Perez v Broadway 98 Condominium
2022 NY Slip Op 32301(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 156859/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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OSCAR PEREZ,

Plaintiff,

- v -

BROADWAY 98 CONDOMINIUM, ORSID REALTY CORP., HANJO CONTRACTORS, INC.,

Defendant.

----------X

INDEX NO. 156859/2016

MOTION DATE 02/26/2021, 02/26/2021, 03/01/2021

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

HANJO CONTRACTORS, INC.

Plaintiff,

-against-

MANHATTAN STEEL DESIGN, CORP.

Defendant.

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Third-Party
Index No. 595810/2016

BROADWAY 98 CONDOMINIUM, ORSID REALTY CORP.

Plaintiff,

-against-

BESSIE CHIANG, ROBIN JANIS

Defendant.

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Second Third-Party
Index No. 595855/2016

The following e-filed documents, listed by NYSCEF document number (Motion 005) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 218, 220, 225, 228, 231, 236, 240, 244, 253, 254, 255, 256

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 219, 221, 224, 229, 232, 234, 237, 238, 239, 241, 242, 245, 247, 248, 249, 250, 251, 252

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 222, 223, 230, 233, 235, 243, 246, 257, 258

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

In this action, plaintiff Oscar Perez alleges that on February 19, 2016, he suffered personal injuries while working at 241 97th Street, New York, New York, a residential building known as Broadway 98 Condominium.

In motion sequence 005, third-party defendant Manhattan Steel Design Corp. (Manhattan Steel), moves, pursuant to CPLR 3211 and 3212, for an order granting summary judgment as to the third-party claims and cross claims for common law indemnification and contribution.

In motion sequence 006, defendant/third-party plaintiff Hanjo Contractors, Inc. (Hanjo), and second third-party defendants Bessie Chiang (Chiang), and Robin Janis (Janis) move, pursuant to CPLR 3212, for an order dismissing plaintiff's claims for common law negligence, as well as the alleged violations of Labor Law §§ 200, 240 (1) and 241 (6). Hanjo also seeks summary judgment as to its claims against Manhattan Steel and to dismiss all cross claims.

In motion sequence 007, defendant/second third-party plaintiff Broadway 98 Condominium (Broadway 98) and defendant/second third-party plaintiff Orsid Realty Corp. (Orsid), move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiff's complaint and all cross claims and counterclaims. They also move for an order granting summary judgment to for their claim for contractual indemnification against Chiang and Janis and seek costs, attorneys' fees, and other legal expenses.

The motions are consolidated for disposition.

FACTUAL ALLEGATIONS

Plaintiff's deposition

Plaintiff testified that on February 19, 2016, he was working as a helper for Manhattan Steel at a building on the corner of 97th Street and Broadway in New York County for his boss known as "Oggy." (NYSCEF DOC. NO. 167, at 71, 258). Oggy was present at the site at the time and was the only worker who provided plaintiff with directions or instructions for his work. (*id*., at 67, 260). Plaintiff maintains that "Bo" was a welder at the location and cut steel beams with a torch, that a worker named "Carlos" would weld the beams, and that a worker named "Raphael" would assist Oggy. (*id*., at 68-69).

At the time of his accident, plaintiff was not aware that he was working for a company known as Manhattan Steel and only learned of its name during the litigation process. (*id*., at 72-74). On the days prior to his accident, plaintiff was connecting beams, setting up scaffolds, bringing materials to the floors, cleaning, and setting up the work site. (*id*., at 74-75).

During the four days prior to plaintiff's accident, Oggy was connecting, cutting, and removing beams. (*id*., at 92- 93). When removing the old beams, a hand crane would be utilized to hold the beam in place with choker brackets utilized to prevent the beam from falling. (*id*., at 94, 98, 102).

Plaintiff recalls assembling a 4 wheeled scaffold and placing it beneath a beam that was going to be cut. (*id*., at 111-115). Plaintiff was working with Bo who was to cut and lower the beam. (*id*., at 122-123). Bo climbed the scaffold after the crane was assembled. (*id*., at 122, 147).

Plaintiff recalls setting up water, placing a fire blanket below where Bo was working and waiting for him to start cutting above on the scaffold. (*id*., at 125). As Bo started to cut a beam,

a fire began on the fire blanket which plaintiff proceeded to extinguish with water. (*id*., at 134-135). Bo then proceeded to strike the corner bracket with a mallet. (*id*., at 138). After striking the corner bracket, a piece of the corner beam measuring approximately five inches by five inches, which plaintiff testified was heavy, proceeded to fall between fifteen to sixteen feet onto plaintiff's right shin (*id*., at 141-144, 308). Plaintiff then tripped on the scaffold and fell into a boiler hole measuring two or three feet deep. (*id*., at 146, 152 and 328).

