SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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MATTHEW MORAN,

Plaintiff — Index No. 157435/2016

-against-

HENEGAN CONSTRUCTION CO., INC., 85 TENTH AVENUE ASSOCIATES L.L.C., GOOGLE, INC., NATIONAL ACOUSTICS HOLDINGS, INC., NATIONAL ACOUSTICS, LLC, and NATIONAL ACOUSTICS, INC.,

Defendants

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HENEGAN CONSTRUCTION CO., INC., 85 TENTH AVENUE ASSOCIATES L.L.C., and GOOGLE, INC.,

Third Party Plaintiffs — Third Party Index No. 595249/2017

-against-

SEA BREEZE MECHANICAL CORP.,

Third Party Defendant

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SEA BREEZE MECHANICAL CORP.,

Second Third Party Plaintiff — Second Third Party Index No. 596003/2017

-against-

NATIONAL ACOUSTICS HOLDINGS, INC., NATIONAL ACOUSTICS, LLC, and NATIONAL ACOUSTICS, INC.,

Second Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained July 27, 2016, when he fell off a ladder while working on premises owned by defendant 85 Tenth Avenue Associates, L.L.C., and occupied by defendant Google, Inc., a tenant, on a construction project for which defendant Henegan Construction Co. was the general contractor (collectively, Henegan Construction defendants). Defendants National Acoustics Holdings, Inc., National Acoustics, LLC, and National Acoustics, Inc., worked as subcontractors on the project and were wheeling large slabs of sheetrock on an A-frame cart near plaintiff when he fell. Henegan Construction also subcontracted the heating ventilation and air conditioning (HVAC) work to nonparty Admore Air Conditioning, who further subcontracted the metal sheet work to third party defendant Sea Breeze Mechanical Corp., plaintiff's employer.

The Henegan Construction defendants cross-claim against the National Acoustics defendants for both contractual and non-contractual indemnification and for contribution. The Henegan Construction defendants also commenced a third party action against Sea Breeze for contractual and non-contractual indemnification, contribution, and breach of a contract to

procure insurance. C.P.L.R. § 1007. Sea Breeze likewise commenced a second third party action against the National Acoustics defendants for contractual and non-contractual indemnification, contribution, and breach of a contract to procure insurance. C.P.L.R. § 1011.

Plaintiff moves for partial summary judgment on liability against the Henegan Construction defendants under New York Labor Law § 240(1). They cross-move for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) claims as well as all cross-claims against them, which the National Acoustics defendants oppose on procedural grounds. Since a cross-motion is not a vehicle for relief against a non-moving party, Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014); Kershaw v. Hospital for Special Surgery, 114 A.D.3d 75, 88 (1st Dep't 2013), the court denies the cross-motion to the extent that it seeks relief against the National Acoustics defendants and Sea Breeze, as neither of them moved against the Henegan Construction defendants before they filed their cross-motion.

The National Acoustics defendants move for summary judgment dismissing the amended complaint, the Henegan Construction defendants' cross-claims, and Sea Breeze's second third party complaint. C.P.L.R. § 3212(b). Finally, Sea Breeze moves for

summary judgment dismissing the Henegan Construction defendants' third party complaint.

For the reasons explained below, the court grants plaintiff's motion against the Henegan Construction defendants and grants the National Acoustics defendants' motion against Sea Breeze in part, but denies the cross-motion and the remainder of the motions. C.P.L.R. § 3212(b) and (e).

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving party must present a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). Only if the moving party meets that initial burden, does the burden shift to the non-moving parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for

purposes of summary judgment, the court construes the evidence in the light most favorable to the non-moving parties. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012).

III. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Labor Law § 240(1) requires that all building owners and general contractors:

> in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The statute imposes absolute liability on the owner and general contractor of a construction site if they fail to provide adequate protection against an elevation-related risk, and that failure is the proximate cause of plaintiff worker's injury. Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 97 (2015); Hogan v. 590 Madison Ave., LLC, 194 A.D.3d 570, 571 (1st Dep't 2021); Milligan v. Tutor Perini Corp., 191 A.D.3d 437, 437 (1st Dep't 2021). Google, Inc., also qualifies as an owner under the statute because the tenant undertook the construction project and hired Henegan Construction. Reyes v. Bruckner Plaza Shopping

Ctr., LLC, 173 A.D.3d 570, 571 (1st Dep't 2019); Nava-Juarez v. Mosholu Fieldston Realty, LLC, 167 A.D.3d 511, 513 (1st Dep't 2018); Gordon v. City of New York, 164 A.D.3d 1110, 1111 (1st Dep't 2018); Karwowski v. 1407 Broadway Real Estate, LLC, 160 A.D.3d 82, 85 (1st Dep't 2018).

Plaintiff claims that the Henegan Construction defendants are liable under Labor Law § 240(1) because the safety device provided to him failed to protect him. He maintains that, although the Henegan Construction defendants provided a functioning ladder, it proved inadequate as a safety device because it twisted underneath him during his work with both hands overhead, which caused him to fall and sustain injuries. The Henegan Construction defendants maintain that they did not violate Labor Law § 240(1) because the ladder was not physically defective and showed no sign of damage after plaintiff's fall. They also contend that factual questions remain whether plaintiff was the sole proximate cause of his injuries, because he did not: (1) direct anyone to hold the base of the ladder, (2) request additional safety equipment, or (3) establish the absence of fault on his part. Sea Breeze, in opposition to plaintiff's motion, insists plaintiff admitted that the ladder functioned safely and that he never fell.

In determining liability, the inquiry does not end simply because the Henegan Construction defendants provided a ladder

without defects. Labor Law § 240(1) lists ladders as safety devices, but does not mean that they provide adequate protection for every assigned task. The statute required the Henegan Construction defendants to provide a safety device "so constructed, placed and operated as to give proper protection to a person so employed." Plaintiff's work installing a Variable Air Valve box over eight feet above the ground required the ladder to be not only free from physical defects, but also securely placed, to ensure his protection from the foreseeable elevation-related risk inherent in his work: the risk of falling from a significant height. Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571; Milligan v. Tutor Perini Corp., 191 A.D.3d at 437; Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 413 (1st Dep't 2019); Gonzalez v. 1225 Ogden Deli Grocery Corp., 158 A.D.3d 582, 583 (1st Dep't 2018).

Plaintiff's deposition testimony that the ladder suddenly twisted during his work overhead establishes his prima facie claim. Daly v. Metropolitan Transp. Auth., 206 A.D.3d 467, 468 (1st Dep't 2022); Wu v. 34 17th St. Project LLC, 200 A.D.3d 508, 508 (1st Dep't 2021); Rodriguez v. Milton Boron, LLC, 199 A.D.3d 537, 537 (1st Dep't 2021); Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571. In opposition, the Henegan Construction defendants and Sea Breeze fail to show that plaintiff was provided an adequate safety device under Labor Law § 240(1).

Although Terrence Fearon, Sea Breeze's expert engineer with 17 years of experience, attests that the ladder was an "appropriate elevating device for the work that Plaintiff was performing at the time of his accident," Aff. of C. Briggs Johnson in Opp'n Ex. 5 ¶ 25, the mere procurement of the ladder did not absolve the Henegan Construction defendants of their non-delegable duty to protect plaintiff throughout his work. Quiroz v. Memorial Hosp. for Cancer and Allied Diseases, 202 A.D.3d 601, 604 (1st Dep't 2022); Mayorga v. 75 Plaza LLC, 191 A.D.3d 606, 606-607 (1st Dep't 2021); Gallegos v. Bridge Land Vestry, LLC, 188 A.D.3d 566, 567 (1st Dep't 2020).

