [2d Dept 2009]). Conversely, if the injured worker is solely to blame for the injury, it necessarily means that there has been no statutory violation (see *Blake*, 1 NY3d at 290). Here, there is no reasonable view of the record from which it might be concluded that decedent's "actions were the sole proximate cause of his injuries" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998], *rearg denied* 92 NY2d 875 [1998]). As stated above, the subject sling was inadequate, and when it snapped, the beam fell, which led to the accident and decedent's death. The Labor Law § 240 (1) violation and causation are thus established. Since plaintiff has established that the breach of the duty imposed by Labor Law § 240 (1) was a proximate cause in bringing about the accident and decedent's death (*see Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271-272 [1st Dept 1999]), decedent's failure to secure his safety harness would amount, at most, to contributory negligence, which is not a defense to a Labor Law

§ 240 (1) claim (*see Rocovich*, 78 NY2d at 513; *Zimmer*, 65 NY2d at 521. Since none of the affirmative defenses have any merit, plaintiff is entitled to partial summary judgment against the owners, contractors and their agents on the issue of liability pursuant to Labor Law § 240 (1).

There is no dispute that Briarwood is an owner and that Pav-Lak is a contractor for Labor Law § 240 (1) purposes. Those entities are thus vicariously liable for the violation without regard to fault (*Zimmer*, 65 NY2d at 521] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]). AGL asserts that it is not a defendant that is properly subject to absolute vicarious liability pursuant to the Labor Law because it is not an owner or general contractor. This argument, however, fails. Despite AGL's argument in the papers, its written agreement with Pav-Lak specifies that AGL is responsible for both the fabrication of and the installation of the steel beams for the structure of the new building. Thus, AGL had the authority to oversee the erection of the steel structure, which is the work that produced the subject accident. To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240 (1) or 241 (6), there must be a showing that it had the authority to supervise and control the work (*see Temperino v DRA, Inc.*, 75 AD3d 543, 544-545 [2d Dept 2010]; *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 669 [2d Dept 2008]; *Kehoe v Segal*, 272 AD2d 583, 584 [2d Dept 2000]). "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*Bakhtadze v Riddle*, 56 AD3d 589, 590 [1st Dept 2008] [internal quotation marks and citations omitted]). Where the owner or general contractor does in fact delegate the

duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). AGL had, in fact, the right to exercise supervision and control over the erection of the steel beams. The fact that it delegated that task to CRV[12] is of no moment. Thus, plaintiff has established as a matter of law that AGL had the authority to supervise and control the work and was the statutory agent of the general contractor, and is thus subject to vicarious absolute liability pursuant to Labor Law §§ 240 (1) and 241 (6) (*Van Blerkom v America Painting, LLC*, 120 AD3d 660, 662 [2d Dept 2014], citing *Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2d Dept 2010]; *Bakhtadze v Riddle*, 56 AD3d at 590).

Similarly, the record establishes that Cranes is not a statutory agent of the general contractor. Specifically, the record provides that Cranes was not responsible for anything but the lease of a crane and the provision of a crane operator, who was to work only under the supervision, direction and control of CRV's employees. It is thus apparent that the only Cranes employee present on the site was the crane operator, and he had no authority to exercise any supervision or control over the erection of the steel structure. Indeed, the record reflects that even the hoisting of the crane, although this was a task performed by the crane operator, who was Cranes' employee, he was directed and controlled by CRV's flagmen. This fact eliminates a finding of vicarious Labor Law liability with regard to Cranes (*see, e.g., Jaeger v Costanzi Crane Inc.,* 280 AD2d 743 [3d Dept 2001]). Finally, and most pertinently, there is nothing in the record that indicates that the subject Crane

[12]AGL's contention that it was "forced" to hire CRV is rejected as unsupported and irrelevant.