Plaintiff did not know who created the hole he fell into or how long it existed but recalls that it was there when Manhattan Steel started work at the location. (*id*., at 295-296). Plaintiff maintains that no one from Hanjo told him how to correct his work or stop him from performing his work. (*id*., at 266). Plaintiff never met Chiang and did not know Janis. (*id*., at 271).

Andrew Sak's deposition

Andrew Sak testified that he works as a superintendent for Broadway 98. (NYSCEF DOC. NO. 216, at 7). In February of 2016, Penthouse K was being renovated and combined with Apartment 14L both of which were owned by Chiang. (*id*., at 8-10). This work was taking place in 2014 through 2019. (*id*., at 10). Sak would check the progress of the work, and if he saw something unsafe, he would point it out to Hanjo, the general contractor. (*id*., at 11-13).

Hanjo had a supervisor at the location nicknamed "Rambo" who was present at the site every day. (*id*., at 13). Sak was not familiar with the plaintiff's accident on February 19, 2016. (*id*., at 14). He was also not familiar with Manhattan Steel (*id*., at 15). When he was told of the accident by "Rambo" he said that no one knew anything regarding it as there were no witnesses. (*id*., at 15).

Sak would occasionally attend construction meetings between the contractor and Orsid. (*id.*, at 16-17). He did not physically assist with work performed at the project nor did he hire any contractors or subcontractors to assist with the work being performed. (*id.*, at 17). In 2016, Sak did not report on the progress of the project to the account executive for Broadway 98, however he testified that after June of 2016, the account executive would ask about the progress and visit the site weekly or biweekly. (*id.*, at 22).

Sak recalls welding work going on in the apartment but did not visually inspect the work. (*id.*, at 25). He maintains that he did not supervise the employees who were working on the project and that it was not his responsibility. (*id.*, at 26). Sak did not recall seeing anything dangerous or unsafe taking place in Penthouse K or apartment 14 L. (*id.*, at 27).

Augusto Cortino's deposition

Augusto Cortino testified that he was the owner of Manhattan Steel. (NYSCEF DOC. NO. 189). Manhattan Steel would conduct work including the installation, cutting, and framing of commercial and private frames with steel beams. (*id.*, at 13). Manhattan Steel had two employees in 2016 named "Carlos" and "Bo." (*id.*, at 14). Manhattan Steel would provide the workers with a floor blanket, goggles, and a hard hat. (*id.*, at 15-16). Cortino was present at the site on a daily basis. (*id.*, at 16-17). He did not recall a project located at 241 West 97th Street known as "Broadway 98 Condominiums." (*id.*, at 19).

At his deposition, Cortino reviewed a proposal Manhattan Steel sent to the owner of Hanjo. (*id.*, at 21-22). Cortino recalls signing the proposal and faxing it to Hanjo. (*id.*, at 35). The only work Manhattan Steel performed in 2015 was for Hanjo. (*id.*, at 37).
Cortino recalls that plaintiff was employed by Manhattan Steel and was at the project acting as a fire watch. (*id.*, at 44-45).

On the date of plaintiff's accident, Cortino was inserting bolts into beams. (*id.*, at 58). Cortino recalls telling plaintiff that it was his job to work as a fire watch which was required by the building. (*id.*, at 59). Bo was working with a beam and there was a scaffold available for use which was seven feet high. (*id.*, at 60). Cortino recalls that there was a carpenter present as well as a superintendent named Rambo on the floor below. (*id.*, at 63 64). Cortino was supervising the work to make sure it was performed safely and was supervising the work at all times that day. (*id.*, at 66, 69).

On the date of plaintiff's accident, Cortino maintains that a piece of the beam or metal did not fall to the ground and plaintiff was not working near Bo but was near a door. (*id.*, at 67, 72). Cortino did not see plaintiff get hit by any piece of material, did not see plaintiff fall, and did not see plaintiff strike his head against the wall. (*id.*, at 68). Cortino recalls that plaintiff left before he did and told him that he had a pinch in his neck. (*id.*, at 69-105). Neither Bo nor Carlos told Cortino that an accident occurred. (*id.*, at 102). Cortino remembers that the police arrived at the site, and that they had asked if anyone got hurt. (*id.*, at 70-71). The police told Cortino that they were contacted by plaintiff. (*id.*, at 101).

