Domanski v Sun Moon NY LLC
2021 NY Slip Op 30677(U)
February 25, 2021
Supreme Court, Kings County
Docket Number: 508583/17
Judge: Peter J. Sweeney

At an IAS Term, Part 73 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of February 2021.

P R E S E N T:

HON. PETER J. SWEENEY,

Justice.

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DOMINIK DOMANSKI,

Plaintiff,

- against -

Index No. 508583/17

SUN MOON NY LLC, CAVA CONSTRUCTION & DEVELOPMENT, INC., AND AGL INDUSTRIES, INC.,

Motion Seq. Nos. 13-17

Defendants.

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AGL INDUSTRIES, INC.,

Third-Party Plaintiff,

- against -

SKYLINE SCAFFOLDING GROUP, INC., D/B/A SKYLINE SCAFFOLDING, INC., AND M&A PROJECTS, INC.,

Third-Party Defendants.

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SUN MOON NY LLC, CAVA CONSTRUCTION & DEVELOPMENT, INC.,

Second Third-Party Plaintiffs,

- against -

AGL INDUSTRIES, INC., SKYLINE SCAFFOLDING GROUP, INC., D/B/A SKYLINE SCAFFOLDING, INC., AND M&A PROJECTS, INC.,

Second Third-Party Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 281-308, 309-340, 342-356, 357-395, 397-399. 401-447, 449-460, 464-472, 473-509, the motions and cross-motions are decided as follows:

Plaintiff Dominik Domanski (plaintiff) moves (in motion sequence no. 13) for an order, pursuant to CPLR 3212, (1) granting partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants/second third-party plaintiffs Sun Moon NY LLC (Sun Moon), Cava Construction & Development, Inc. (Cava), and defendant/third-party plaintiff/second third-party defendant AGL Industries, Inc. (AGL),. Third-party defendant/second third-party defendant Skyline Scaffolding Group, Inc. d/b/a Skyline Scaffolding, Inc. (Skyline) moves (in motion sequence no. 14), pursuant to CPLR 3212, for a conditional order of summary judgment on its common-law indemnification claim over and against AGL, as well as summary judgment dismissing AGL's third-party complaint and Sun Moon and Cava's second third-party complaint, as well as any and all crossclaims, as asserted against it. Third-party defendant/second third-party defendant M&A Projects, Inc., (M&A) moves (in motion sequence no. 15) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party and second third-party complaints and any and all crossclaims as against it, as well as dismissing plaintiff's complaint. AGL moves (in motion sequence no. 16) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint

and all crossclaims as asserted against it. Sun Moon and Cava move (in motion sequence no. 17) for an order, pursuant to CPLR 3212, (1) granting summary judgment dismissing plaintiff's Labor Law §§ 200, 241 (6) and common-law negligence claims; (2) granting summary judgment on their common-law indemnity and contractual indemnity claims against AGL, Skyline and M&A; and (3) granting summary judgment on their breach of contract to procure insurance claims against AGL and M&A.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff on April 7, 2017, while performing work at premises located at 100 Greenwich Street in New York City. Sun Moon is the owner of the premises, which was undergoing the construction of a 26-story hotel building. At some point prior to the date of the accident, Sun Moon hired Cava to perform work as the construction manager/general contractor for the construction project. Cava subsequently retained various subcontractors to perform work on the project including, but not limited to, AGL, a steel subcontractor, Skyline, a scaffolding company, and M&A, a masonry subcontractor. Skyline furnished and erected the sidewalk bridge/shed that was involved in the plaintiff's accident.

Plaintiff's Deposition Testimony

During his deposition, the plaintiff testified that he was employed by M&A as a foreman. He was in charge of work on the project involving the installation of outside metal panels and stucco on the exterior of the building. While working on the project,

plaintiff received instructions regarding work that needed to be done from his M&A project manager/direct supervisor, Piotr Paczynski. As the foreman, plaintiff attended various meetings with Cava's building manager and safety manager during which they discussed the status of the project and the work each trade was performing onsite. Just before the accident occurred, plaintiff was in the process of setting up lines (using steel rope) that were used as markers for the stonework installation. In order to perform this task, plaintiff had to walk onto the platform of a sidewalk bridge to get to the location where he was placing the markers. Plaintiff described the sidewalk bridge as extending along the entire width of the front of the building and extending from inside the building up to the sidewalk curb. The sidewalk bridge was supported by steel pillars and beams. The surface of the bridge's platform consisted of wooden planks with metal sheets underneath and was located more than 12 feet above the ground level. On the day of the accident, and following his lunch break, the plaintiff proceeded onto the bridge's platform. He then lowered the first steel rope as a marker and turned to his left to walk towards the second pillar where he was planning to lower the next rope. The area where the plaintiff walked was approximately four to five feet away from the edge of the sidewalk bridge situated outside the building and closer towards the street. When the plaintiff took three to four steps towards the second pillar, one of the planks on the bridge's platform broke causing him to fall 12 feet down to the ground, whereupon he struck the support leg of a crane that had been previously placed under the bridge. Plaintiff ultimately landed on the concrete surface that was part of the building's ground

floor. Although the plaintiff kept a safety harness at the site, he was not wearing one while he worked on the sidewalk bridge. He further testified that even if he had worn a harness, there was no place on the bridge to which he could have tied off. Plaintiff additionally testified that prior to the accident, he had accessed the sidewalk bridge platform a few times without any problems, and that he never experienced any difficulty walking on it.

Cava - Raymond Luglio's Deposition Testimony

Raymond Luglio testified at a deposition on behalf of Cava. Luglio testified that he is employed as a general superintendent at Omnibuild, a general contractor, which was formerly known as Cava Construction. At the time of the accident, Luglio was a Cava superintendent in charge of multiple projects, including the subject project at 100 Greenwich Street. He was at the site on a daily basis and his duties included coordinating the various trades' work at the site and ensuring that the quality of work was properly done in accordance with the intended scope of work and drawings. During his walkthroughs of the building, Luglio oversaw quality control, scheduled/coordinated where the trades' work was taking place, and checked the progress of the work. Cava also had safety managers assigned to the project responsible for the workers' overall safety. Luglio had the authority to stop any unsafe work he observed at the site. In addition, Luglio testified that a sidewalk bridge had been erected at the site early on in the project, and that the installer (Skyline) did not remain on the premises after its installation. According to Luglio, the workers at the site were permitted to walk on the bridge's

platform while performing their job duties. He further testified that M&A was hired to perform the waterproofing, roofing and exterior stone and stucco work at the site, and that AGL was hired to install a steel canopy at the entrance to the building. Luglio had no independent recollection of when AGL performed its work, but when he was shown a Cava Daily Field Construction Report, dated April 7, 2017, the date of the accident, he testified that the report indicated that AGL had workers on site working on the canopy beam at the north entry way of the hotel, on the same side of the building where plaintiff's accident occurred.

Cava - Robert Filippone's ***Deposition Testimony***

Robert Filippone also testified on behalf of Cava. Filippone was Cava's site safety manager at the time of the accident. He described his duties at the site as making sure the building was in compliance with the New York City Department of Buildings safety standards. Filippone testified that on the morning of the accident, approximately three to four AGL employees met with him for job site orientation and advised him that they would be installing a steel beam on the east side of the building. The steel beam was to be in the front of the sidewalk bridge between two columns. He did not see any work performed by AGL, but claimed he observed them setting up their materials beforehand including a scaffold. Filippone further testified that he was also aware that M&A was performing stonework on the front of the building in the same area. He did not witness the plaintiff's accident but heard over his radio that the plaintiff had fallen. At that point, Filippone rushed over to the accident location and claimed that he noticed that a wooden

plank that was holding a piece of the sidewalk bridge's steel decking, i.e., "Q deck" (a thin metal plate that was used as an under layer for the sidewalk bridge platform) had been removed. A portion of the Q deck was bent down and had separated from the rest of the metal. Although Filippone did not witness AGL remove the planking, he believed AGL's workers removed it because they told him earlier that morning that they were going to be installing a beam in the same area. He further testified that there were no other trades working in the area other than the AGL crew. When Filippone returned to the area 45 minutes later, he noticed that AGL's steel beam was in place, the wood plank (which supported the sidewalk bridge) was back in its position, and that the AGL crew had left the site. He further testified that he recalled that workers on site resumed using the sidewalk bridge the very next day. In addition, Filippone testified that he did a visual inspection of the sidewalk bridge on the morning of the accident, and that it visually appeared to be in safe condition. He was not aware of any problems with the bridge before the alleged accident.

