To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

MANUEL MAINATO,

Plaintiff,

- against -

FRANZOSA CONTRACTING INC., JEFFREY GUZMAN and MARGARET GUZMAN,

Defendants.

----------X

FRANZOSO CONTRACTING INC. i/s/h/ as FRANZOSA CONTRACTING INC.,

Third-Party Plaintiff,

- against -

MEP GENERAL CONTRACTOR CORP.,

Third-Party Defendant.

----------X

INDEX NO. 68779/2016

DECISION/ORDER

Mot. Seq. 1
Submit Date: 4/08/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF as submitted in connection with the motion of defendant/third-party plaintiff FRANZOSO CONTRACTING INC. i/s/h/ as FRANZOSA CONTRACTING INC. (hereinafter "Franzoso") (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment to dismiss plaintiff MANUEL MAINATO's complaint; and granting summary judgment on Franzoso's claims for common-law indemnification, contractual indemnification, breach of contract, and reimbursement of counsel fees as against third-party defendant MEP GENERAL CONTRACTOR CORP.

Plaintiff, a roofer employed since 2012 by third-party defendant MEP General Contractor Corp. (hereinafter referred to as MEP), fell from the roof of a two-story house while he was performing certain construction work on October 14, 2016. The homeowners are Jeffrey Guzman and Margaret Guzman (hereinafter the Guzmans). Prior to the accident in question,

the Guzmans contracted with Franzoso)[1] for Franzoso to remove and replace the roofing system of the Guzmans' home. As the general contractor, Franzoso retained MEP, the subcontractor, to complete the roof removal and replacement. The accident occurred on the second day of work on the construction project.

In December 2016, plaintiff commenced this action against Franzoso and the Guzmans,[2] alleging causes of action to recover damages for personal injuries allegedly sustained due to common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). After joinder of issue, Franzoso commenced a third-party action against MEP seeking, among other things, indemnification. Following discovery, Franzoso now moves for summary judgment dismissing the complaint and on its third-party claims against MEP for common-law indemnification, contractual indemnification, reimbursement of counsel fees, and breach of contract. Plaintiff opposes the motion. Though it answered raising three affirmative defenses, MEP has not filed opposition to this motion.

On a summary judgment motion, a court must determine whether there are issues of fact that militate against granting summary relief. "It is not the court's function on a motion for summary judgment to assess [issues of] credibility" (*Chimbo v Bolivar*, 142 AD3d 944, 945 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014]), nor to "engage in the weighing of evidence" (*Chimbo v Bolivar*, 142 AD3d at 945; *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Bykov v Brody*, 150 AD3d 808, 809 [2d Dept 2017]; *accord Kahan v Spira*, 88 AD3d 964, 966 [2d Dept 2011]). Thus, "summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]). Under this standard, the court will address each branch of Franzoso's motion.

I. PLAINTIFF'S CLAIM UNDER LABOR LAW § 240 (1)

Turning first to plaintiff's claim under Labor Law § 240 (1), Franzoso's main contention in this regard is that plaintiff was a recalcitrant worker whose failure to use the safety equipment available consisting of a harness and rope supplied by his employer MEP, which he knew was available for use by him, was the sole proximate cause of the accident. Plaintiff counters that questions of fact exist inasmuch as a rope was unavailable for his use as an attachment point at the time of his accident since the rope had been left coiled and stored on the roof, along with the harness which, according to plaintiff, was MEP's accepted company custom and practice. Plaintiff claims that his purported failure to bring down his harness from the roof on the day prior to the accident, or to obtain a separate harness, was inconsequential because a harness alone would not have prevented his fall from the roof.

---

[1] The general contractor Franzoso was incorrectly sued herein as "Franzosa Contracting Inc."

[2] By stipulation filed in February 2018, plaintiff discontinued this action with prejudice as against the Guzmans.

Labor Law § 240 (1) imposes absolute liability upon general contractors when the failure to provide or erect safety devices to protect a worker from an elevation-related risk or hazard constitutes the proximate cause of the worker's injuries (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 338 [2008]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]). The principal objective of this statute is to prevent a worker from falling from an elevated height differential by providing the worker with protective devices (i.e., safety lines, harnesses, rope grabs or netting) that prevent such falls (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). "Contributory negligence on the part of the worker is not a defense to a Labor Law § 240 (1) cause of action" (*Salinas v 64 Jefferson Apts., LLC*, 170 AD3d 1216, 1222 [2d Dept 2019]; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]).