Cortino also recalls that the building superintendent checked on the work and made sure the work was being performed safely. (*id.*, at 71). Cortino did not give plaintiff instructions on the date of plaintiff's accident and all of the welding or cutting of beams would have been completed off- site. (*id.*, at 72, 74).

Eileen Aluska's deposition

Eileen Aluska testified that she works as a senior account executive with Orsid overseeing buildings' management. (NYSCEF DOC. NO. 210, at 7). Orsid was hired by Broadway 98 to manage the building located at 241 West 97th Street in Manhattan. (*id.*, at 32).

Aluska would visit the building once a week and would attend weekly construction meetings. (*id.*, at 28). Aluska contends that in June of 2016, she was an account executive and managed the day-to day operations of the building, interacted with staff, and oversaw capital projects. (*id.*, at 26).

Aluska was familiar with Chiang and Janis who were the unit owners of Penthouse K, and two other apartments in the building. (*id.*, at 9). Aluska became aware of work being done in Chiang and Janis' units in June of 2016 and maintains that the work was completed in 2018. (*id.*, at 11).

Aluska heard about plaintiff's accident four months after it occurred. (*id.*, at 20). She was not aware of an investigation of plaintiff's accident. (*id.*, at 20-21). Sak, the superintendent of the building in 2016 who was employed by Broadway 98 would report to the board of managers and Orsid. (*id.*, at 24-25, 29, 40). He was responsible for ensuring that the contractor was working safely, that there were no leaks, and that the plumbing work was being done correctly, however, he was not a construction manager. (*id.*, at 27). If he saw safety issues, Sak would point them out to the contractor or an architect. (*id.*, at 29).

Damandra Persaud's deposition

Damandra Persaud worked for Hanjo, a general construction company, and served as a supervisor in 2016. (NYSCEF DOC. NO. 211, at 10, 11). Persaud's duties included ensuring that the work was completed as planned. (*id.,* at 11, 14). Persaud worked daily at the Chiang and Janis residence as a site supervisor. (*id.,* at 16-17, 30). Hanjo was hired to combine two apartments in the building located on the penthouse level and the 14th floor. (*id.,* at 45). Manhattan Steel was a subcontractor for Hanjo on this project (*id.*). Persaud clarified that he did not direct the manner in which Manhattan Steel performed its work in the penthouse, nor did

anyone from Hanjo direct the means or methods of Manhattan Steel's work in the penthouse. (*id.,* at 33). He did not know if anyone from the building directed Manhattan Steel's work in the penthouse. (*id.,* at 34).

Persaud does not recall if he was present on February 19, 2016 and does not recall when the job started or finished. (*id.,* at 20-21). Manhattan Steel was changing steel beams in the penthouse. (*id.,* at 22-23). He did not observe any steel beams being cut. (*id.,* at 23). Oggy was the supervisor for Manhattan Steel and was generally located at the site when Persaud was present. (*id.,* at 23-24). Persaud only took directions from a Hanjo employee (*id.,* at 30-31).

Persaud did not know anything about plaintiff's accident. (*id.,* at 26). He spoke with "Andrew" the superintendent of the building, who would sometimes check the building, however the superintendent did not direct specific work that Manhattan Steel was conducting in the penthouse. (*id.,* at 31). Persaud did not know who was responsible for site safety at the project. (*id.,* at 49).

DISCUSSION

"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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's

function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp*., 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented on a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

NY State Workers Compensation Law § 11

Manhattan Steel moves for summary judgement and dismissal on all claims and cross claims for common law indemnification and contribution as against it. Manhattan Steel, plaintiff's employer, argues that because plaintiff's injuries do not qualify as a grave injury as defined by the New York State Workers Compensation Law § 11, these claims and cross claims must be dismissed.

Manhattan Steel posits that it is undisputed that it was plaintiff's employer at the time of the accident and that plaintiff received Workers' Compensation benefits. Manhattan Steel contends that it is also undisputed that plaintiff did not allege any injuries which would qualify plaintiff as having sustained a "grave injury" as defined by Workers Compensation Law § 11. Manhattan Steel notes that plaintiff claims he sustained disc herniations to his neck and back, that he underwent a cervical discectomy with fusion at C3-C4, that his treatment consisted of physical therapy for his neck and steroid injections for his back as well as a cervical discectomy

with fixation and fusion. Manhattan Steel contends that plaintiff's medical records demonstrate that he was treated for alleged neck pain, herniated discs, and a cervical fusion.