AGL - Dominick Lofaso's Deposition Testimony

Dominick Lofaso, an AGL manager, testified that AGL was hired by Cava to perform structural and miscellaneous steel work at the site. AGL's scope of work at the site included installing structural steel beams to support a canopy for the front facade of the building. Christian Bermeo was the AGL foreman working at the site at the relevant time period. According to Lofaso, Bermeo was entirely responsible for the means and methods of AGL's work at the site. AGL adhered to Cava's scheduling of the work and

coordinated with it in determining the work AGL needed to perform. According to Lofaso, Cava was aware that there was a problem with the height of the sidewalk bridge and AGL's installation of the steel beams for the canopy. He testified that Bermeo had told him that AGL could not install the canopy because the sidewalk bridge was in the way, and that Cava had advised him (Bermeo) to leave the materials at the site. AGL left the materials at the site and did not return for approximately 6-8 weeks, when Cava advised Bermeo it was ready for the installation of the steel beams. The canopy beams were ultimately installed in front of the subject premises. Lofaso was not onsite during the installation and claimed he had no knowledge of any AGL workers removing the supports from the sidewalk bridge; nor did he know what changes to the bridge were necessary in order for the canopy beams to be erected.

M&A - Bogdan Molinowski's Deposition Testimony

Bogdan Molinowski, the president and sole principal of M&A, testified that M&A was hired by Cava to perform masonry work at the site. The plaintiff was M&A's job site foreman, and his responsibilities included overall safety, supervising and coordinating M&A employees' work according to drawings and M&A's contracted scope of work, and coordinating the work with the general contractor and the other trades. Molinowski testified that plaintiff's daily assignments were given to him by the project manager, Paczynski, who would visit the site twice a week. Paczynski's job involved communicating with the general contractor, Cava, and assuring that the work was being

performed according to the contract and drawings. Molinowski further testified that Cava never instructed M&A on how to perform its work.

Skyline - Sal Rexha's Deposition Testimony

Sal Rexha, Skyline's president of sales, testified on behalf of Skyline. Rexha testified that Skyline contracted with Cava to install a sidewalk bridge/shed at the premises. Skyline supplied all of the materials used to erect the sidewalk bridge, and it completed the installation of same on or about March 18, 2016. Rexha explained that the construction of the sidewalk bridge first involved erecting the structural steel components, which included posts and overhead beams that were braced together with steel braces. On top of the structure were additional "junior" beams, a corrugated metal deck, and planking with a plywood panel on the outside of the structure to prevent debris from falling off. According to Rexha, after the constriction of the sidewalk bridge was completed, Skyline's workers left the site and were never notified as to any problems or called back for any maintenance requests before it was ultimately taken down. He further testified that after the sidewalk bridge was erected, he inspected it and found that it was in accordance with the New York City Department of Buildings codes, and claimed that Skyline provided Cava with a letter confirming same.

Procedural History

Plaintiff commenced the within action on or about May 3, 2017 against Sun Moon, Cava and AGL seeking to recover for his personal injuries. Plaintiff's complaint asserted claims for Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence.

Issue was joined by the parties with the service of their respective answers. AGL thereafter commenced a third-party action against Skyline and M&A on or about January 12, 2018, seeking common-law indemnity and contribution. Answers were served by Skyline on March 27, 2018 and by M&A on February 20, 2018. On or about August 29, 2019, Sun Moon and Cava commenced a second third-party action against AGL, Skyline and M&A asserting claims for common-law indemnity, contribution, contractual indemnity, and breach of contract for failure to procure insurance. Answers were served by AGL on March 18, 2020, by Skyline on September 10, 2019 and by M&A on September 6, 2019. The parties engaged in discovery, and the plaintiff filed his note of issue on January 21, 2020. The following summary judgment motions are timely.

Discussion

AGL's Motion

The court will first address that branch of AGL's motion seeking to dismiss plaintiff's complaint on the ground that it is not a proper Labor Law defendant. AGL maintains it was not an owner of the premises, a general contractor, or an agent thereof, and therefore not a proper Labor Law defendant. Instead, AGL contends it was merely a steel subcontractor for the project, and thus lacked the authority to enforce any safety standards. AGL maintains that the plaintiff's own actions were the sole proximate cause of his accident in that he failed to wear a safety harness which was on the site . In addition, AGL claims there is no evidence in the record that it altered the sidewalk bridge, and that any contentions to the contrary are purely speculative. In support, AGL

relies primarily upon the deposition testimony of Lofaso, an AGL manager, who claimed he had no knowledge of any AGL worker removing or cutting the supports for the sidewalk bridge.

In opposition, plaintiff argues that AGL was in fact a statutory agent within the meaning of the Labor Law in that it had control and supervision over installation of the steel beam, which plaintiff alleges altered the sidewalk bridge's supporting plank thereby causing him to fall. Skyline, M&A, Sun Moon and Cava also oppose AGL's motion arguing that issues of fact exist as to whether AGL, during the course of its work, cut and removed the wooden plank supports from the sidewalk bridge's platform, thereby creating a falling hazard for persons, such as plaintiff, working on the bridge. The parties further point out that the only witness proffered by AGL (Lofaso) was not on site on the day of the accident, and therefore had no personal knowledge as to what work AGL's crew performed, or whether they were involved in the removal/alteration of the bridge's support beam. Sun Moon and Cava additionally argue that AGL's motion for summary judgment should be denied as premature because there is outstanding discovery related to how the accident occurred.

In reply, AGL maintains it has met its burden of establishing that it is not liable under the Labor Law, and submits, for the first time in its reply, an affidavit of its former AGL foreman, Christian Bermeo, who was responsible for the installation of the canopy in the area of the sidewalk bridge (NYSCEF Doc. No. 509). Bermeo avers that neither

he, nor the AGL workers he was supervising cut or removed any wood or planking on the sidewalk bridge at any time.

It is well settled that "the 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff's Labor Claims Against AGL

It is well settled that claims under Labor Law §§ 240 (1), 241 (6) and 200 may be brought only against owners, contractors and their agents (*see* Labor Law § 240 [1] [applying to "[a]ll contractors and owners and their agents"]; § 241 [sub-provisions applying to "[a]ll contractors and owners and their agents"]; *Hill v Mid Island Steel Corp*., 164 AD3d 1425, 1426 [2d Dept 2018]; *Merino v Cont'l Towers Condo*., 159 AD3d 471, 472 [1st Dept 2018]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority

over the work being done where a plaintiff is injured" (*Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018 [quotations omitted]; *see Linkowski v City of New York*, 33 AD3d 971, 974–975 [2d Dept 2006]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). "To impose . . . liability [under the Labor Law], the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Linkowski v City of New York*, 33 AD3d at 975; *see Rodriguez v Mendlovits*, 153 AD3d 566, 568 [2d Dept 2017]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]).

Here, AGL has made a prima facie showing of its entitlement to judgment as a matter of law dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action insofar as asserted against it. It has submitted evidence demonstrating that it did not have the requisite authority to control or supervise the means or methods of plaintiff's work or that of his employer, M&A. In opposition, the plaintiff has failed to raise a triable issue of fact. Accordingly, plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed as against AGL (*see Diaz v Trevisani*, 164 AD3d at 754).

Plaintiff's Labor Law § 200 claim against AGL must also be dismissed. Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Annicaro v Corporate Suites, Inc*., 98 AD3d 542, 544 [2d Dept 2012]; *Linkowski v City of New York*, 33 AD3d at 975). Here, it is

undisputed that AGL neither controlled nor supervised the plaintiff's work when he fell through the sidewalk bridge. While AGL did have authority and control over the installation of the steel beams and canopy, which is alleged to have involved the removal of the bridge supports, this is insufficient to impose liability under section 200. Rather, "it is necessary to show authority and control over plaintiff's 'work'" (*Ryder v Mount Loretto Nursing Home,* 290 AD2d 892, 894 [2002], citing *Russin v Picciano & Son,* 54 NY2d 311, 318[1981]). AGL, a steel subcontractor, had no control over the plaintiff's employer, a masonry subcontractor. Thus, there is no evidence in the record that AGL had been delegated the authority to supervise and control the work in which the plaintiff was engaged at the time of the accident, or the authority to insist that proper safety practices were followed. Accordingly, AGL is entitled to summary judgment dismissing plaintiff's Labor Law § 200 claim (*see Van Nostrand v Race & Rally Const. Co.*, 114 AD3d 664, 666 [2d Dept 2014]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]).