Fearon further attests "that there is no evidence that the subject 8-foot, A-frame ladder was damaged, defective, or not properly setup at the time of the accident," Johnson Aff. in Opp'n Ex. 5 ¶ 6, but plaintiff need not show a defect to establish the Henegan Construction defendants' liability. Lin v. 100 Wall St. Prop. L.L.C., 193 A.D.3d 650, 651 (1st Dep't 2021); Sacko v. New York City Hous. Auth., 188 A.D.3d 546, 547 (1st Dep't 2020); Paz Avila v. Saint David's School, 187 A.D.3d 460, 460 (1st Dep't 2020); Rodriguez v. BSREP UA Heritage LLC, 181 A.D.3d 537, 537 (1st Dep't 2020). Nor does the ladder's set-up bear on their liability. Regardless whether the ladder initially provided a stable surface for plaintiff to carry out his work, and even if the ladder was not physically defective, it

ultimately proved inadequate as a safety device when it twisted underneath him. Once the ladder lost its stability, it ceased to provide any protection to plaintiff; instead, the unstable ladder caused him to fall. Daly v. Metropolitan Transp. Auth., 206 A.D.3d at 468; Wu v. 34 17th St. Project LLC, 200 A.D.3d at 508; Rodriguez v. Milton Boron, LLC, 199 A.D.3d at 537; Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571.

The Henegan Construction defendants and Sea Breeze next insist that plaintiff, as the foreman on the job, could have directed another worker to hold the ladder's base, or plaintiff could have stepped off the ladder when he heard other workers approaching him, in anticipation that they might disturb the ladder. Plaintiff's conduct, however, did not negate the Henegan Construction defendants' non-delegable duty to provide an adequate safety device. Plaintiff's inaction amounts, at most, to comparative fault, which is no defense to liability under Labor Law § 240(1). Daly v. Metropolitan Transp. Auth., 206 A.D.3d at 468; Pimentel v. DE Frgt. LLC, 205 A.D.3d 591, 593 (1st Dep't 2022); Wu v. 34 17th St. Project LLC, 200 A.D.3d at 508; Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571.

Plaintiff also owed no obligation to ask for assistance or for a more suitable safety device, because "the burden of providing a safety device is squarely on contractors and owners and their agents." Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d

1, 10 (1st Dep't 2011). See Greene v. Raynors Lane Prop. LLC, 194 A.D.3d 520, 522 (1st Dep't 2021). Moreover, he testified without contradiction that Sea Breeze's owner had assigned all other Sea Breeze workers to other duties, so that no one was available to hold the ladder. Nor does any defendant show that other safety devices were made available to plaintiff that he knew about and knew how to use, but declined to use. Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571; Sacko v. New York City Hous. Auth., 188 A.D.3d at 547.

Plaintiff also need not identify an alternative safety device to establish liability under Labor Law § 240(1), yet he nonetheless testified that scissor lifts sometimes were used for the work that he performed, "but a lot of the GC's don't like that," and the general contractor, not he, determined whether he worked on a scissor lift or scaffold. Aff. of Nicola Duffy Ex. C, at 183. Either a scissor lift equipped with guardrails or a similar stable elevated platform with guardrails, such as a baker scaffold, likely would have protected plaintiff from his fall.

Finally, no admissible evidence indicates that plaintiff caused the ladder to shift. Plaintiff testified that he rotated his body while on the ladder to perform his work, but not that he was continuously rotating or changing his position. Instead, he testified that he "was standing in the same direction for several minutes and then all of a sudden [the ladder] twisted." Id. at

143. The Henegan Construction defendants maintain that plaintiff's testimony is inconsistent, but fail to specify any contradiction or present any other evidence that his movement precipitated his fall.