In opposition, Hanjo contends that it was not actively negligent in causing plaintiff's accident to occur, that Hanjo did not direct or control the plaintiff's work, and that Hanjo did not otherwise cause or create a dangerous condition or have notice of a dangerous condition.

Workers' Compensation Law §11 provides, in part, as follows:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot...or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Furthermore, "[w]here the plaintiff has not sustained a 'grave injury,' section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant. Requiring the indemnification contract to be clear and express furthers the spirit of the legislation." (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *see also Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404 [1st Dept 2017]).

Here, Manhattan Steel has met its burden to demonstrate that plaintiff's injury did not satisfy the requirements of a grave injury. It references the neurological independent evaluation performed on September 16, 2020 by Dr. Adam N. Bender who concluded that plaintiff did not

suffer a disability due to any neurological problem and that "[t]here is no neurological problem casually related to the incident of February 19, 2016." (NYSCEF DOC. NO. 171, at 12, ¶ 6). Manhattan Steel also references an expert spinal independent medical examination dated October 6, 2020 performed by Dr. John A. Bendo who concludes that "[t]here is no objective evidence of orthopedic disability and/or neurologic disability." (NYSCEF DOC. NO. 172, at 5).

In opposition, Hanjo fails to meet its burden by providing medical evidence that plaintiff did suffer a "grave injury". Hanjo instead argues that it was not actively negligent. Broadway 98 and Orsid did not oppose the part of the motion seeking to dismiss the claims for common law indemnification and contribution. As plaintiff's alleged injuries discussed in his deposition and independent medical examinations do not fall within the categories discussed in section 11 of the Workers Compensation Law, he did not sustain a "grave injury" pursuant to the statute.

Accordingly, Manhattan Steel's motion for summary judgment dismissing the third-party claims for common law indemnification and contribution will be granted (*see Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006] [holding as plaintiff's "alleged injuries to his back, as described in his deposition testimony and as further amplified in his second supplemental verified bill of particulars, clearly do not fall within any of the enumerated categories, he did not sustain a 'grave injury,' and therefore third-party plaintiff may not assert a common-law indemnification claim as against (the third-party defendant)"]).

Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

Hanjo

Hanjo argues that there is no evidence to suggest that it undertook a duty to direct or supervise the work performed by the plaintiff. Hanjo notes that the contract between Hanjo and Manhattan Steel specifies that Manhattan Steel is responsible for the direction and supervision of the work performed by its own employees. Hanjo contends that the testimony of the witnesses demonstrates that Hanjo supervised the overall progress of work at the project and did not direct or control any work performed by the plaintiff on the date of the accident. Finally, Hanjo contends that it did not cause or create a dangerous condition, nor did it have notice of any allegedly dangerous condition.

Hanjo has met its burden to demonstrate that it was not negligent or that it violated Labor Law § 200. Plaintiff testified that no one from Hanjo told him how to correct his work or stopped him from performing his work and that he only received directions from Manhattan Steel. (NYSCEF DOC. NO. 167, at 266). Persaud from Hanjo testified that to her knowledge, no one from Hanjo directed the means and methods of Manhattan Steel's work at the subject premises. (NYSCEF DOC. NO. 188 at 33- 34). Furthermore, Cortina testified that Manhattan Steel supervised the work at all times on the date of the accident. (NYSCEF DOC. NO. 189, at 68).

Plaintiff does not address that part of Hanjo's motion seeking summary judgment dismissing his Labor Law § 200 claim against it.

Accordingly, that part of Hanjo's motion seeking summary judgment dismissing plaintiff's claims for common law negligence and violation of Labor Law § 200 will be granted.

Broadway 98 and Orsid

Broadway 98 and Orsid argue that plaintiff's allegation that they were negligent pursuant to the common law or violated Labor Law § 200 must be dismissed because neither of them provided any supervision over the injury producing work. Based upon plaintiff's testimony, plaintiff only received instructions from Manhattan Steel. (NYSCEF DOC. NO. 211, at 67, 260). Furthermore, Sak, the superintendent from Broadway 98, testified that he did not supervise the employees who were specifically working on the project. (NYSCEF DOC. NO. 216, at 26).

Broadway 98 and Orsid have met their burden that they were not negligent and did not violate Labor Law § 200. Plaintiff did not oppose Broadway 98 or Orsid's motion.