To establish the recalcitrant worker defense, the contractor must demonstrate that a worker deliberately refused to employ safety devices available, visible, and in place at the work site; and that such was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Gordon v Eastern Ry. Supply*, 82 NY2d at 562-563). The defense applies "where the plaintiff, acting as a recalcitrant worker, misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available" (*Salinas v 64 Jefferson Apts., LLC*, 170 AD3d at 1222 [internal quotation marks omitted]).

Franzoso asserts the recalcitrant worker defense inasmuch as plaintiff failed to use a harness on the second day at the work site, which was readily available to him and he should have used it. Franzoso claims that since there was no harness on the roof, plaintiff knew he should have first obtained a harness from MEP's work vehicle and use one of three ropes connected to the roof as an attachment point, and that he failed to do so, thus resulting in the accident.

In contrast, plaintiff maintains that using a harness would not have prevented the fall since there was no rope available to attach to a harness, as it was MEP's customary practice at work sites to leave harnesses and ropes on the roof near the chimney so that the ropes would not hang over the windows of a house.

Franzoso counters that there was no harness left on the roof the day preceding the accident; thus, the use of a rope by plaintiff without a harness would have been a misuse of safety equipment. Franzoso submits several photographs of the roof on the first workday of the project and hours after the accident taken by Jacob Amacher, Franzoso's project manager, asserting that one of the ropes connected on the roof was accessible to plaintiff from the ground level.

Plaintiff testified he worked on approximately 40 roofing jobs during his tenure at MEP wherein he utilized a harness that was tied off. At his deposition, he stated that on the first day of the construction project, he was instructed by Benjamin Pomavilla, the MEP crew chief of the project,[3] to place three hooks on the roof to connect to plaintiff's harness while

[3] Pomavilla indicated in his deposition that MEP is owned by his brother, Manuel Pomavilla.

on the roof. Plaintiff stated that after concluding work on the first day of the project, he and other MEP workers left the ropes attached to the hooks on the roof, folded up near the chimney so that the ropes would not hang over the windows of the house. Plaintiff explained that he left his disconnected harness on the roof behind the chimney so that the wind would not blow the harness down, which was in accordance with normal company practice.

Plaintiff testified that the next day, he, Pomavilla, and another worker arrived at the work site shortly after 8 a.m. He was tasked with bringing new shingles up to the roof using a power ladder. The shingles were stacked in the driveway near the house, and there were no materials on the roof at that time. There was an extension ladder used to access the roof which was set up on the same side of the house as the power ladder when the accident occurred. On the morning of the accident, Pomavilla directed him to go up to the roof and set up the shingles that were lifted from the ground to the roof. Plaintiff explained he climbed up using the ladder to retrieve his harness and rope where he had left them the day before. He was not wearing a harness when he climbed the ladder. Pomavilla and another worker remained on the ground level near the ladder. As plaintiff stepped from the ladder onto the roof, his left leg suddenly slipped, and he fell to the ground, thus causing his injuries.[4]

Pomavilla testified it was customary practice for all MEP workers to hook the rope into their harnesses while they were on the roof; that when he and plaintiff concluded work on the first day, they put their harnesses in a "bucket . . . on the floor next to the material." The next morning, they drove to the work site. Plaintiff was a passenger in the backseat of the vehicle, and Pomavilla states that he told plaintiff to "use the harnesses and the ropes because it had rained the previous night." Pomavilla testified that when they arrived at the work site the next day, their harnesses were still "in the bucket," and "not in the truck" in reference to MEP's work vehicle. Pomavilla testified that he instructed plaintiff to put his harness on. However, the location of the harness which plaintiff was to use is in dispute — whether it was on the roof, in a bucket on the ground floor, or in MEP's work vehicle.