operator had any control or knowledge of the inadequate sling - the failure of which caused the subject accident - chosen and rigged by CRV employees. Further, there is nothing in the record that indicates that the crane operator could see that plaintiff's decedent was standing on the load from his position in the cab. The record thus proves that Cranes had no authority to supervise or control the subject work, and, despite the protestations of the opponents of Cranes' motion, it is clear that Cranes had no responsibility for the subject accident. The fact that Cranes supplied the crane operator is insufficient to support a finding of liability (*see Diamond v Reilly Homes Constr. Corp.,* 245 AD2d 763, 765, 665 NYS2d 464 [3d Dept 1997]). As Cranes is not, for Labor Law purposes, an owner, contractor or statutory agent thereof, Cranes is not properly subject to absolute vicarious liability under the Labor Law,[13] and plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed as against it (*see, e.g., Mahoney v Turner Constr. Co.* 37 AD3d 377 [1st Dept 2007] [crane company that merely leased crane and did not supervise operator is not subject to vicarious Labor Law liability]).

Lastly, plaintiff has demonstrated entitlement to partial summary judgment against Briarwood, Pav-Lak and AGL on the issue of their liability pursuant to Labor Law § 241 (6), at least as predicated on Industrial Code, 12 NYCRR 23-8.1 (f) (5) which states "Mobile cranes, tower cranes and derricks shall not hoist, lower, swing or travel while any person is located on the load or hook" (*see also Catarino v State*, 55 AD3d 467, 467 [1st Dept 2008]). The record establishes that decedent was on the load (the subject steel beam) when it was hoisted, and this led to the accident. Thus, the Industrial Code

[13]The argument that the subject crane operator was duty-bound to exercise independent judgment despite the instructions of the CRV flagmen is rejected.

provision was violated, and the violation proximately caused the accident. This Industrial Code provision is sufficiently specific to both support a Labor Law § 241 (6) cause of action and, when causation is established, support partial summary judgment in favor of an injured worker (*Id.*; *see also Valdez v Turner Constr. Co.*, 171 AD3d 836, 839-841 [2d Dept 2019]). Since Briarwood, Pav-Lak and AGL are an owner, contractor and agent thereof, respectively, they are thus liable for the Labor Law § 241 (6) violation without regard to fault. Whether the decedent was comparatively negligent remains an issue for trial (S*ee Quizhpi v S. Queens Boys & Girls Club, Inc.,* 166 AD3d 683 [2d Dept 2018], citing *Carlos Rodriguez v City of NY,* 31 NY3d 312 [2018]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 states, in applicable 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 protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto,* 91 NY2d at 352]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous

condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi,* 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo,* 260 AD2d at 433, quoting *Comes,* 82 NY2d at 877 and *Russin,* 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, the record establishes that decedent's accident and death was caused by the inadequate sling, chosen and rigged by decedent's CRV coworkers, which failed, snapped and caused the subject steel beam to fall. There is thus no indication that a premises condition was involved (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007] ["Where a plaintiff's injuries stem . . . from a dangerous [premises] condition, an owner [or its agent] may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and . . . created the dangerous condition . . . or had actual or constructive notice of the dangerous condition that caused the accident"]).

Accordingly, owners, contractors and their agents—such as Briarwood, Pav-Lak and AGL herein—are subject to liability only if they exercised actual control or supervision over the work (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2d Dept 2004], citing *Lombardi,* 80 NY2d at 295).

The record establishes that no defendant directed decedent's work; in fact, the record suggests that decedent received instructions only from CRV employees. Accordingly, plaintiff has no viable Labor Law § 200 or common-law negligence claims against defendants (*see, e.g., Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]). Moreover, "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence or under Labor Law § 200 (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the work site is insufficient to give rise to a question of fact as to the defendant's direction and control"]). Further, the accident occurred as a result of CRV's negligence, specifically, the negligence of its employees

when they selected and rigged a crane with a sling that was rated for maximum loads that were less than half the weight of the subject steel beam. Coupled with the fact that none of the defendants was involved in supervising or controlling decedent's work, the fact that the accident arose from the means, methods and equipment of CRV, decedent's employer and a subcontractor, plaintiff's Labor Law § 200 claims are unsustainable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008] [no Labor Law § 200 liability if accident arose from methods of plaintiff's employer and defendants exercise no supervisory control over the work], citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2d Dept 2006], *lv denied* 8 NY3d 807 [2007]). Plaintiff's Labor Law § 200 and common-law negligence claims must therefore be dismissed.