Accordingly, that part of Broadway 98 and Orsid's motion seeking summary judgment on plaintiff's common law and Labor Law § 200 claims will be granted and these claims as against them will be dismissed.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse* Diesel, 98 AD2d 615 [1st Dept 1983]), provides in relevant part:

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

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501 [1993]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Once a plaintiff establishes that a violation of the statute proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Hanjo

Hanjo argues that plaintiff alleges an injury resulting from a falling piece of metal and that plaintiff was later injured after tripping over a Bakers' Scaffold at ground level. Hanjo contends that plaintiff's injuries to his head, neck and back did not result from a falling object.

In opposition, plaintiff contends that as a result of Hanjo failing to properly secure the beam, a portion of the beam fell onto him which then caused him to fall into an uncovered boiler hole. Plaintiff contends that there are issues of fact concerning whether he was exposed to a falling object which needed to be secured for the purpose of the undertaking and whether the unprotected opening into which he fell constituted a gravity related hazard.

According to the "Physician Documentation Sheet" plaintiff was injured "when a piece of beam fell on his leg and pt lost balance which caused him fall [sic] on the L side of his head on a wall and onto his back while at work pta." (NYCEF DOC. NO. 170). Furthermore, plaintiff testified that the over one-foot-deep hole he fell into after being struck by the portion of the beam was there when he began working and that it was not covered by plywood and that there were no warning cones around it. (NYSCEF DOC.NO.18394, at 153; NYSCEF DOC. NO. 16875, at 295-296). However, Cortino disputes plaintiff's account of the accident and asserts that while he was supervising the work all day, a piece of beam or metal did not fall at the site, that plaintiff did not get hit by a falling object while Bo was working, and that he was unaware of an accident. (NYSCEF DOC. NO. 189, at 67, 72).

Consequently, there are questions of fact whether Hanjo violated Labor Law § 240 (1). A question exists as to whether the beam or metal, which was being cut several feet above plaintiff, fell and struck plaintiff, whether it was adequately secured, and whether it caused his alleged injuries, including triggering him to trip and fall into a hole (*see Apel v City of New York*, 73 AD3d 406, 407 [1st Dept 2010] [holding that the risk arose from the force which a heavy object caused in its descent]). A second question also exists as to whether the hole plaintiff fell into should have been covered due its proximity to where he was working.

Accordingly, that part of Hanjo's summary judgment motion seeking to dismiss plaintiff's Labor Law § 240 (1) claim as against it will be denied.

Labor Law § 241 (6)

Hanjo contends that plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code sections 23-1.7 (a) (b) (c) (d) (e) must be dismissed. Labor Law § 241 (6) provides, in pertinent part:

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

Labor Law § 241(6) imposes a duty upon owners, contractors, and their agents "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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Here, plaintiff does not oppose dismissal of this claim insofar as it is premised on violations of Industrial Code Sections 23-1.7 (c) (d) (e), and as such, those claims are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475, 938 N.Y.S.2d 288 [1st Dept 2012] [holding plaintiff abandoned reliance on certain Industrial Code sections by failing to address them in opposition to defendant's summary judgment motion]).

Accordingly, Hanjo is entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on the abandoned provisions.

Hanjo contends plaintiff's allegation of a violation of section 23-1.17 (b) (1) (i) of the Industrial Code must be dismissed. Section 23-1.17 (b) (1) (i) provides:

> "(1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

Section 23-1.7 (b) (i) is sufficiently specific to support a Labor Law § 241 (6) claim (s*ee Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 451 [1st Dept 2013]).

Plaintiff argues that after being struck by a part of a beam, he fell into an opening created for a boiler. Plaintiff contends that there are questions of fact concerning whether Hanjo violated this provision of the Industrial Code, as the hole was left unguarded and his fall into the hole caused him to suffer injuries.

Accordingly, because there is a question of fact as to whether the hole plaintiff fell into should have been covered, that part of Hanjo's summary judgment motion seeking to dismiss plaintiff's Labor Law § 241 (6) predicated on a violation of 23-1.17 (b) (1) (i) will be denied.

Regarding Industrial Code section 23-1.7 (a), Hanjo contends that because plaintiff's injuries were not caused by a falling object, section 23-1.7 (a) must be dismissed.

Section 23-1.7 (a) (1) provides:

"Overhead hazards.