Sea Breeze relies on two reports of plaintiff's injury to contest whether plaintiff actually fell, but neither is admissible. The report prepared by Deborah Beaumont, Sea Breeze's bookkeeper, is unauthenticated pursuant to C.P.L.R. § 4540-a or otherwise by any witness. The report by Romeo Volpacchio, Henegan Construction's supervisor, was authenticated during Volpacchio's deposition, but neither he nor any witness laid a foundation for the record's admissibility as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). Sea Breeze also relies on Volpacchio's deposition testimony that plaintiff recounted to Gene Popejoy, another Sea Breeze employee, that plaintiff stepped down the ladder, but this testimony of what Volpacchio learned from Popejoy is inadmissible hearsay. Patton v. Genito, 202 A.D.3d 631, 631 (1st Dep't 2022); Greca v. Choice Assoc. LLC, 200 A.D.3d 415, 416 (1st Dep't 2021); Poyodi v. Go N.Y. Tours, Inc., 193

A.D.3d 518, 519 (1st Dep't 2021); Weisenfeld v. Iskander, 187 A.D.3d 533, 533 (1st Dep't 2020).

In sum, even though plaintiff is unable to identify what caused the ladder to twist, his fall would not have occurred but for the Henegan Construction defendants' failure to provide adequate safeguards to plaintiff, who worked at a significant height in an actively shared work site. Daly v. Metropolitan Transp. Auth., 206 A.D.3d at 468; Wu v. 34 17th St. Project LLC, 200 A.D.3d at 508; Rodriguez v. Milton Boron, LLC, 199 A.D.3d at 537; Hogan v. 590 Madison Ave., LLC, 194 A.D.3d at 571. Therefore the court grants plaintiff's motion for summary judgment on his Labor Law § 240(1) claim and denies the Henegan Construction defendants' cross-motion for summary judgment dismissing that claim. C.P.L.R. § 3212(b) and (e).

IV. THE HENEGAN CONSTRUCTION DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The Henegan Construction defendants cross-move for summary judgment dismissing the entire amended complaint, in addition to plaintiff's Labor Law § 240(1) claim. Since plaintiff discontinued his negligence and Labor Law § 200 claims against 85 Tenth Avenue Associates and Google, Inc., the portion of the cross-motion seeking dismissal of plaintiff's negligence and Labor Law § 200 claims pertains only to Henegan Construction. All three defendants, however, cross-move for dismissal of plaintiff's claims under Labor Law § 241(6).

A. Plaintiff's Negligence and Labor Law § 200 Claims

Henegan Construction utterly fails to present a prima facie defense to plaintiff's negligence and Labor Law § 200 claims, because Henegan Construction demonstrates neither an absence of actual or constructive notice of a hazardous worksite, Simo v. City of New York, 205 A.D.3d 508, 509 (1st Dep't 2022), Padilla v. Touro Coll. Univ. Sys., 204 A.D.3d 415, 416 (1st Dep't 2022); Lopez v. City of New York, 203 A.D.3d 405, 405 (1st Dep't 2022), Nestenborg v. Standard Intl. Mgt., LLC, 202 A.D.3d 628, 629 (1st Dep't 2022), nor a lack of control over the means or methods of plaintiff's work. Alberto v. DiSano Demolition Co., Inc., 194 A.D.3d 607, 609 (1st Dep't 2021); Lemache v. MIP One Wall St. Acquisition, LLC, 190 A.D.3d 422, 423 (1st Dep't 2021); Taylor v. Port Auth. of New York and New Jersey, 176 A.D.3d 475, 476 (1st Dep't 2019). To the contrary, Volpacchio testified that Henegan Construction exercised its authority to separate subcontractors from working in the same area. Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352-53 (1998); Lemache v. MIP One Wall St. Acquisition, LLC, 190 A.D.3d at 423-24; Matter of New York Asbestos Litig., 146 A.D.3d 461, 461-62 (1st Dep't 2017). Yet Henegan Construction allowed National Acoustics workers to transport sheetrock on a A-frame cart through a narrow corridor where one or more workers were on a ladder. Thus Henegan Construction is not entitled to summary judgment on plaintiff's

negligence and Labor Law § 200 claims.