Indemnification and Breach of Contract

Briarwood, Pav-Lak and AGL are entitled to summary judgment against CRV with respect to common-law indemnification.[14] A party is entitled to summary judgment against another for common-law indemnification if it "prove[s] 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" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept

[14]The court notes that the Workers' Compensation Law ordinarily bars common-law indemnity against an injured worker's employer, such as CRV, but an exception exists for "grave" injuries, including death (Workers' Compensation Law § 11; *see also Ibarra v Equipment Control*, 268 AD2d 13, 17 [2d Dept 2000]).

2004]). In this regard, the Court of Appeals has explained and clarified that "[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision over the work (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011], citing *Felker v Corning, Inc.*, 90 NY2d 219, 226 [1997] and *Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]). Where the proposed indemnitee's liability is purely statutory and vicarious, summary judgment for common-law indemnification is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work site" (*Reilly v DiGiacomo & Son*, 261 AD2d 318 [1st Dept 1999].

Contrary to CRV's protestations, this court can properly find, as a matter of law, that the proposed indemnitees (Briarwood, Pav-Lak and AGL) were not themselves negligent, and that CRV was in fact the negligent party. The accident was the direct result of the failed sling, which was rated for loads less than half the weight of the subject beam. The sling was chosen and rigged exclusively by CRV's workers. No agent of Briarwood, Pav-Lak or AGL was involved. It is clear that only CRV was responsible for choosing and rigging the sling that failed, which is the act which led to decedent's death. Moreover, the record indicates that only CRV supervised, controlled and directed the work that led to the accident. Other than the inadequate sling and CRV's directions, no other dangerous condition, equipment or method was involved in the accident.[15] Therefore, the two criteria for common-law indemnification have been met: the record

[15]The court reiterates that CRV directed the crane operator, with CRV flagman.

establishes that Briarwood, Pav-Lak and AGL are not guilty of negligence (and are subject to statutory absolute vicarious liability), and that CRV committed a negligent act (*see, e.g., Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]). Briarwood, Pav-Lak and AGL are therefore entitled to summary judgment on their claims for common-law indemnification against CRV (*see, e.g., Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 947 [2d Dept 2019] [lower court should have granted motions of parties who were only statutorily vicariously liable against party that controlled plaintiff's work]).

With respect to the claims for contractual indemnification, Pav-Lak is entitled to summary judgment against AGL on that issue. "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]). Here, the record indicates that Pav-Lak and AGL executed a written trade agreement in which AGL agreed to indemnify Pav-Lak for all claims arising out of AGL's work. As stated above, steel beam erection is work within the scope of the subject agreement. Moreover, the record reflects that the agreement was in effect at all applicable times. Lastly, and again, as stated above, there is no evidence that Pav-Lak is attempting to have AGL indemnify it for its own negligence (*cf.* General Obligations Law § 5-322.1 [1]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997] [for party to be entitled to indemnification it must demonstrate that no negligent act or omission on its part contributed to accident and that its liability is therefore purely vicarious]). Hence,

Pav-Lak has demonstrated that it is entitled to a judgment of contractual indemnification against AGL.

Similarly, CRV executed a written indemnification agreement in favor of Pav-Lak (exhibit P to Pav-Lak's motion, last two pages) that covers the subject work, covers the instant claims, and is both enforceable and in full force and effect. Pursuant to the same reasoning as above, Pav-Lak is thus entitled to a judgment of contractual indemnification against CRV.

Also, Briarwood and Pav-Lak have demonstrated that they were not responsible for any negligent acts or omissions. They have also demonstrated that any applicable indemnity provisions were exclusively in their favor. Accordingly, any cross claims asserted by Cranes or AGL against Briarwood and Pav-Lak are without merit and must be dismissed.

The court will neither award AGL summary judgment against CRV on the issue of contractual indemnification, nor will it dismiss AGL's claims for such relief. The record reflects that a written agreement, including an indemnity provision, exists between the two parties. However, and as CRV points out, multiple typographical errors prevent this court from finding the parties' intent as a matter of law. Nevertheless, the existence of typographical errors and poorly-drafted language does not render the written agreement unenforceable. Instead, issues of fact exist, and thus the court denies both AGL's summary judgment motion and CRV's motion to dismiss on the issue of contractual indemnification.