(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

This section of the Industrial Code is sufficiently specific to support a cause of action pursuant to Labor Law § 241 [6] (*see Podobedov v East Coast Constr. Grp., Inc.*, 133 AD3d 733, 736 [2nd Dept 2015]).

Here, a question of fact exists as to whether this section of the Industrial Code was violated and whether overhead protection could have prevented plaintiff's injuries. Plaintiff was allegedly struck by a piece of falling steel beam while working in an area beneath where beams were being cut precipitating his fall into the boil hole. Therefore, a question of fact exists as to whether overhead protection may have prevented the beam from hitting plaintiff and precipitating his fall.

Accordingly, that part of Hanjo's summary judgment motion seeking to dismiss plaintiff's Labor Law § 241 (6) predicated on a violation of 23-1.17 (a) (1) will be denied.

Broadway 98 and Orsid

Broadway 98 and Orsid argue that both plaintiff's Labor Law §§ 240 (1) and 241 (6) claims must be dismissed as against them because they did not own the residential condominium unit where the accident occurred and they did not have control over the injury producing work. Broadway 98 and Orsid contend that Chiang and Janis are the "unit owners" pursuant to section 339-e (16) of the Condominium Act, as they owned Unit PH-K in fee simple absolute.

Broadway 98 and Orsid further contend that Chiang and Janis have acknowledged ownership of the residential condominium unit through a Notice to Admit and authenticated the deed for that unit through the same notice. They also contend that they did not retain Hanjo, Manhattan Steel, or any other contractor on the project and that instead, Chiang and Janis retained Hanjo, and Hanjo in turn retained Manhattan Steel. Moreover, Broadway 98 and Orsid contend that Chiang and Janis are specifically defined as "Owner" in their contract with Hanjo, which Chiang and Janis have admitted was operative at the time of plaintiff's alleged accident. Finally, they contend that the alteration agreement provided Broadway 98 and Orsid with the authority to stop a contractor's work only if the work interfered or threatened the condominium, risked a labor disturbance, deviated from the designs that the unit owners had submitted to the Condominium or exceed the allotted construction time.

A condominium association is not an owner within the meaning of Labor Law §§ 240 (1) and 241 (6) where it does not own the property where a plaintiff was performing his work and there is no evidence that the association had either the authority to contract with the plaintiff's employer to perform the work or the right to control the work (*Guryev v Tomchinsky*, 20 NY3d 194, 200 [2012]; *see also Mangiameli v Galante*, 171 AD2d 162, 164 [3d Dept 1999]).

Here, Broadway 98 and Orsid have met their burden to demonstrate that plaintiff's Labor Law §§ 240 (1) and 241 (6) claims should be dismissed because Chiang and Janis were the joint deed owners of residential units 14-L and PH-K as demonstrated by the submitted deeds, the joint deed owners retained the contractors who performed the subject work, and Broadway 98 and Orsid demonstrate that they did not have significant control over the injury producing work, and had merely general oversight over the property. Plaintiff did not oppose Broadway 98 or Orsid's motion.

Accordingly, that part of 98 Broadway and Orsid's summary motion seeking to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against them will be granted.

Contractual Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York,* 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). Moreover, a declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see also Long Is. Light. Co v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006]).

Hanjo

Hanjo argues that it was not actively negligent in causing plaintiff's alleged accident, that it did not direct or control plaintiff's work, and that Hanjo did not otherwise cause or create a dangerous condition or have notice of a dangerous condition. Hanjo contends that since Manhattan Steel was responsible for the direction and supervision of its own employees and

responsible for the safety of its employees, Manhattan Steel owes Hanjo contractual indemnification.

In opposition, Manhattan Steel contends that there was no written contract entered into between itself and Hanjo for the project. Manhattan Steel maintains that Hanjo submitted a document that it labeled a "subcontract" however it contends that this document contains no contractual terms, conditions, scope of work or delineation of responsibilities. Manhattan Steel further contends that the agreement does not require indemnification for negligent acts, but only for damages caused by any omission of the subcontractor. Finally, Manhattan Steel contends that the clause is "unintelligible on its face." NYCEF DOC. NO. 237, at 21.