Plaintiff's Common-Law Negligence Claim Against AGL

Even though AGL did not have authority to supervise or control the plaintiff's work, it could still be liable under a common-law theory of negligence if its work created the hazardous condition which contributed and/or caused the plaintiff's accident (*see Tomyuk v Junefield Ass'n*, 57 AD3d at 521-22; *Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 719 [2d Dept 2007]. A subcontractor "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if

it did not possess any authority to supervise and control the plaintiff's work or work area" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011] [internal quotation marks omitted]; *see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2d Dept 2010]). An award of summary judgment in favor of a subcontractor on a negligence cause of action is improper "where the 'evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries'" (*Erickson v Cross Ready Mix, Inc.*, 75 AD3d at 523, quoting *Marano v Commander Elec., Inc.*, 12 AD3d 571, 572–573 [2d Dept 2004]).

Based upon a review of the record, the court finds that an issue of fact exists as to whether AGL contributed to and/or caused the plaintiff's accident. In this regard, it is undisputed that AGL was at the site on the day of the incident and that its work took place in the vicinity of the sidewalk bridge. Notably, Cava's site safety manager, Filippone, testified that three or four AGL workers arrived on site the morning of the incident, and told him they were planning to set up a steel beam between columns in the front sidewalk bridge area (Filippone tr at 42-43). He further testified that he saw the AGL workers setting up their materials in the subject area. After the accident occurred and he rushed to the scene, he observed that a wooden plank that had been holding a piece of the sidewalk bridge's steel decking had been removed (*id*. at 47-48, 118-119, 152). Although Filippone did not personally observe AGL's workers remove the

bridge's plank support, he claimed that there were no other trades working in the area other than the AGL crew (*id.* at 56).

In addition, M&A's project manager, Piotr Paczynski, avers in a sworn affidavit that he did not witness the plaintiff fall, but went to the site once he was notified (NYSCEF Doc. No. 304). Upon his arrival when he looked underneath the area of the bridge, Paczynski claims he observed a broken wooden plank, and specifically noticed that AGL workers were working directly beneath where the plaintiff fell and appeared to be installing a steel canopy beam (*id.* at ¶ 5-6). Plaintiff's co-worker, Krzyztof Sarnacki, also avers in a sworn affidavit that he did not witness the plaintiff's fall, but was at the ground level at the time that it occurred (NYSCEF Doc. No. 303). Sarnacki claims he heard a loud bang and another worker shout that "somebody has fallen." When he immediately went over to the sidewalk bridge, he saw plaintiff lying on the ground in pain, and noticed that the metal support of the sidewalk bridge was curved downward and that the wooden planks were no longer there (*id.* at ¶ 6). According to Sarnacki, the wooden planks appeared to have been cut by someone (*id.*).

Furthermore, AGL's own witness, Lofaso, testified that he was aware that, due to its height, portions of the sidewalk bridge planks needed to be removed, or changed, in order for AGL to perform its installation of the canopy, but that he did not have any personal knowledge as to who removed the planks on the date in question (Lofaso tr at 87, 92). Lastly, the Cava Daily Field Construction Report indicated that AGL was scheduled to install a canopy beam in front of the building on the date of the accident,

which was in the same vicinity as the plaintiff's work, under the sidewalk bridge (*see* NYSCEF Doc. No. 292).

Based upon the foregoing evidence, the court finds that an issue of fact exists as to whether AGL, during the course of its work in installing the steel beam, modified or altered the wood supports for the sidewalk bridge, thereby weakening the platform through which the plaintiff fell (*see Lombardo v Tag Court Square, LLC*, 126 AD3d 949, 950 [2d Dept 2015]; *Van Nostrand v Race & Rally Const. Co.,* 114 A.D3d 664, 666 [2d Dept 2014)] [issue of fact as to whether subcontractor's employee created an unreasonable risk of harm that was a proximate cause of the plaintiff's injuries precluded dismissal of common-law negligence claim]; *Williams v O & Y Concord 60 Broad St. Co.,* 304 AD2d 570, 571[2d Dept 2003][issue of fact as to whether the contractor did in fact perform renovations on the second floor which may have created the alleged defective condition]).

In light of the issues of fact as to AGL's negligence, if any, being attributable to the plaintiff's accident, that branch of its motion seeking to dismiss Sun Moon and Cava's common-law indemnity and contribution claims against it is also denied.

Plaintiff's Motion

Labor Law § 240 (1)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against Sun Moon, Cava and AGL. As discussed above, plaintiff's Labor Law § 240 (1) claim has been dismissed as against AGL, and therefore the court will

address the merits of this claim as it pertains to Sun Moon and Cava (collectively, the defendants). Plaintiff contends that Sun Moon, as the owner, and Cava, as the general contractor, are liable under his Labor Law § 240 (1) claim as it is undisputed that he was injured when the sidewalk bridge underneath him collapsed, causing him to fall 12 feet to the ground below, and that he was not provided with any safety devices to prevent his fall. Plaintiff argues that the defendants' failure to provide adequate safety devices was a proximate cause of his injuries. Sun Moon and Cava oppose plaintiff's motion arguing that the plaintiff's accident was caused by his own actions in failing to wear a safety harness which was on site, rather than by a lack of adequate safety devices.

Under Labor Law § 240 (1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711, 711 [2d Dept 2013]). To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d at 433; *Vivar v 441 Realty, LLC*, 128 AD3d 810, 810 [2d Dept 2015]). A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240 (1) and does not effect a reduction in liability (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 690 [2d Dept 2017]; *Robinson v National Grid Energy Mgt.*,

LLC, 150 AD3d 910, 912 [2d Dept 2017]; *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). When, however, the worker's own conduct is the sole proximate cause of the accident, no recovery under Labor Law § 240 (1) is available (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 290; *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1023-24 [2d Dept 2018]). A plaintiff is the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she "misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (*Orellana v 7 West 34th Street, LLC*, 173 AD3d 886, 887 [2d Dept 2019] [internal quotation marks and citations omitted]).

Here, the plaintiff has made a prima facie showing that Sun Moon, as the owner, and Cava, as the general contractor in charge of the construction project, violated Labor Law § 240 (1) by failing to provide adequate safety devices, and that such violation proximately caused his injuries. Plaintiff submitted evidence (his deposition testimony) establishing that he fell approximately 12 feet from a sidewalk bridge when the wood planking on which he was standing collapsed from underneath his feet (*see Barraco v First Lenox Terrace Assocs.*, 25 AD3d 427, 428 [1st Dept 2006]). Plaintiff's unrefuted testimony established prima facie that his injuries were the direct consequence of a failure to provide adequate protection against the gravity-related risk of his construction work, and that the absence of the necessary protection was a proximate cause of his

injuries (*see Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d at 1024; *Cruz v Cablevision Sys. Corp.*, 120 AD3d 744, 746 [2d Dept 2014]; *Chabla v 72 Greenpoint, LLC*, 101 AD3d 928, 928 [2d Dept 2012]).

In opposition, the parties (Sun Moon, Cava, Skyline and AGL) all argue that the plaintiff's failure to use the safety devices provided to him (i.e., a safety harness) at the time of the accident was the sole proximate cause of his injuries thereby falling outside the protections of Labor Law § 240 (1). This contention is without merit as plaintiff's uncontroverted testimony demonstrates that the bridge's platform "broke" from underneath him (*see Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). Under these circumstances, the plaintiff's failure to wear a safety harness cannot be deemed the sole proximate cause since the platform breaking also contributed to the accident (*see Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d at 1024; *see also McDonnell v Sandaro Realty, Inc*., 165 AD3d 1090, 1094 [2d Dept 2018]; *Garzon v Viola*, 124 AD3d 715, 716-17 [2d Dept 2015]; *Vasquez v C2 Dev. Corp.*, 105 AD3d 729, 730-731 [2d Dept 2013]). Moreover, even if the plaintiff was partially at fault for not using his harness, a worker's comparative negligence is not a defense to a claim based on Labor Law § 240 (1) (*see Stolt v General Foods Corp.*, 81 NY2d 918 [1993]; *Gabrus v New York City Hous. Auth*., 105 AD3d 699, 700 [2d Dept 2013]; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 638–639 [2d Dept 2005]). Accordingly, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim against Sun Moon and Cava is granted.