Also, the court declines to award AGL summary judgment dismissing Pav-Lak's breach of the covenant to procure insurance cross claim. AGL asserts that it complied with this covenant, but there does not appear to be in the record any proof of insurance obtained by AGL that covers Pav-Lak. The court does award AGL summary judgment dismissing CRV's claim for breach of the covenant to procure insurance, as AGL has demonstrated, with a copy of an applicable certificate of insurance, that CRV was insured at all relevant times.

Similarly, the court will neither award Cranes summary judgment on the issue of contractual indemnification against CRV nor grant CRV's motion to dismiss Cranes' third-party claims. It is undisputed that an extensive business relationship existed between these two entities, and it is also undisputed that, at all relevant times, representatives of CRV and Cranes would execute a daily crane rental and operation written agreement (which contains an indemnity clause). Given that the record reflects the extensive relationship between these parties, and that the terms of virtually identical written agreements are not in dispute, the fact that the particular written agreement for the date of the accident is not part of the record is not fatal to Cranes' contractual indemnification claims. However, given that Cranes cannot produce the subject written agreement, it has not demonstrated prima facie entitlement to judgment as a matter of law on this issue. In short, factual issues exist as to the contractual relationship between

Cranes and CRV, and both motions are denied regarding this dispute.[16]

Accordingly, for the foregoing reasons,[17] it is

ORDERED that the motion of Briarwood MP LLC and Pav-Lak Contracting Inc., mot. seq. 16, is granted solely to the extent that 1) plaintiff's claims based on Labor Law § 200 and common-law negligence are dismissed; and 2) Briarwood MP LLC and Pav-Lak Contracting Inc. are awarded a judgment of common-law indemnification against CRV Precast Construction, LLC; and 3) Pav-Lak Contracting Inc. is awarded a judgment of contractual indemnification against AGL Industries, Inc.; and 4) all cross claims asserted by Cranes Express, Inc. and AGL Industries against Briarwood MP LLC and Pav-Lak Contracting Inc. are dismissed, and is otherwise denied; and it is further

ORDERED that the motion of CRV Precast Construction, LLC, mot. seq. 17, is denied in its entirety; and it is further

ORDERED that the motion of plaintiff, mot. seq. 18, is granted solely to the extent that plaintiff is awarded partial summary judgment on the issue of liability

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[16]However, Cranes has demonstrated that all other cross claims must be dismissed as asserted against it. The record establishes that Cranes was not actually negligent nor a party to a contract with any company other than CRV.

[17]This court reaches its decisions without reference to the opinions of the purported experts submitted by the parties. The opinions are largely conclusions of law, which are not the province of experts. Also, the court did not consider the video recordings submitted by the parties. Indeed, considering video evidence seems improper in light of the fact that the recordings cannot (at present) be uploaded to the court's electronic filing system and are thus outside of the record.

pursuant to Labor Law §§ 240 (1) and 241 (6) against Briarwood MP LLC, Pav-Lak Contracting Inc. and AGL Industries, Inc., and is otherwise denied; and it is further

ORDERED that the motion of AGL Industries, Inc., mot. seq. 19, is granted solely to the extent that 1) plaintiff's claims based on Labor Law § 200 and common-law negligence are dismissed; and 2) AGL Industries, Inc. is awarded a judgment of common-law indemnification against CRV Precast Construction, LLC; and 3) the indemnification and breach of contract claims allegedly asserted by CRV Precast Construction, LLC against AGL Industries, Inc. are dismissed, and is otherwise denied; and it is further

ORDERED that the motion of Cranes Express, Inc., mot. seq. 20, is granted to the extent that all claims asserted against it are dismissed.

IT IS FURTHER ORDERED, that any dispute as to the amount of the attorneys' fees and costs which any party granted indemnification pursuant to this decision and order claims to be entitled to, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and costs to be awarded to such party.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R :

Hon. Debra Silber, J.S.C.