B. Plaintiff's Labor Law § 241(6) Claim

The Henegan Construction defendants insist that dismissal of plaintiff's Labor Law § 241(6) claim is warranted simply because plaintiff moves for summary judgment on liability only under Labor Law § 240(1). Yet C.P.L.R. § 3212(e) explicitly allows summary judgment to "be granted as to one or more causes of action," so that plaintiff may move for partial summary judgment on one claim without affecting his other claims. The court considers a claim abandoned only when a non-moving party fails to address a motion seeking dismissal of the claim, Disla v. Biggs, 191 A.D.3d 501, 501 (1st Dep't 2021); Burgos v. Premiere Properties, Inc., 145 A.D.3d 506, 508 (1st Dep't 2016), unlike here, where plaintiff both moves for summary judgment on one claim and vigorously opposes the cross-motion seeking dismissal of all his claims. See Kempisty v. 246 Spring St., LLC, 92 A.D.3d 474, 475 (1st Dep't 2012).

The Henegan Construction defendants present no evidence that warrants dismissal of plaintiff's Labor Law § 241(6) claim. Lopez v. City of New York, 203 A.D.3d at 405. They offer only conclusions that plaintiff may not recover for his injuries under the statute. The Henegan Construction defendants also seek dismissal of this claim because plaintiff failed to make a prima facie showing of entitlement to recovery under the statute, but

plaintiff bears no burden at this juncture when he did not move for summary judgment on this claim. Therefore the court denies the Henegan Construction defendants' cross-motion for summary judgment. C.P.L.R. § 3212(b).

V. THE NATIONAL ACOUSTICS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The National Acoustics defendants move for summary judgment dismissing (1) the amended complaint, (2) the Henegan Construction defendants' cross-claims, and (3) Sea Breeze's third party claims against the National Acoustics defendants. Plaintiff discontinues his claims under Labor Law §§ 200, 240(1), and 241(6) against the National Acoustics defendants, but maintains his negligence claim. In opposition to the National Acoustics defendants' motion for summary judgment dismissing the Henegan Construction defendants' cross-claim for contractual indemnification the Henegan Construction defendants, as non-moving parties, ask for summary judgment in their favor based on a search of the record. C.P.L.R. § 3212(b).

Although Sea Breeze contends that factual issues regarding the National Acoustics defendants' liability defeats their motion for summary judgment dismissing Sea Breeze's third party claims for non-contractual indemnification and contribution, Sea Breeze does not oppose dismissal of its third party claims for contractual indemnification and breach of a contract. Therefore the court grants the National Acoustics defendants summary

judgment dismissing these claims as abandoned. Disla v. Biggs, 191 A.D.3d at 501; Burgos v. Premiere Properties, Inc., 145 A.D.3d at 508.

A. Plaintiff's Negligence Claim

The National Acoustics defendants insist that no evidence indicates they caused plaintiff's fall. Yet their work required them to wheel large slabs of sheetrock on an A-frame cart down a narrow corridor in plaintiff's immediate vicinity. Their work's proximity to plaintiff constitutes circumstantial evidence, which does not conclusively establish that their negligent transportation of materials impacted plaintiff's ladder, contributing to his fall, but does raise a reasonable inference of proximate cause. Chavez v. Prana Holding Co. LLC, 200 A.D.3d 449, 449 (1st Dep't 2021); Canzoneri v. City of New York, 193 A.D.3d 637, 637 (1st Dep't 2021); De Pepin v. Berik Mgt., Inc, 188 A.D.3d 525, 526 (1st Dep't 2020); Broderick v. Edgewater Park Owners Coop., Inc., 180 A.D.3d 527, 527 (1st Dep't 2020). Moreover, the National Acoustics project superintendent Anthony Indiviglio testified at his deposition that the safety procedure when transporting materials in proximity to a ladder was to warn the worker on the ladder to descend and "never wheel by anybody on a ladder." Aff. of Peter Naber Ex. N, at 89. Yet no witness or other evidence indicates that National Acoustics workers followed that procedure July 27, 2016. Therefore a factual

question remains as to the National Acoustics defendants' liability, requiring denial of summary judgment dismissing plaintiff's negligence claim against the National Acoustics defendants. C.P.L.R. § 3212(b); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 627 (1st Dep't 2015).