Sun Moon and Cava's Motion

Sun Moon and Cava (collectively, defendants) seek summary judgment dismissing plaintiff's Labor Law §§ 241 (6), 200 and common-law negligence causes of action as against them. Defendants also seek summary judgment on their second third-party common-law indemnity and contractual indemnity claims against AGL, Skyline and M&A, and on their breach of contract to procure insurance claims against AGL and M&A.

Labor Law § 241 (6)

Turning to plaintiff's Labor Law § 241 (6) claim, that provision imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

In his bill of particulars, plaintiff alleges that the following sections of the Industrial Codes are applicable to the instant matter: 12 NYCRR 23-1.5, 23-1.7, 23-1.11,

23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.30, 23-1.31, 23-1.32, 23-3.3, 23-3.4, 23-5.1, 23-5.2, 23-5.3, 23-5.4, 23-5.5, 23-5.6 and 23-5.11. In support of their motion, defendants have demonstrated that various Industrial Code provisions upon which the plaintiff relies cannot support his Labor Law § 241 (6) claim because they are either not sufficiently specific or inapplicable to the facts of this case. In opposition, plaintiff argues that defendants have failed to meet their initial burden and maintains that sections 23-1.18 (b) (1), 23-5.1 (c) (1), and 23-5.3 are applicable herein and were violated by the defendants.

As to code section 23-1.5, defendants correctly argue that the plaintiff cannot premise his Labor Law § 241 (6) claim on this provision, which relates to general responsibilities of employers. This regulation, with the exception of 23-1.5 (c) (3) which plaintiff does not specify has been violated, is too general to support such a claim (*see Opalinski v City of New York*, 164 AD3d 1354, 1355 [2d Dept 2018]; *Spence v Island Estates at Mt. Sinai, II, LLC*, 79 AD3d 936, 937-938 [2d Dept 2010]; *Maday v Gabe's Contracting, LLC*., 20 AD3d 513 [2d Dept 2005]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2d Dept 2005]).

Turning to section 23-1.7, although plaintiff does not specify which of the seven subsections was violated, none of them are applicable herein and may not support plaintiff's Labor Law § 241 (6) claim. This accident arose from the plaintiff falling off a sidewalk bridge when the plywood platform broke from underneath him. It was not due to his fall through a hazardous opening of the type contemplated in this provision, or during bridge or highway overpass construction; nor was it due to drowning hazards;

slipping hazards; tripping hazards, vertical passages; air-contaminated work areas; or corrosive substances (*see* Industrial Code § 23-1.7 [b]-[f]). Subsection (a)(1) of 23-1.7 pertaining to "overhead hazards" is also not applicable to the facts herein.

To the extent plaintiff's Labor Law § 241 (6) claim is predicated on Industrial Code § 23–1.11 (lumber and nail fastenings), there is no allegation that the lumber and/or nails used to make the sidewalk bridge were in any way deficient, but that the alleged alteration of the bridge caused the accident. Thus, this provision is also inapplicable.

Sections 23-1.15, 1.16, and 1.17, concerning safety railings, safety belts, harnesses, tail lines or lifelines, are also not applicable herein since there were no safety railings on the sidewalk bridge, and the plaintiff was not using any of the foregoing devices (*see Kwang Ho Kim v D & W Shin Realty Corp*., 47 AD3d 616, 619 [2d Dept 2008]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336,337-338 [1st Dept 2006]).

Section 23-1.30, which addresses illumination of work areas, is also inapplicable herein as there are no allegations that plaintiff's fall was caused by inadequate lighting (*see Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159 [1st Dept. 2005]). In addition, section 23-1.31 (approval of materials and devices) does not apply here because it is a general provision regarding procedures by which an owner or general contractor may seek approval from the Industrial Board of Appeals for "any device, apparatus, material, equipment or method" to be used in compliance with the Labor Law (*see generally Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Plaintiff's reliance on section 23-1.32 is also misplaced as there is no evidence that defendants had

written notice of an allegedly hazardous condition on the sidewalk bridge (*see Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2d Dept. 2002]).

In addition, code sections 23-3.3, which pertains to demolition by hand, and 23-3.4, which pertains to mechanical methods of demolition, are also inapplicable under the circumstances presented, which did not involve any demolition work at the time of the accident.

Additionally, section 23-5.2, which required approval for certain scaffolds, is not applicable here. Similarly, sections 23-5.4, 23-5.5, 23-5.6 and 23-5.11 contain directives concerning four different types of scaffolding (i.e., tubular welded frame scaffolds, tube and coupler metal scaffolds, pole scaffolds and needle beam scaffolds), none of which were involved in the plaintiff's accident. Thus, they are not applicable. Further, the court notes that the plaintiff does not dispute that the aforementioned provisions are inapplicable and has thus abandoned those claims (*see Cardenas v One State St., LLC*, 68 AD3d 436, 890 [1st Dept 2009]).

Section 23-1.18 (b) (1), which pertains to Sidewalk sheds and barricades, states as follows:

> (b) Sidewalk shed construction.
> (1) The deck and supporting structure of every sidewalk shed shall be constructed to sustain a live load of at least 150 pounds per square foot without breaking, and if material is to be stored thereon such deck and supporting structure shall be constructed to sustain a live load of not less than 300 pounds per square foot without breaking. Every sidewalk shed shall be so erected as to provide a vertical clearance of not less than seven and one-half feet at any point above the walkway surface. Every sidewalk shed shall have such width as to

> allow the unimpeded passage of pedestrians at all times but in no case shall any sidewalk shed be less than five feet wide.

As an initial matter, the court notes that this provision is sufficiently specific to support a Labor Law § 241 (6) violation (*see generally Debowski v City of New York*, 3 Misc.3d 1109 (A) [2004]). In light of plaintiff's uncontroverted testimony that the sidewalk bridge's planking broke as he stood on it, the court finds that Sun Moon and Cava have failed to eliminate all triable issues of fact as to whether this provision is applicable and whether a violation of it contributed to the plaintiff's accident. Thus, defendants have failed to meet their burden warranting dismissal of plaintiff's Labor Law § 241 (6) claim as predicated on section 23-1.18 (b) (1).

Next, section 23-5.1 (c) (1), which is sufficiently specific to support a Labor Law § 241 (6) claim (*see Tomyuk v Junefield Assn.*, 57 AD3d at 521; *see also O'Conner v Spencer (1997) Inv. Ltd. Partnership*, 2 AD3d 513, 515 2d Dept 2003]), sets forth that "all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use." In seeking to dismiss plaintiff's reliance on this provision as a predicate for his Labor Law § 241 (6) claim, Sun Moon and Cava argue that it is not applicable because the plaintiff was not working on a construction site, and was not working on a scaffold at the time of the alleged accident. Contrary to defendants' contention, however, there is evidence in the record that the sidewalk bridge was partially being use as a work platform by the plaintiff and his employer, M&A, and, therefore, the sidewalk bridge was the functional equivalent of a scaffold to which section

23-5.1 applies. In addition, the defendants have failed to establish that the plaintiff was not performing "construction work," as defined by 12 NYCRR 23-1.4 (b) (13). It is undisputed that the plaintiff, a foreman, was performing work related to the masonry work his employer was retained to perform on the construction project. Clearly, plaintiff's work falls within the ambit of the Labor Law. Inasmuch as these are the only arguments advanced by the defendants, they have failed to satisfy their prima facie burden establishing that section 23-5.1 (c) (1) is not applicable herein (*see Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept 20 15]).

With respect to section 23-5.3, inasmuch as the plaintiff has failed to particularize which specific subsections of 23-5.3 defendants allegedly violated, his reliance on this code section is deemed abandoned (*see McLean v Tishman Constr. Corp*., 144 AD3d 534, 535 [1st Dept 2016] [when "plaintiff failed to specify any particular subsection[s] or subdivision[s]" of the Industrial Code provisions allegedly violated, the Court deemed them to be abandoned]). Based upon the foregoing, that branch of Sun Moon and Cava's motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted except to the extent said claim is predicated upon Industrial Code Sections 23-1.18 (b) (1) and 23-5.1 (c) (1).