The record on this motion presents issues of fact with respect to plaintiff's claim under Labor Law § 240 (1). At his deposition, plaintiff testified that he was going up the ladder "to

---

[4] Franzoso argues in reply that plaintiff's affidavit submitted in opposition is inadmissible because it was translated by his counsel from Spanish to English and counsel is not a qualified professional translator for purposes of CPLR 2102 (b) despite counsel's Hispanic background. The court notes that plaintiff's affidavit is not in a "foreign language," is typewritten entirely in English, and no English-translated document was submitted (*see generally* CPLR 2101 [b]). Although counsel states he is a "qualified translator and competent to act as an interpreter," plaintiff's affidavit is inadmissible inasmuch as counsel's submission is self-serving and he cannot be deemed an independent professional translator for purposes of this case despite his perceived qualifications (*see Raza v Gunik*, 129 AD3d 700, 700 [2d Dept 2015]). *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008]; *Matter of S.A.B.G.*, 47 Misc 3d 812, 814 [Fam Ct, Nassau County 2015]; *cf. Saavedra v 64 Annfield Ct. Corp.*, 137 AD3d 771, 772 [2d Dept 2016]; *see also Natl. Puerto Rican Day Parade, Inc. v Casa Publs., Inc.*, 79 AD3d 592, 594 [1st Dept 2010]). In any event, the inadmissibility of plaintiff's affidavit does not affect the court's determination on this motion due to the parties' other submissions, including plaintiff's deposition testimony.

get the rope and the harness" and that MEP's normal practice was to "always" leave them on the roof. Although he acknowledged that there were other harnesses in MEP's work vehicle,[5] when the crew arrived at the work site on the second day, plaintiff maintained "mine was up" on the roof, having been left there the day before.

The court finds, based upon the parties' submissions, that there is a triable issue of fact as to whether plaintiff knew he was expected to use a different harness located in MEP's work vehicle, notwithstanding his assertion that it was the custom and practice of a MEP worker to leave one's harness on the roof at the work site, when the work for that day concluded (*cf. Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1168 [2020]). Where, as here, a contractor fails to provide a necessary safety device, "liability is mandated by [Labor Law § 240 (1)] without regard to external considerations such as custom or usage" (*Hamilton v Kushnir Realty Co.*, 51 AD3d 864, 865 [2d Dept 2008], *lv denied* 15 NY3d 705 [2010]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]). In short, plaintiff is asserting that his conduct was not recalcitrant because he was adhering to his employer's direction, pointing to MEP's customary practice that a worker would leave the harness on the roof (*cf. Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d at 1168).

In addition, plaintiff urges that based on MEP's company custom and practice, there was no rope available for him to use as an attachment point at the time of the accident since it had been left coiled and stored on the roof on the previous day. He disputes the photographs taken by Amacher accurately depict the position of the rope on the morning of the accident as he climbed the ladder. There is an issue of fact as to whether plaintiff was recalcitrant in failing to obtain a proper safety device before ascending to the roof, or whether he failed to follow Pomavilla's instructions and deliberately refused to use a safety harness that was readily available (*cf. Garzon v Viola*, 124 AD3d 715, 716 [2d Dept 2015]).

Even if plaintiff was at fault for not retrieving a harness and using a rope connected to the roof as an attachment point to the harness, a worker's comparative negligence is not a defense to a claim predicated on Labor Law § 240 (1) (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Garzon v Viola*, 124 AD3d at 716-717; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 638-639 [2d Dept 2005]). Given the conflicting evidence here, a factfinder must determine whether plaintiff's neglect to retrieve a harness "establishes that he knew he was expected to use the safety device[]" (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d at 1168). As such, there is a triable issue of fact as to the application of the recalcitrant worker defense, due to the inconsistencies in this record as to which party was responsible for the proximate cause of plaintiff's injuries (*see Podbielski v KMO-361 Realty Assoc.*, 294 AD2d 552, 554 [2d Dept 2002], *lv denied* 98 NY2d 613 [2002]; *Job v 1133 Bldg. Corp.*, 251 AD2d 459, 460 [2d Dept 1998]). Thus, that branch of Franzoso's motion seeking summary judgment to dismiss the cause of action alleging violation of Labor Law § 240 (1) is denied.

[5] Pomvilla testified that the vehicle driven to the work site on the day of the accident was actually owned by "LPG General Contractor," a separate company owned by his brother Pablo Pomavilla.

II. PLAINTIFF'S CLAIM UNDER LABOR LAW § 241 (6)

Franzoso argues that plaintiff's claim under Labor Law § 241 (6) must fail because, according to Franzoso's expert, the accident was not proximately caused by a violation of any alleged Industrial Code regulation. Plaintiff, in opposition, relies on his expert's affidavit and Industrial Code (12 NYCRR) § 23-1.16 (b) — titled "attachment required" — pertaining to safety belts, harnesses, tail lines, and lifelines, contending that his claim made pursuant to this section has been sufficiently demonstrated.

"Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*King v Villette*, 155 AD3d 619, 622-623 [2d Dept 2017]; *see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). To maintain a viable claim under that statute, a plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505). Labor Law § 241 (6) "give[s] rise to a nondelegable duty, while the [Industrial Code do[es] not" (*id.*)

Although he alleges multiple violations of the Industrial Code in the complaint, plaintiff fails to address nearly all of them in his opposition papers, with the sole exception of 12 NYCRR 23-1.16 (b). Hence, plaintiff's claims with respect to the remaining alleged Industrial Code violations are deemed abandoned (*see Harsch v City of New York*, 78 AD3d 781, 783 [2d Dept 2010]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n 1 [3d Dept 2003]; *see also Deangelis v Franklin Plaza Apts., Inc.*, 59 Misc 3d 1227[A], *10 [Sup Ct, Kings County 2018]). Thus, Franzoso is entitled to summary judgment dismissing those claims under Labor Law § 241 (6) that were not addressed in plaintiff's opposition (*see generally Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]).

As for the remaining violation, namely 12 NYCRR 23-1.16 (b), Franzoso submits an expert affidavit of Michael Tracy, a professional engineer employed with CED Technologies, who opines that Labor Law § 241 (6) was not violated in connection with plaintiff's accident. In so concluding, he asserts that plaintiff "slipped but never identified anything that caused him to slip on the roof." Tracy states plaintiff failed to utilize available safety equipment that he was instructed and knew how to use, thereby resulting in plaintiff's fall. He explains that 12 NYCRR 23-1.16 (b) requires mandatory use of an attached safety belt or harness; that plaintiff was provided with appropriate equipment; and that plaintiff used it on the first day of work as shown by photographs. Tracy states that despite a harness being available at the ground level on the second day of work, plaintiff elected not to use one inasmuch as he "did not tie off because he failed to abide by [Pomavilla's] instructions to wear a harness before going to the roof"; and, so, plaintiff made a unilateral choice not to use a harness when he was injured. Thus, Tracy concludes that plaintiff's accident occurred because he did not follow directions of a crew chief at the work site and plaintiff was aware "he needed to wear a harness and tie off to one of the three available lifelines" when working on the roof.

In contrast, plaintiff submits an expert affidavit of Daniel Burdett, a licensed professional engineer in the state since 1965. Burdett opines with a reasonable degree of engineering certainty that Franzoso failed to demonstrate compliance with NYCRR 23-1.16 (b). Citing to that subsection of the Industrial Code, Burdett states that there is "no proof" in the record that "the harness and lifeline attachments provided to [plaintiff] were 'so arranged that if the user should fall such fall shall not exceed five feet'" (NYCRR 23-1.16 [b]). Based on discrepancies in the record, Burdett disputes Tracey's conclusion that NYCRR 23-1.16 (b) was not violated simply because plaintiff "was provided with appropriate equipment." Rather, Burdett believes this alone is "merely speculative" and, thus, sufficient to sustain plaintiff's claim under Labor Law § 241 (6).

The court finds that plaintiff has sufficiently alleged a violation of 12 NYCRR 23-1.16, which requires, in relevant part, that safety belts and harnesses be properly attached to a tail line or lifeline so that "if the user should fall such fall shall not exceed five feet" (12 NYCRR 23-1.16 [b]). That provision of the Industrial Code is sufficiently "specific enough to support a cause of action under Labor Law § 241 (6)" (*King v Villette*, 155 AD3d at 623; *see Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404-405 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017]; *Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 902 [3d Dept 1999]). There is no dispute that the maintenance work being performed on the Guzmans' roof was in the context of construction as is required by Labor Law § 241 (6). 12 NYCRR 23-1.16, which codifies the standards for safety belts or harnesses, is applicable here because the record evinces that plaintiff was provided with a safety harness and rope on the first day of the work project (*compare e.g. Clavijo v Universal Baptist Church*, 76 AD3d 990, 991 [2d Dept 2010]). Though plaintiff was provided with the necessary safety devices on the initial day of work, there are questions of fact as to whether a harness was left on the roof after he concluded work the first day, and the actual location of the rope to tie off the harness when the accident occurred (*see Anderson v MSG Holdings, L.P.*, 146 AD3d at 405). Plaintiff's opposition papers identified this as an alleged violation of 12 NYCRR 23-1.16 (b), a discrete specification and requirement of the Industrial Code (*see Pasquarello v Citicorp/Quotron*, 251 AD2d 477, 477 [2d Dept 1998]). The conclusory opinion of Franzoso's expert that plaintiff disregarded Pomavilla's instruction to wear a harness at the time of the accident is based upon pure speculation (*cf*. *O'Donnell v Buffalo-DS Assoc., LLC*, 67 AD3d 1421, 1423 [4th Dept 2009], *lv dismissed* 14 NY3d 882 [2010]; *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007]). Because there are conflicting expert opinions concerning this issue, Franzoso did not demonstrate its prima facie entitlement to summary judgment dismissing plaintiff's claim to the extent the complaint relied on an alleged violation of 12 NYCRR 23-1.16 (*see Giordano v Forest City Ratner Cos.*, 43 AD3d 1106, 1108 [2d Dept 2007]). Given the disputed facts, Franzoso failed to establish, as a matter of law, that the cited code violation was not a proximate cause of the accident (*see King v Villette*, 155 AD3d at 623). Therefore, the court denies that branch of Franzoso's motion which is for summary judgment dismissing so much of the cause of action alleging a claim of Labor Law § 241 (6) as is predicated on a violation of 12 NYCRR 23-1.16.