The "Indemnity Agreement and Agreement to Maintain Certain Insurance" dated January 1, 206 and entered into between Hanjo, referred to as "Contractor," and Manhattan Steel referred to as "Subcontractor," provides in part:

> Furthermore, to the fullest extent permitted by law, subcontractor shall indemnify, hold harmless and defend Contractor, Owner and agents and employees of any of them from and against all claims, damages, losses and expenses including but not limited to attorneys' fees arising out of resulting from the work of the subcontractor provided any such claim, damage loss or expense (a) is attribute [sic] to bodily injury, sickness, disease or death, or to injury or destruction of tangible property, including loss of use resulting there from, and (b) is caused in whole in part by any [sic] or omission of the subcontractors or anyone directly or indirectly employed by it to anyone for whose acts it may be liable pursuant to the performance of the work, Notwithstanding the foregoing, judgment, mediation or arbitration award or settlement shall extend only to the percentage of the negligence of subcontractor or anyone directly or indirectly employed by it or anyone whose acts it may be liable in connection to such claim, damage loss, and expense."
>
> In any and all claims against Contractor, owner or any of its agents or employees, employee of the sub-contractor, the indemnification obligation under this paragraph shall not be limited by any limitations of amount or type of damages, compensation or benefits payable by or for sub-contractors under workers compensation and benefit act or any other employer benefit acts.
>
> (NYSCEF DOC. NO. 193).

As written, this provision requires Manhattan Steel to indemnify, hold harmless and defend Hanjo for bodily injury caused in whole in part by Manhattan Steel's omissions. It is not yet determined whether an omission by Manhattan Steel caused plaintiff's injury.

Accordingly, that part of Hanjo's motion seeking summary judgment for contractual indemnification as against Manhattan Steel must be denied as premature (s*ee Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021] [holding that a motion for summary judgment on a contractual indemnification claim is premature since the indemnification provision requires a finding of negligence]).

Hanjo also argues that to the extent that cross-claims for contractual indemnification have been asserted by Orsid or Broadway 98, neither Orsid nor Broadway 98 have privity of contract with Hanjo. In opposition, neither Broadway 98 nor Orsid produce a contract or reference contractual language to demonstrate that an indemnification clause existed between the parties.

Accordingly, because neither Broadway 98 nor Orsid submitted an agreement with contractual language in which an intention to indemnify can be implied from the language, that part of Hanjo's motion seeking summary judgment dismissing Orsid and Broadway 98's claims for contractual indemnification will be granted and those claims dismissed.

Broadway 98 and Orsid

Broadway 98 and Orsid contend that provisions in Chiang and Janis's alteration agreement establish that Broadway 98 and Orsid are entitled to contractual indemnification from Chiang and Janis. They argue that Article II, Section 4 of the alteration agreement provides:

> "You will indemnify and hold harmless the Condominium, its directors, officers and unit owners and employees, any architect or engineer engaged by the Condominium, the Managing Agent, and any tenants, occupants, guests or invitees of or in the Building of and from any and all damages, liabilities, costs,

> fees and expenses suffered to person or property as a result of or in connection with the Work . . . ."

(NYSCEF DOC. NO. 214).

In opposition, Hanjo, Chiang, and Janis contend that Broadway98 and Orsid are not entitled to indemnification because they retained supervisory duties over the work performed by plaintiff's employer. Hanjo, Chaing and Janis's opposition does not address the applicability of the specific indemnification clause or language in the alteration agreement.

The "Notice to Admit to Chiang and Janis" dated December 4, 2020, specifies that the alteration agreement was entered into between Chiang, Janis, Broadway 98, and its board of managers and was in effect on February 19, 2016, the date of plaintiff's accident. Furthermore, as the signed alteration agreement discusses the indemnification responsibilities of Chiang and Janis for damages in connection to the alteration work, to the extent that damages are sought against Broadway 98, the agreement would provide for indemnification.

Accordingly, that part of Broadway 98 and Orsid's motion seeking summary judgment for contractual indemnification as against Chiang and Janis will be granted.

Finally, Broadway 98 and Orsid contend that Hanjo's cross claim for contractual indemnification must be dismissed because nether Broadway 98 nor Orsid were in contractual privity with Hanjo and did not agree to indemnify or procure insurance for Hanjo. Hanjo did not oppose this portion of Broadway 98 and Orsid's motion.

Accordingly, that part of Broadway 98 and Orsid's motion seeking summary judgment on Hanjo's cross claim for contractual indemnification as against Broadway 98 and Orsid will be granted and that claim will be dismissed.

Breach of Contract

Hanjo contends that because Manhattan's Steel's carrier has disclaimed coverage to Hanjo, Hanjo's claim for breach of contract against Manhattan Steel for failing to procure insurance must be granted. In support of its contention, Hanjo attaches to its moving papers a "Tender Declination" letter dated November 10, 2016 from Meadowbrook Insurance Group. However, a denial of coverage letter does not establish that a party failed to procure the required insurance (*see Sicilia v City of New York*, 127 AD3d 628, 629 [1st Dept 2015]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [holding insurer's refusal to indemnify does not change the conclusion that party purchased the liability policy required under the contract]).