Labor Law § 200 and Common-Law Negligence

Sun Moon and Cava also seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them, arguing that they lacked the authority to control the manner in which the plaintiff's work was performed, and that

there is no evidence that they exercised any control over the means or methods of M&A's work. In opposition, however, plaintiff's counsel has indicated that the plaintiff does not oppose the dismissal of these claims (NYSCEF Doc. No. 473, Rogers Affirm in Opp, at 5, fn 2). Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are hereby dismissed as against Sun Moon and Cava (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

M&A's Motion

M&A seeks summary judgment dismissing AGL's third-party complaint, Sun Moon and Cava's second third-party complaint, and all crossclaims asserted against it. As to the common-law indemnification and contribution claims, M&A maintains that the plaintiff did not suffer a qualifying "grave injury" within the meaning of Workers' Compensation Law § 11, and therefore said claims against it are barred.

Pursuant to Workers' Compensation Law § 11, an employer may not be held liable for contribution to or indemnification of any third person for an employee's injuries "unless such third person proves through competent medical evidence that such employee has sustained a grave injury." The law is settled that an employer may be held liable for contribution or common-law indemnification only if the employee has sustained a "grave injury" within the meaning of the Workers' Compensation Law (Workers' Compensation

Law § 11; *see Fleming v Graham*, 10 NY3d 296, 299 [2008]). Grave injuries are those injuries that are listed in the statute and are determined to be permanent (*see Persaud v Bovis Lend Lease, Inc*., 93 AD3d 831, 832 [2d Dept 2012]). One such enumerated injury is an "acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). A "permanent total disability" requires a showing that the injured employee is no longer employable "in any capacity" (*Rubeis v Aqua Club, Inc*., 3 NY3d 408, 412 [2004]; *see Grech v HRC Corp.*, 150 AD3d 829, 830 [2d Dept 2017]; *Cueto v Hamilton Plaza Co., Inc*., 67 AD3d 722, 724 [2d Dept 2009]).

Here, it is undisputed that the plaintiff was an M&A employee, and that he received workers compensation benefits related to the accident. Thus, M&A may be held liable for contribution or common-law indemnification only if the plaintiff sustained a "grave injury" within the meaning of the Workers' Compensation Law (Workers' Compensation Law § 11; *see Fleming v Graham*, 10 NY3d at 299). In his bill of particulars, plaintiff alleges he sustained various injuries, one of which is a "traumatic brain injury," and arguably the only injury that could fall within the grave injury criteria of the Workers' Compensation Law. Specifically, M&A argues that the plaintiff has not sustained "an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). In support of this contention, M&A relies upon the plaintiff's deposition testimony that he had not returned to work since his accident but indicated that he has not looked for work because of his

elbow pain and arm injury. When specifically questioned as to his head injury, plaintiff testified that he experiences headaches 2-3 days a week, but further stated there are weeks where he doesn't experience any pain in his head. He also testified that none of his pastimes or activities have been affected by any cognitive problems, nor does he have any difficulties in focusing or remembering events.

In further support, M&A has submitted an affirmed report by Dr. David M. Erlanger, Ph.D., ABPP, a board-certified clinical neuropsychologist, wherein he notes that the plaintiff underwent a neurological and psychological evaluation by him on August 2, 2019. He opined that:

> Within a reasonable degree of neuropsychological certainty, there was no valid and reliable evidence that [plaintiff] has current symptoms of a concussion, post-concussion syndrome or traumatic brain injury, and there was valid and reliable evidence that any hypothetical cognitive symptoms have resolved. (NYSCEF Doc. No. 336 at 9).

Dr. Erlanger concluded that "[f]rom a neuropsychological perspective, [plaintiff] is capable of returning to work on a full-time basis."(*id.*).

In addition, plaintiff was examined by a Vocational Rehabilitation Specialist, Alan L. Getreu, MA CAP CFMC CRC. In an affidavit, dated August 29, 2019, and annexed report from his May 7, 2019 examination of the plaintiff, Mr. Getreu concluded that: "[plaintiff] does not meet the criteria to be considered vocationally nor industrially disabled. He may be unable to return to his former employment as a working foreman in the construction industry, however, it is my opinion that he is otherwise employable on a

full-time basis." (NYSCEF Doc. No. 337 at 20). Lastly, plaintiff was examined on December 29, 2017, by Dr. Jean-Robert Desrouleaux who performed a neurological examination, and concluded that: "I find no (0%) causally related disability from a neurological standpoint based on the physical examination at this time (NYSCEF Doc. No. 338 at 7).

Based upon the foregoing, the court finds that M&A has demonstrated that the plaintiff's injuries did not constitute a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Kitkas v Windsor Place Corp.*, 72 AD3d 649, 649–650 [2d Dept 2010]; *Marshall v Arias*, 12 AD3d 423, 423–424 [2d Dept 2004]). Indeed, M&A has submitted competent admissible evidence, including the reports of neurologists, who examined plaintiff and concluded that he did not suffer from any brain injury rendering him "no longer employable in any capacity" (*Rubei*s, 3 NY3d at 413; *see Grech*, 150 AD3d at 830; *Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 574 [1st Dept 2015]; *Fried v Always Green, LLC*, 77 AD3d 788, 790 [2d Dept 2010]). In opposition, none of the parties, nor the plaintiff, have raised a triable issue of fact establishing otherwise (*see Goodleaf v Tzivos Hashem, Inc.*, 68 AD3d 817, 817 [2d Dept 2009]; *DePaola v Albany Med. Coll.*, 40 AD3d 678 [2d Dept 2007]; *O'Berg v MacManus Group, Inc.*, 33 AD3d 599 [2d Dept 2006]; *see generally Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Accordingly, that branch of M&A's motion seeking to dismiss all common-law indemnity and contribution claims against it is granted.

That branch of M&A's motion seeking to dismiss AGL's third-party claims for contractual indemnity and breach of contract for failure to procure insurance is also granted. M&A has made a prima facie showing that no contractual agreement existed requiring it to indemnify AGL or procure insurance on its behalf (*see Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012] [contractual indemnity claim dismissed where parties were not in contractual privity with each other]). Moreover, the court notes that AGL submitted no opposition to M&A's motion. Based upon the foregoing, AGL's third-party complaint is dismissed as against M&A in its entirety.

Sun Moon and Cava's Second Third-Party Claims Against AGL, M&A and Skyline

Sun Moon and Cava seek summary judgment in their favor on their second third-party claims for common-law indemnification and contractual indemnification against AGL, M&A and Skyline, and on their breach of contract for failure to procure insurance claims against AGL and M&A.

Common-Law Indemnification

M&A

As articulated above in relation to M&A's motion, Sun Moon and Cava's common-law indemnity and contribution claims against M&A are barred pursuant to Workers' Compensation Law § 11 as plaintiff has not sustained a qualifying "grave injury." Thus, that branch of Sun Moon and Cava's motion seeking common-law indemnity as against M&A is denied.

AGL

That branch of defendants' motion seeking summary judgment on their common-law indemnity claim against AGL is also denied. To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*see Mikelatos v Theofilaktidis*, 105 AD3d 822, 824 [2d Dept 2013]). Thus, to obtain common-law indemnification from AGL, the defendants had the burden of submitting proof that AGL's actual negligence contributed to the accident, or that it had the authority to direct, supervise, and control the work giving rise to the injury (*McDermott v City of New York*, 50 NY2d 211 [1980]; *Kader v City of New York Hous. Preserv. & Dev.*, 16 AD3d 461 [2d Dept 2005]). As noted above in relation to AGL's motion, issues of fact exist as to whether AGL's workers altered the sidewalk bridge thereby creating the dangerous condition that caused the plaintiff's accident. In light of the issue of fact as to AGL's negligence, Sun Moon and Cava are not entitled to summary judgment on their common-law indemnity claim against AGL.

Skyline

That branch of defendants' motion seeking summary judgment on their common-law indemnity claim against Skyline is also denied, as defendants have failed to make a prima facie showing that Skyline was in any way negligent in erecting the sidewalk

bridge or otherwise at fault in causing the plaintiff's injuries (*see Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742 [2d Dept 2009]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]).