B. The Henegan Construction Defendants' Claim for Contractual Indemnification

Defendant National Acoustics, Inc., entered a Subcontractor Purchase Order with Henegan Construction dated May 13, 2016, which the parties stipulate is authenticated and admissible. This Subcontractor Purchase Order provides that:

> 6 INDEMNIFICATION
>
> 6.1 To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless Owner, Construction Manager, Owner's design and project management consultants, the building landlord, and their directors, officers, employees, agents and representatives (collectively, the "Indemnitees") from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of, in connection with or resulting from Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . , regardless of whether or not it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

Naber Aff. Ex. S. The National Acoustics defendants seek dismissal of the Henegan Construction defendants' cross-claim for contractual indemnification because the Subcontractor Purchase Order provides for indemnification of damages even if "caused in

part by a party indemnified hereunder," the Henegan Construction defendants, id. ¶ 6, in violation of New York General Obligations Law § 5-322.1. The Henegan Construction defendants maintain that they are entitled to partial contractual indemnification, even if they are partly liable for plaintiff's injuries. General Obligations Law § 5-322.1 prohibits indemnification of the Henegan Construction defendants for their own fault, but the Subcontractor Purchase Order remains enforceable because it includes a savings provision, "To the fullest extent permitted by law," Naber Aff. Ex. S ¶ 6, which eliminates indemnification for any damages attributable to the Henegan Construction defendants. Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008); Winkler v. Halmar Intl., LLC, 206 A.D.3d 458, 461-62 (1st Dep't 2022); Payne v. NSH Community Servs., Inc., 203 A.D.3d 546, 548 (st Dep't 2022).

The National Acoustics defendants also seek dismissal of the Henegan Construction defendants' cross-claim for contractual indemnification because plaintiff's injuries did not arise from the National Acoustics defendants' work. Again, although no evidence establishes that, when National Acoustics workers passed plaintiff, they or their equipment or materials impacted his ladder, no witness or other evidence affirmatively establishes that they did not, as is the National Acoustics defendants' burden upon their motion for summary judgment. Therefore the

National Acoustics defendants are not entitled to summary judgment dismissing the Henegan Construction defendants' claim for contractual indemnification.

Because the Subcontractor Purchase Order is enforceable, Brooks v. Judlau Contr., Inc., 11 N.Y.3d at 210; Winkler v. Halmar Intl., LLC, 206 A.D.3d at 461-62; Payne v. NSH Community Servs., Inc., 203 A.D.3d at 548, the Henegan Construction defendants request summary judgment as the non-moving parties on partial contractual indemnification against the National Acoustics defendants, C.P.L.R. § 3212(b), to the extent that each of the Henegan Construction defendants is not found liable for plaintiff's injuries. Because a factual question remains whether plaintiff's injuries arose from or were sustained in connection with the work of National Acoustics, Inc., the party to the subcontract, however, the Henegan Construction defendants are not entitled to contractual indemnification from National Acoustics, Inc., until that issue is determined against National Acoustics, Inc. Moreover, because the other two National Acoustic defendants are not even parties to the subcontract, a further question remains regarding their obligations under the contract.

C. The Henegan Construction Defendants' and Sea Breeze's Claims for Non-Contractual Indemnification and Contribution

Since the National Acoustics defendants do not establish absence of fault as explained above, they also are not entitled

to summary judgment dismissing the Henegan Construction defendants' and Sea Breeze's respective third party claims for non-contractual indemnification and contribution. Seymour v. Hovnanian, 207 A.D.3d 420, 420 (1st Dep't 2022); Winkler v. Halmar Intl., LLC, 206 A.D.3d at 461; Vitucci v. Durst Pyramid LLC, 205 A.D.3d 441; 444 (1st Dep't 2022); Goya v. Longwood Hous. Dev. Fund Co., Inc., 192 A.D.3d 581, 585 (1st Dep't 2021). Therefore the court denies the National Acoustics defendants' motion for summary judgment. C.P.L.R. § 3212(b).