Accordingly, because Hanjo does not raise any other argument to support its breach of contract claim, that part of Hanjo's motion seeking summary judgment on its claim for breach contract as against Manhattan Steel will be denied.

Common law indemnification

To establish a claim for common-law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept. 2012]).

Hanjo

Hanjo argues that Orsid and Broadway 98's cross claims for common law indemnification against it must be dismissed. Hanjo maintains that it was not negligent and neither supervised the injury producing work or had actual or constructive notice of a dangerous

condition. Hanjo argues that the testimony demonstrates that Hanjo merely supervised the overall progress of work at the project and did not direct or control any work performed by the plaintiff on the date of the accident. Hanjo contends that Persaud and Cortina both testified that Hanjo did not direct or control Manhattan Steel's work or the means and methods of how the work was performed and Persaud confirmed that Hanjo did not provide tools or equipment to Manhattan Steel.

In opposition, Orsid and Broadway 98 fail to demonstrate that Hanjo was negligent, a necessary element of a claim for indemnification. Therefore, as Hanjo has met its burden to demonstrate that it was not negligent, and as Orsid and 98 Broadway fail to demonstrate otherwise.

Accordingly, that part of Hanjo's motion seeking summary judgment on Orsid and Broadway 98 cross claims it for common law indemnification will be granted and those claims will be dismissed.

Broadway 98 and Orsid

Broadway 98 and Orsid contend that Hanjo and Manhattan Steel's cross-claims for common law indemnification and contribution against them are meritless. Broadway 98 and Orsid argue that they were not negligent and did not cause plaintiff's accident because they did not supply any equipment for the project and had no control over the manner in which Manhattan Steel performed the work as evidenced by plaintiff and Sak's testimony. Broadway 98 and Orsid have met their burden that they were not negligent.

Hanjo and Manhattan Steel fail to demonstrate that either Broadway 98 or Orsid had actual supervision or control over the work which injured plaintiff. Instead, they reference testimony that Broadway 98 and Orsid provided a level of general supervision. Therefore,

Hanjo and Manhattan Steel do not demonstrate that Broadway 98 and Orsid had control over the injury producing work.

Accordingly, that part of Broadway 98 and Orsid's summary judgment motion seeking to dismiss Hanjo and Manhattan Steel's cross claims for common law indemnification as against them will be granted and those claims will be dismissed.

CONCLUSION and ORDER

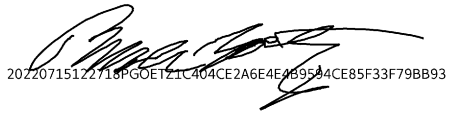
Accordingly, it is

ORDERED that third-party defendant Manhattan Steel Design Corp.'s motion (sequence 005) pursuant to CPLR §§ 3211 and 3212 for an order granting summary judgment as to the third-party claims and cross claims for common law indemnification and contribution is granted and those claims and cross claims as against it are dismissed; and it is further

ORDERED that defendant/third-party plaintiff Hanjo Contractors, Inc. and second third-party defendants Bessie Chiang and Robin Janis's motion (sequence 006) pursuant to CPLR § 3212 for an order granting summary judgment is granted to the extent that plaintiff Oscar Perez's claims for common law negligence, under Labor Law § 200 and Labor Law § 241 (6) claims premised on violations of Industrial Code § 23-1.7 (c) (d) and (e) are dismissed as against these defendants; and Orsid Realty Corp. and Broadway 98 Condominium's cross claims for contractual and common law indemnification are dismissed and the motion is otherwise denied; and it is further

ORDERED that Orsid Realty Corp. and Broadway 98 Condominium's motion (sequence 007) pursuant to CPLR § 3212 for an order granting summary judgment is granted and the complaint is dismissed as against these defendants; Hanjo's cross claim for contractual indemnification and Hanjo and Manhattan Steel's cross claims for common law indemnification

are dismissed as against Orsid Realty Corp. and Broadway 98 Condominium; and Broadway 98 Condominium's motion seeking summary judgment as to their claim for contractual indemnification as against Bessie Chiang and Robin Janis is granted.



7/15/2022
DATE

PAUL A. GOETZ, J.S.C.

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