Contractual Indemnification

M&A

Sun Moon and Cava's contractual indemnity claim against M&A is based upon the contract Cava entered into with M&A, dated September 19, 2016. Article 12.1 of that agreement contains an indemnification clause which provides that M&A is required to indemnify, defend and hold harmless the owner [Sun Moon], and the Construction Manager [Cava], among others, for all claims arising out of the work, " . . .but only to the extent caused by the acts or omissions of Subcontractor [M&A], its employees, sub-subcontractors, representatives or other persons for whom Subcontractor is responsible on this Project." (NYSCEF Doc. No. 431, at 30). Based upon the foregoing language, defendants argue that M&A is obligated to indemnify them as the plaintiff's injuries arose out of M&A's work at the site. In this regard, defendants contend that the plaintiff, as M&A's employee, caused the accident by failing to wear proper fall protection even though he had a safety harness on the site.

In opposition, M&A argues that Cava and Sun Moon are not entitled to contractual indemnification because, at the time of the alleged accident, plaintiff's work related to the stonework for the front of the premises and did not fall within the scope of work outlined

in the Cava/M&A contract. Instead, M&A contends that the stonework at issue was pursuant to a subsequent Change Order, dated September 26, 2016, that was issued after the Cava/M&A contract, and that the plaintiff was injured while taking measurements for such stonework (NYSCEF Doc. No. 339). M&A maintains the Change Work Order did not incorporate the terms of the initial agreement between Cava and M&A, including the indemnity provision.

In addition, M&A contends that the indemnity provision set forth in the Cava/M&A contract only requires M&A to indemnify defendants in the event that the accident was caused by M&A's acts or omissions. M&A further contends there is no evidence that it caused or created the hazardous condition which caused the plaintiff's accident. In this regard, it claims the accident did not arise from the means or methods under which plaintiff performed his measurements for the stucco work; but instead was a result of AGL removing the supports for the sidewalk bridge platform and/or the failure of either Cava or AGL to rope off the sidewalk bridge while AGL was working underneath it. M&A notes that the evidence in the record (namely, the affidavits of plaintiff's supervisor and co-worker [NYSCEF Doc. Nos. 329 & 330], and deposition testimony of Cava's site safety manager, Filippone) establishes that AGL's workers were working in the same location as the sidewalk bridge and may have altered it in order to complete its installation of the steel canopy. Thus, M&A contends that an issue of fact

exists as to whether plaintiff's accident was caused by the acts or omissions of AGL, rather than as a result of any act or omission on M&A's part.

In addition, M&A argues that Cava has failed to establish that it was free from fault in the happening of plaintiff's accident in that it may have negligently failed to rope off the area while AGL was working and/or failed to coordinate/schedule the trades' work at the site. In any event, M&A argues that the plaintiff's accident was not caused by its acts or omissions.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d at 930; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491–492 [1989]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2d Dept 2009]).

Here, based upon a review of the record, including all contract documents, the court finds that the work in which the plaintiff was engaged at the time of the accident

falls within the "scope of work" under the Cava/M&A contract, which included modifications pursuant to change orders. However, as M&A points out, pursuant to the express terms of the indemnity provision, M&A is obligated to defend and indemnify Sun Moon and Cava for all claims arising out of M&A's work ". . . **but only to the extent caused by the acts or omissions"** of M&A (NYSCEF Doc. No. 431, at 30 [emphasis added]). Thus, contrary to defendants' contention, the plain language of the indemnity clause requires more than demonstrating that the claim arose out of M&A's contracted work but must also establish that M&A's action or inaction caused the plaintiff's accident. Since it has not been determined whether plaintiff's injury was caused by any act or omission of M&A, summary judgment on defendants' contractual indemnity claim against M&A is denied as premature (*see D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007] [summary judgment on contractual indemnification claim against subcontractor denied as premature where it had not yet been determined that plaintiff's accident was caused by any act or omission of that subcontractor]).

Furthermore, the court finds that M&A has raised an issue of fact as to whether Cava was partially at fault in the happening of the accident by failing to properly coordinate the trades' work on the site (*see Armental v 401 Park Ave. S. Assocs., LLC*, 182 AD3d 405 [1st Dept 2020][issues of fact existed as to whether general contractor negligently created the hazardous condition over which worker tripped by directing the placement of the pipes and by failing to properly coordinate work on the site]; *Maza v*

University Ave. Dev. Corp., 13 AD3d 65 [1st Dept. 2004]). In this regard, AGL's manager, Lofaso, testified that AGL adhered to Cava's scheduling and coordination of the work AGL needed to perform at the site (Lofaso tr at 22). He also testified that Cava was aware of the conflict with AGL's installation of the steel canopy and the height of the sidewalk bridge, and that Cava was the one that notified AGL to come back to the site to perform its steel canopy work, which was at the same time M&A was working onsite (*id.* at 37-38, 41). In addition, the testimony of Cava's site safety manager, Filippone, reveals that, on the day of the accident, Cava had knowledge that both trades, AGL and M&A, were performing work in the same vicinity – AGL installing a steel beam and the plaintiff on the sidewalk bridge setting up markers for M&A's stonework (Filippone tr at 41-42, 79). In light of the forgoing issues of fact, that branch of Sun Moon and Cava's motion seeking contractual indemnity as against M&A is denied. That branch of M&A's motion seeking to dismiss Sun Moon and Cava's contractual indemnification claim as against it is also denied.

AGL

That branch of Sun Moon and Cava's motion seeking contractual indemnity as against AGL is also denied. Pursuant to the express terms of the indemnity provision (section 12.1) contained in the Cava/AGL Subcontract, AGL was similarly obligated to defend and indemnify Sun Moon and Cava, among others, for all claims "arising out of [AGL's] Work" . . . **but only to the extent caused by the acts or omissions"** of AGL

(NYSCEF Doc. No. 430 at 26 [emphasis added]). Since it has not been determined whether plaintiff's accident was caused by any act or omission by AGL's workers with respect to the alleged modification of the sidewalk bridge, an award of summary judgment on defendants' second third-party contractual indemnity claim against AGL is denied as premature (*see Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007, 1010 [2d Dept 2011]; *D'Angelo v Builders Grp.,* 45 AD3d at 525).

Breach of Contract To Procure Insurance

M&A

Sun Moon and Cava also seek summary judgment on their breach of contract to procure insurance claim against M&A. M&A moves for summary judgment dismissing this claim. "'A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with'" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]; *see Ginter v Flushing Terr., LLC*, 121 AD3d 840, 844 [2d Dept 2014]).

Here, Section 13.1 of the Cava/M&A agreement clearly required M&A to obtain commercial general liability insurance naming Cava and Sun Moon as additional insureds (NYSCEF Doc. No. 431, at 30). In particular, M&A was required to procure a comprehensive general liability policy with per occurrence limits of $1,000,000, naming

Sun Moon and Cava, among others, as additional insureds. M&A contends that it has procured the insurance required by the subcontract, and has proffered a copy of a certificate of insurance indicating that M&A procured a commercial general liability policy through United Specialty Insurance, numbered PSS 1600017 with effect dates of July 22, 2016 to July 22, 2017, with per occurrence limits of $1,000,000 (the USI policy), naming both Cava and Sun Moon are additional insureds. M&A avers that Cava and Sun Moon tendered the defense of this matter to USI and, in response, USI accepted the tender by letter dated May 4, 2017 (NYSCEF Doc. No. 460, National Claims Letter, at pg 5). Based upon the foregoing, the court finds that M&A has made a prima facie showing that it procured the requisite insurance on behalf of Sun Moon and Cava. Moreover, the court notes that Sun Moon and Cava have not opposed this branch of M&A's motion. Accordingly, that branch of defendants' motion seeking summary judgment in their favor on said claim against M&A is denied, and that branch of M&A's motion seeking to dismiss this second third-party claim is granted.

AGL

As to AGL, aside from pointing to the relevant contractual provision in the Cava/AGL contract in which AGL agreed to procure certain insurance and name Sun Moon and Cava as additional insureds (NYSCEF Doc. No. 430, at pg 27), defendants have failed to submit any evidence substantiating their claim that AGL failed to procure the requisite insurance. As such, this branch of Sun Moon and Cava's motion is denied

(*see Ginter v Flushing Terrace, LLC*, 121 AD3d at 844]; *Mathey v Metropolitan Transp. Authority* 95 AD3d 842, 845 [2d Dept 2012]).