VI. SEA BREEZE'S MOTION FOR SUMMARY JUDGMENT

Last, Sea Breeze moves for summary judgment dismissing the Henegan Construction defendants' third party complaint for contractual indemnification, non-contractual indemnification, contribution, and failure to procure insurance, but the Henegan Construction defendants discontinued the last three claims. Regarding the claim for contractual indemnification, Sea Breeze entered a subcontract dated June 16, 2016, to perform sheet metal work for nonparty Admore Air Conditioning Corp., which the parties also stipulate is authenticated and admissible. This subcontract provides that:

> To the fullest extent permitted by law, Subcontractor will defend, indemnify, and hold Owner and Contractor and all of their agents and employees harmless from any loss arising out of or resulting from the performance of this subcontract by Subcontractor or any of Subcontractor's materialmen or subcontractors, even if the loss was partially caused by the negligence of Owner or Contractor, unless the loss was occasioned by the sole negligence of

> Owner or Contractor. For purposes of this section, "loss" includes all claims, demands, damages, losses, expenses, and liability, statutory or otherwise, of any kind or nature, for any bodily injury, sickness, disease, or death, or damage to property, arising out of or resulting from the performance of work by Subcontractor or any of Subcontractor's materialmen or subcontractors, even if the loss was partially caused by the negligence of Owner or Contractor, unless the loss was caused by the sole negligence of Owner or Contractor. Subcontractor expressly waives any "exclusive remedy" provision of worker's compensation or other statutory or common law that might otherwise affect this section.

Johnson Aff. Ex. 18 § 2(c). Sea Breeze contends that it owes no contractual obligation to indemnify the Henegan Construction defendants because they are not named indemnitees. The Henegan Construction defendants insist that they are the presumed "Owner" under the subcontract, because it incorporates the Subcontractor Purchase Order between them and Admore Air Conditioning by reference.

Sea Breeze's subcontract names Henegan Construction as the "General Contractor," Google, Inc., as the "Project," and 85 10th Avenue as the "Project Address," but does not identify any of these defendants as the "Owner." Id. ¶ 2(c). Although the Henegan Construction defendants point to their Subcontractor Purchase Order with Admore Air Conditioning, which names defendant Google as the "Owner" of the same premises, Sea Breeze's subcontract includes no provision that expressly incorporates that contract, without which the court may not assume that any of the Henegan Construction defendants is an

intended indemnitee. Tonking v. Port Auth. of N.Y. & N.J., 3 N.Y.3d 486, 489 (2004); Ruisech v. Structure Tone Inc., 208 A.D.3d 412, 416-17 (1st Dep't 2022); Tavarez v. LIC Dev. Owner, L.P., 205 A.D.3d 565, 567 (1st Dep't 2022). Because "Owner" under the subcontract remains ambiguous, leaving a factual question for trial, the court nonetheless denies Sea Breeze's motion for summary judgment. C.P.L.R. § 3212(b); Castillo v. Big Apple Hyundai, 177 A.D.3d 473, 474 (1st Dep't 2019); Pereira v. J.P. Morgan Chase Bank, N.A., 159 A.D.3d 566, 567 (1st Dep't 2018); Millennium Holdings LLC v. Glidden Co., 146 A.D.3d 539, 546 (1st Dep't 2017).

VII. CONCLUSION

For the foregoing reasons, the court grants plaintiff's motion for summary judgment on liability under Labor Law § 240(1) against defendants Henegan Construction Co., Inc., 85 Tenth Avenue Associates L.L.C., and Google, Inc. C.P.L.R. § 3212(b) and (e). The court grants the motion by defendants-second third party defendants National Acoustics Holdings, Inc., National Acoustics, LLC, and National Acoustics, Inc., for summary judgment dismissing second third party plaintiff Sea Breeze Mechanical Corp.'s claims for contractual indemnification and breach of a contract as abandoned and otherwise denies the parties' motions and cross-motion. Id.

DATED: October 4, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS J.S.C