III. PLAINTIFF'S CLAIMS FOR NEGLIGENCE AND VIOLATION OF LABOR LAW § 200

Turning to plaintiff's claims for negligence and Labor Law § 200, Franzoso argues that Amacher, its employee, assigned the entirety of the project to MEP pursuant to the subcontract; Amacher had no authority to stop the work; Amacher did not provide directions to the MEP employees regarding the means and methods of work; and Amacher's conduct on the roof on the day prior to the accident in not tying off, or using, a harness is immaterial to plaintiff's failure to follow Pomavilla's directions.

In opposition, plaintiff avers Franzoso exercised some control over the work in connection with the roof project in that Amacher was present at the work site the day before the accident when the fall arrest protection was configured and approved by him; that Amacher had a general supervisory role in that he "set up" the subcontractors for their work and oversaw their jobs, including MEP; and Fransozo would supply safety equipment should MEP require any.

"Labor Law § 200 is a codification of the common-law duty of . . . [a general] contractor to provide workers with a reasonably safe place to work. Where a cause of action arises out of the means and methods of the work, a defendant may be held liable for common-law negligence or a violation of Labor Law § 200 only if [it] had the authority to supervise or control the performance of the work. A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed. When a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use, in moving for summary judgment[,] that defendant must establish that it neither created the alleged danger or defect in the instrumentality[,] nor had actual or constructive notice of the dangerous or defective condition" (*Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138 [2d Dept 2016] [internal quotation marks and citations omitted).

Here, at the time of the accident, Amacher was employed with Franzoso for 26 years and had served as a project manager for six of those years. He testified that his duties and responsibilities, included, among other things, to get subcontractors "set for their jobs" and he had general oversight of the underlying project. Amacher was acquainted with plaintiff having worked on various roof jobs since plaintiff's employment with MEP. Amacher testified that when Pomavilla visited Franzoso's office on the morning of the day preceding the accident, the only materials Pomavilla took for the work project were "nails, buttons, drip edge, pipe boots," but not ladders, harnesses, ropes, or lanyards. Amacher testified that he went to the work site later that morning and was there for "approximately an hour." Amacher stated that he spoke only to Pomavilla when visiting the work site and asked whether anything was needed for working on the project. Amacher stressed that he did not instruct Pomavilla whatsoever as to how the work had to be performed, nor did he provide any directions to the MEP employees, including plaintiff. Amacher added that while he was at the work site on the first day, he photographed the "roof sheathing and decking" with his cellphone (an iPhone 6) to document the condition of the roof for the client. Amacher testified that MEP used their own ladders, harnesses, ropes, or cables "the entire time" and conceded that Franzoso would supply to MEP a safety harness, lanyard, or ladder to MEP "only if they

need it." Amacher emphasized that Fransozo did *not* supply MEP any safety equipment in connection with the underlying project. Critically, plaintiff did not rebut Amacher's testimony in this regard.