Skyline's Motion

Skyline moves for a conditional order of summary judgment on its common-law indemnification claim over and against AGL, and for summary judgment dismissing the third-party complaint and second third-party complaint as against it, as well as all crossclaims. In its third-party complaint, AGL asserts common-law indemnification and contribution claims against Skyline, and in their second third-party complaint, Sun Moon and Cava assert common-law and contractual indemnification, contribution and breach of contract for failure to procure insurance claims against Skyline.

That branch of Skyline's motion seeking a conditional order of summary judgment on its common-law indemnification claim over and against AGL is denied as issues of fact exist as to the precise degree of fault of AGL, if any, in the happening of the plaintiff's accident (*see Dow v Hermes Realty. LLC*, 155 AD3d 824 [2d Dept 2017]).

Common Law Indemnity/Contribution Claims Against Skyline

As to all common-law indemnity and contribution claims asserted against it, Skyline argues there is no evidence it had any control or authority over the plaintiff's work, or that of his employer, M&A; nor did Skyline have notice of any alleged dangerous condition at the site. Skyline maintains that although it erected the sidewalk bridge at issue, it committed no act or omission which may be said to have been the

proximate cause of plaintiff's accident, and thus it cannot be found negligent. Instead, Skyline contends that the evidence in the record establishes that AGL was the entity that altered the sidewalk bridge by removing the support beam during the course of its work. Skyline, therefore, argues that all common-law indemnity and contribution claims must be dismissed as against it.

In opposition, Sun Moon, Cava and AGL argue that Skyline's motion should be denied as premature due to outstanding discovery. Defendants further contend it is undisputed that Skyline constructed the sidewalk shed/bridge from which plaintiff fell, and that there was no guard railing or fencing installed on the interior building-facing side of the shed/bridge. As such, they argue that there exists an issue of fact as to whether Skyline negligently erected the sidewalk shed, thereby contributing to plaintiff's accident.

As noted above, to establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident (*see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Debennedetto v Chetrit,* 190 AD3d 933 [2d Dept 2021]; *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008]). "Contribution is available where two or more tortfeasors combine to

cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami, Inc*., 302 A.D.2d 57, 61 [2d Dept 2003]).

As an initial matter, Sun Moon and Cava's contention that Skyline's summary judgment motion should be denied because of outstanding discovery is without merit. The defendants failed to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the movant (*see Mogul v Baptiste*, 161 AD3d 847 [2d Dept 2018]; *Suero–Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013]).

As to the merits, the court finds that Skyline has made a prima facie showing that no negligence on its part caused or contributed to the plaintiff's injuries. Although Skyline supplied and erected the sidewalk bridge, there is no evidence that it was negligently constructed or that Skyline in any way created the condition that resulted in the collapse/breaking of the bridge's platform (*see Vera v Low Income Mktg. Corp.,* 145 AD3d 509, 512 [1st Dept 2016]). The plaintiff himself testified that prior to the accident, he had accessed the sidewalk bridge's platform a few times without any problems (Domanski tr at 47, 56). Moreover, Sal Rexha, Skyline's President of Sales, testified that Skyline's construction of the sidewalk bridge, which was completed as of March 18, 2016, was in full compliance with the New York City Department of Buildings' (DOB) approved drawings (Rexha tr at 25-28). Rexha further testified that

two or three days after Skyline erected the sidewalk bridge, he personally went to the site to perform an inspection on it (*id.* at 44-45). According to Rexha, it was the responsibility of the general contractor (Cava) to fill out a daily DOB log noting if any deficiencies arose regarding the sidewalk bridge, and that Skyline never received any such deficiency logs or notice of any problems (*id*. at 83). According to Rexha, Skyline was never called back to the site to make any modification/alterations to the sidewalk bridge, nor were any complaints made with regard to its structural integrity (*id.* at 65).

In addition, Cava's site superintendent, Luglio, testified that Skyline did not remain on site after the installation of the shed/bridge, and did not return until the date the shed was dismantled well after the plaintiff's accident (Luglio tr at 65-67). Cava's site safety manager, Filippone, testified that he visually inspected the sidewalk bridge everyday, including on the morning of the accident, and did not see any problems with it; nor had he received any complaints regarding same at the site (Filippone tr at 145-146). He also testified that when he went to the accident scene immediately after the plaintiff fell, he noticed that a wooden plank that was holding a piece of the sidewalk bridge's steel deck had been removed (*id.* at 47-48, 118 -119), and was back in place about 45 minutes later when he returned to the area (*id*. at 84-85). Filippone did not witness the removal of the plank but testified that AGL was the only trade working in the vicinity of the sidewalk bridge when the plaintiff's accident occurred (*id*. at 56). In addition, plaintiff's M&A coworker, Krzysztof Sarnacki, who was onsite when the

accident occurred, avers in a sworn affidavit, that the wooden plank under the sidewalk bridge appeared to have been cut (NYSCEF Doc. No. 303 at 6).

Furthermore, it is undisputed that the plaintiff fell when the platform planking on which he was standing broke, not because he fell over the edge of the sidewalk bridge. Therefore, defendants' argument that plaintiff's accident was caused by the lack of railings and/or guardrails is without merit. In view of forgoing, the court finds that Skyline has established its entitlement for a dismissal of all common-law indemnification and contribution claims asserted against it (*see Vera v Low Income Mktg. Corp.*, 145 AD3d at 512 [common-law negligence claim dismissed as against scaffolding contractor where there was no evidence in record that it created the condition that resulted in the collapse of the scaffold and plaintiff's testimony established that the scaffold was sturdy before his accident]). In opposition, none of the parties have presented any evidence sufficient to raise an issue of fact establishing that Skyline was in any way negligent in its erection of the sidewalk bridge, or that any action or inaction on its part contributed to the plaintiff's accident. Rather, the overwhelming evidence in the record before the court indicates that the sidewalk bridge was altered/modified by some other entity months after Skyline had erected it and left the site. Accordingly, Skyline is entitled to dismissal of all common-law indemnity and contribution claims asserted against it.

M&A's Contractual Indemnity Cross-Claim Against Skyline

That branch of Skyline's motion seeking to dismiss M&A's contractual indemnity claim as against it is granted as it is undisputed that no contract exists requiring Skyline to indemnify M&A; nor is M&A a beneficiary to any contract between Skyline and any other entity. Accordingly, M&A's cross-claim for contractual indemnification against Skyline is dismissed.

Sun Moon and Cava's Contractual Indemnity Claim Against Skyline

Skyline seeks summary judgment dismissing Sun Moon and Cava's contractual indemnity second third-party claim against it. Sun Moon and Cava oppose and move for summary judgment in their favor on said claim against Skyline. Defendants' contractual indemnity claim is based upon the indemnification provision contained within the contract between Cava and Skyline which provides, in pertinent part, as follows:

> 10.4 (a) To the fullest extent permitted by law, Subcontractor [Skyline] shall indemnify, defend and hold harmless Owner [Sun Moon]…Construction Manager [Cava]…from and against all losses, claims…causes of action, lawsuits, costs, damages, and expenses including the deductible amount of any insurance and, without limitation, attorneys' fees and disbursements), due to: (i) any personal injury, sickness, disease or death, or
> damage or injury to, loss of or destruction of property . . . , including the loss of use resulting therefrom sustained at the Project; (ii) any negligent or wrongful act or omission of Subcontractor [Skyline], its employees, subcontractors, representatives or other persons for whom Subcontractor is responsible; and (iii) any claim asserted, or lien or notice of lien filed, by any subcontractor or supplier of any tier against

> the Project, or against any Indemnitee in connection with the Work. (NYSCEF Doc. No. 385 at ¶ 10.4).

Based upon the foregoing language, defendants argue that Skyline is required to indemnify them for bodily harm allegedly caused by Skyline's acts or omissions in erecting the sidewalk bridge.

Skyline opposes and argues that the subject indemnity provision has not been triggered in that the alleged claim does not arise out of any negligent or wrongful act or omission on its part. Skyline further argues that the above-referenced indemnification provision is inapplicable and unenforceable as a matter of law. In this regard, Skyline contends that a Skyline document, entitled "Terms and Conditions," which it claims was a part of the Cava/Skyline contract, contained a "Warranty Disclaimer, Limitation of Liability" provision, which states as follows:

> (i) Skyline Scaffolding Group, Inc. will not be responsible for any equipment failure or liability whatsoever, unless such failure or liability is the result of Skyline Scaffolding Group, Inc.'s negligence, and (ii) Skyline Scaffolding Group, Inc. will have no liability whatsoever for any incidental, consequential, punitive, or other damages, including without limitation … any other indirect damage or loss arising from or relating to the design, manufacture, sale, delivery, installation, repair, operation or use of equipment or any component part thereof, or any actual or alleged failure or defect in the equipment or any component part thereof (NYSCEF Doc. No. 385 at 28).

In addition, Skyline notes that Paragraph 12 of the Terms and Conditions provision further provides that:

> The customer (Cava) shall indemnify and defend lessor/seller (Skyline) and hold Skyline harmless from any and all claims, actions, suits … and liabilities including attorneys fees which relate to injury or to destruction of property, or bodily injury… of any person…and are caused or claimed to be caused in whole or in part by the equipment leased herein or by the liability or conduct of Skyline …The parties agree that Skyline shall only be liable or responsible for actions of willful misconduct. Customer shall, at it's own cost and expense, defend Skyline against all suits or proceedings commence[d] by anyone in which Skyline is a named party for which Skyline is alleged to be liable or responsible as a result of or arising out of the equipment, or any alleged act or omission by Skyline (NYSCEF Doc. No. 385 at 27).

Skyline also refers to paragraph 17 of the Terms and Conditions provision which states that:

> SKYLINE'S AGREEMENT TO PROVIDE EQUIPMENT OF SERVICES HEREUNDER IS EXPRESSLY CONDITIONED UPON CUSTOMER'S (CAVA) UNQUALIFIED ACCEPTANCE OF THIS AGREEMENT, AND CUSTOMER'S ACCEPTANCE OF THIS AGREEMENT IS EXPRESSLY LIMITED TO THESE EXACT TERMS AND CONDITIONS SPECIFIED HEREIN (NYSCEF Doc. No. 385 at 28).

Skyline contends that the above-referenced provisions in the Terms and Conditions document were incorporated and made a part of the overall Cava/Skyline contract documents. Although the Terms and Conditions document is not signed by the

parties, Skyline contends that this portion of the contract was annexed at the end of the contract documents provided by Cava. As such, Skyline argues that it is not contractually obligated to indemnify the defendants, or any other entity in this matter, for anything other than Skyline's own failure or negligence as set forth in its Terms and Conditions. Since there is no evidence it was negligent in causing the plaintiff's accident, Skyline argues that Sun Moon and Cava's contractual indemnity claim should be dismissed as against it.

A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . .be enforced according to its terms [internal quotation marks and citations omitted]" (*TAG 380, LLC v ComMet 380, Inc.,* 10 NY3d 507, 512-513 [2008]).

Here, the indemnity provision upon which Cava and Sun Moon rely states that Skyline is obligated to defend and indemnify the defendants for all claims "due to: (i) any personal injury . . . sustained at the Project; (ii) any negligent or wrongful act or omission" of Skyline and "(iii) any claim asserted, or lien or notice of lien filed, by any subcontractor or supplier of any tier against the Project, or against any Indemnitee in

connection with the Work." Defendants assert they are not required to prove that plaintiff's accident resulted from Skyline's negligence, but only that it arose out of the performance of Skyline's work in erecting the sidewalk bridge, which arguably appears to fall under subsection (i) of the indemnity clause pertaining to all claims sustained at the project. However, such an interpretation renders meaningless subdivision (ii) of the clause, which specifically states that Skyline must indemnify defendants for claims due to "any negligent or wrongful act or omission" on Skyline's part (*see Lenart Realty Corp. v Petroleum Tank Cleaners*, Ltd., 116 AD3d 536, 537 [1st Dept 2014]). "It is a well settled principle of contract law that a court should not adopt a construction of a contract which will operate to leave a provision of a contract . . . without force and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (*Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 460 [1st Dept 2010] [internal quotation marks and citations omitted]; *see Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133-34 [1st Dep't 2017]). Thus, subsection (ii) of the indemnity clause must be read in conjunction with, and as limiting the former subsection (i). Thus, as properly construed, the indemnity clause in the Cava/Skyline contract requires Skyline to indemnify, defend and hold harmless Sun Moon and Cava for claims that occurred on the project but only where said claims resulted from Skyline's negligent acts or omissions.

Moreover, the court finds that Skyline has demonstrated, prima facie, that its Terms and Conditions were incorporated and made a part of the overall Cava/Skyline contract, and that this provision also limits its indemnification obligations to claims that arise out of Skyline's own failures or negligence. Notably, in opposition, Sun Moon and Cava do not challenge Skyline's contention that its Terms and Conditions were incorporated into the main agreement.

Turning to the issue of whether the indemnity clause has been triggered, as discussed above, the court finds that Skyline has made a prima facie showing that its erection of the sidewalk bridge did not contribute and/or cause the bridge's platform to collapse/break. Inasmuch as the plaintiff's accident cannot be attributed to any negligence on the part of Skyline, the contract's indemnity provision has not been triggered. Accordingly, that branch of Skyline's motion seeking to dismiss Sun Moon and Cava's contractual indemnity claim as against it is granted. Consequently, that branch of Cava and Sun Moon's motion seeking summary judgment in their favor on said claim against Skyline is denied.

Sun Moon and Cava's Breach of Contract Claim To Procure Insurance Against Skyline

Finally, as to Sun Moon and Cava's second third-party claim against Skyline for breach of contract to procure insurance, the court finds that Skyline has made a prima facie showing that it procured the requisite insurance pursuant to the terms of the Cava/Skyline contract. Furthermore, the court notes that defendants have proffered no

opposition to this branch of Skyline's motion. As such, that branch of Skyline's motion seeking to dismiss defendants' breach of contract to procure insurance claim as against it is granted as unopposed (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

Conclusion

Based upon the foregoing, it is hereby

Motion Seq. No. 13

ORDERED that plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim is granted as against Sun Moon and Cava, and denied as to AGL; and it is further

Motion Seq. No. 14

ORDERED that Skyline's motion is granted to the extent that AGL's third-party complaint against Skyline is dismissed, and Sun Moon and Cava's second third-party claims against Skyline for common-law indemnity, contractual indemnity, contribution, and breach of contract for failure to procure insurance are also dismissed; and it is further

ORDERED that branch of Skyline's motion seeking to dismiss M&A's contractual indemnity crossclaim as against it is granted; and it is further

ORDERED that all common-law indemnity and contribution crossclaims against Skyline are dismissed and that branch of Skyline's motion seeking a conditional order of

summary judgment on its common-law indemnification crossclaim over and against AGL is denied; and it is further

Motion Seq. No. 15

ORDERED that M&A's motion is granted to the extent that AGL's third-party complaint is dismissed as against it, and Sun Moon and Cava's second third-party claims against M&A for common-law indemnity, contribution and breach of contract for failure to procure insurance are dismissed as against M&A; and it is further

ORDERED that branch of M&A's motion seeking to dismiss Sun Moon and Cava's contractual indemnification claim as against it is denied; and it is further

Motion Seq. No. 16

ORDERED that AGL's motion is granted to the extent that plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims are dismissed as against it; and it is further

ORDERED that branch of AGL's motion seeking to dismiss plaintiff's common-law negligence claim and Sun Moon and Cava's common-law indemnity and contribution claims against it is denied; and it is further

Motion Seq. No. 17

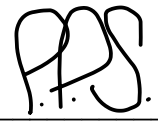
ORDERED that branch of Sun Moon and Cava's motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is granted as unopposed; and it is further

ORDERED that branch of Sun Moon and Cava's motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted except to the extent said claim is predicated upon Industrial Code Sections 23-1.18 (b) (1) and 23-5.1 (c) (1); and it is further

ORDERED that the remainder of Sun Moon and Cava's motion is denied, and the actions are severed accordingly.

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

E N T E R



PETER P. SWEENEY, J.S.C.