Contrary to plaintiff's contention, Fransozo established its entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action. For recovery under Labor Law § 200, plaintiff must demonstrate that the general contractor exercised some degree of supervisory control over the work (*see Lawyer v Rotterdam Ventures*, 204 AD2d 878, 881 [3d Dept 1994], *lv dismissed* 84 NY2d 864 [1994]). Here, there is no record evidence demonstrating that Fransozo exercised supervision and control of the means and methods of the Guzmans' roof replacement; that Amacher instructed MEP employees in any manner; or, as plaintiff claims in opposition, Amacher approved or set up the fall arrest equipment. Plaintiff's accident did not involve any dangerous or defective condition caused by Fransozo. Rather, the accident involved the manner in which plaintiff was beginning to perform work on the second day of the project when Amacher was not present, at a time when plaintiff was supervised by MEP crew chief Pomvilla, and which involved safety equipment or lack thereof supplied by MEP, not by Fransozo. Moreover, there is nothing in the record to suggest that Amacher either had the authority to control the manner or method by which plaintiff performed his work or provided any safety equipment for the project. Accordingly, plaintiff did not raise a triable issue of fact as to Fransozo's level of control in the underlying project and, thus, failed to satisfy the requisite elements of Labor Law § 200 (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Ortega v Puccia*, 57 AD3d 54, 63 [2d Dept 2008]; *Marvin v Korean Air*, 2 AD3d 223, 224 [1st Dept 2003], *affd* 4 NY3d 399 [2005]). Thus, Franzoso is entitled to summary judgment dismissing the claim under Labor Law § 200. Likewise, the court also finds that Franzoso is also entitled to summary judgment dismissing plaintiff's claim based on common-law negligence (*see Lombardi v Stout*, 80 NY2d at 295; *Ortega v Puccia*, 57 AD3d at 63).

IV. FRANZOSO'S THIRD-PARTY CLAIMS AGAINST MEP

Lastly, the court grants that branch of Franzoso's motion against MEP seeking summary judgment summary judgment on its claims for common-law indemnification, contractual indemnification, breach of contract, and reimbursement of counsel fees. Though it answered, MEP failed to oppose the instant motion. Franzoso claims that MEP, as plaintiff's employer, controlled and supervised his work; supplied plaintiff with the necessary safety equipment to perform the work; and that plaintiff's accident occurred in connection therewith. Importantly, Franzoso and MEP entered into an "insurance and indemnification agreement" in 2015, which, as relevant here, provides indemnification for "any and all claims, suits, damages, liabilities, professional fees, including attorney's fees . . . related to . . . personal injuries . . . arising out of or in connection with or as a consequence of the performance of [MEP's] work." Accordingly, Franzoso's motion for summary judgment as to its third-party claims against MEP is granted without opposition (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]; *Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691 [2006]; *see also Rizo v 165 Eileen Way, LLC*, 169 AD3d 943, 947 [2d Dept 2019]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendant, third-party plaintiff FRANZOSO CONTRACTING INC. i/s/h/ as FRANZOSA CONTRACTING INC. ("Franzoso") (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting summary judgment to dismiss plaintiff MANUEL MAINATO's complaint is granted in part and denied in part, as further set forth in this order; and it is further

ORDERED that the branch of Franzoso's motion for summary judgment dismissing plaintiff's cause of action under Labor Law § 240 (1) is denied; and it is further

ORDERED that the branch of Franzoso's motion for summary judgment dismissing plaintiff's cause of action under Labor Law § 241 (6) is granted except as to that part of the cause of action predicated upon a violation of 12 NYCRR 23-1.16; and it is further

ORDERED that the branch of Franzoso's motion for summary judgment dismissing plaintiff's causes of action for Labor Law § 200 and common-law negligence is granted; and it is further

ORDERED that branch of Franzoso's motion, made pursuant to CPLR 3212, for an order granting summary judgment on its claims for common-law indemnification, contractual indemnification, breach of contract, and reimbursement of counsel fees as against third-party defendant MEP GENERAL CONTRACTOR CORP is granted, without opposition; and it is further

ORDERED that defendants JEFFREY GUZMAN and MARGARET GUZMAN shall be removed from the caption to reflect the stipulation of discontinuance with prejudice filed on February 22, 2018 (NYSCEF Doc No. 26); and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court on a date and time to be set hereafter by said Part.

The foregoing constitutes the decision and order of the court.

Dated: June 10, 2020
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker, J.S.C.

HON. LAWRENCE H. ECKER, J.S.C.
June 10, 2020, 11:20 a.m.

APPEARANCES: Parties appearing via NYSCEF.