At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of July, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,

Justice.

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TYLER SCHULTZ,

Plaintiff,

-against- Index No.: 517485/17

K-SQUARE DEVELOPERS, INC. AND 59 SOUTH 4TH LLC.,

Defendants.

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59 SOUTH 4TH LLC,

Third-Party Plaintiff,

-against-

NSW CONSTRUCTION MANAGEMENT, INC.,

Third-Party Defendant.

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K-SQUARE DEVELOPERS, INC.,

Second Third-Party Plaintiff

-against-

NSW CONSTRUCTION MANAGEMENT INC. and NORTH SHORE WINDOW & DOOR INC.,

Second Third-Party Defendants

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NSW CONSTRUCTION MANAGEMENT INC.,

Fourth-Party Plaintiff,

-against-

ABOVE ALL PROPERTY MANAGEMENT INC.
f/k/a NSW INSTALLATIONS INC.,

Fourth-Party Defendant.
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59 SOUTH 4TH LLC,

Fifth-Party Plaintiff,

-against-

ABOVE ALL PROPERTY MANAGEMENT INC.
f/k/a NSW INSTALLATIONS INC.,

Fifth-Party Defendant.
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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	129-145,156-164,165-173,179-194
Opposing Affidavits (Affirmations)	154,174-177,195-196,197-200,201-202,203-204,210-211
Affidavits/ Affirmations in Reply	174, 206, 207, 208-209
Other Papers:	

Upon the foregoing papers, plaintiff Tyler Shultz (plaintiff) moves for partial summary judgment on the issue of liability against defendants K-Square Developers, Inc. (KSD) and 59 South 4th LLC. (59 South) under his Labor Law § 240 (1) cause of action. Plaintiff further moves for summary judgment dismissing defendants' comparative negligence and assumption of risk affirmative defenses (Mot. Seq 4). Third- party and second third-party defendant NSW Construction Management, Inc. (NSW) and fourth and

fifth-party defendant Above All Property Management, Inc. f/k/a NSW Installations, Inc. (Above All) cross-move for an order dismissing plaintiff's claims and all cross claims/third-party claims asserted against them (Mot. Seq 6). 59 South cross-moves for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it. 59 South further cross-moves for summary judgment under its contractual indemnification claims against KSD, NSW Construction, and Above All, but limited to amounts in excess of the additional insured coverage which is being provided by their respective general liability insurers (Mot. Seq 7). KSD cross-moves for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it. KSD further cross-moves for summary judgment under its contractual indemnification claims against NSW (Mot. Seq 8).

Background Facts and Procedural History

The instant action arises out of personal injuries sustained by plaintiff on January 11, 2016, while performing work on a construction project during his employment with Above All.[1] The underlying project involved the construction of several abutting four-story townhouses located at 59 South 4th Street in Brooklyn, New York (the building or the townhouses). Prior to the accident, 59 South, which owned the building, hired KSD to serve as the general contractor on the project. Thereafter, KSD hired various subcontractors to carry out the work including NSW, which was retained to install the

[1] At the time of the accident, Above All was known as NSW Installations, Inc.

windows in the townhouses. Subsequently, NSW Construction sub- subcontracted plaintiff's employer, Above All, to actually perform the window installation work.

Approximately five days prior to the accident, window units were delivered to the jobsite whereupon plaintiff and his coworkers physically carried the windows to the third and fourth floor of the building where they were to be installed in "referred openings" (*i.e.*, ROs) at a later time. At his deposition, plaintiff testified that the window units were made of steel and glass, measured approximately three feet by six feet and weighed approximately 400-500 pounds. Plaintiff further testified that ordinarily, six workers were used to lift each window unit. However, Mike Temple, who served as Above All's Service and Installation Manager on the construction project, testified that the windows weighed 250-300 pounds and could be lifted by three to four workers.

At the time the accident occurred, plaintiff and his co-workers had been installing windows on the third and fourth floors of the building for approximately five days. According to plaintiff's deposition testimony, the installation process was made more difficult by the fact that the windows were flanged, and needed to be installed from the outside of the building. However, because the windows were stored inside the building, each window needed to be manually carried to the RO, passed through the RO at a 45-degree angle to workers standing on a scaffold outside the window opening, and then installed into the RO's using screw guns and caulk. Plaintiff further testified that the installation process would have been easier had the windows been hoisted to the RO's using a "lull" positioned outside the building.

On the day of the accident, plaintiff and his Above All coworkers were supervised by a foreman by the name of "Steve." According to plaintiff, on the day of the accident, an individual he described as being "white, male, young, blondish hair, skinny" told Steve that only four Above All employees should be used to carry the windows to the RO instead of six workers. In particular, plaintiff testified that this individual stated that the work needed to be performed faster and the other two employees could be used to carry out other work on the project. Plaintiff testified that he believed that this individual was employed by "the GC." However, KSD's owner, Rudolf Kalaitchev, and 59 South's Project Developer, Roger Bittenbender, both testified that an individual by the name of Max Bent met this description. Mr. Bittenbender further testified that Mr. Bent was employed as the Project Manager by KUB Capital and that 59 South had hired KUB Capital to manage the project. Mr. Kalaitchev testified that Mr. Bent worked for 59 South.

The accident occurred as plaintiff and three co-workers were carrying a window on the third floor of the building from where it was stored to an RO approximately 10 feet away. While transporting the window, plaintiff and another worker held the bottom of the window and two other workers positioned behind plaintiff held the top of the window. Plaintiff testified that he held the window at hip level with his right hand using a suction cup that was affixed to the window while the two workers positioned behind plaintiff held the top end of the window above their heads. After moving the window approximately five feet, plaintiff testified that "I felt the weight extremely change, and the window went down and it took my arm. I had a hard shock through my arm, and hit the ground, but I tried to pull back at it to maybe bounce it like two inches and then we were done."

Although plaintiff never determined what exactly caused the accident, he surmised that one of the workers positioned behind him lost his grip on the window, which caused the window to drop and also caused a sudden increase in the amount of weight being born by his right hand and arm. As a result of the accident, plaintiff suffered various injuries to his right arm and wrist.

On or about September 8, 2017, plaintiff filed a summons and complaint against KSD and 59 South seeking to recover for the injuries that he sustained in the accident. Among other things, the complaint alleged that plaintiff's injuries were caused by violations of Labor Law §§ 200, 240 (1) and 241 (6), as well as common-law negligence. Thereafter, KSD and 59 South filed answers to the complaint. On May 4, 2018, 59 South commenced a third-party action against NSW seeking common-law and contractual indemnification. On July 5, 2018, KSD commenced a third-party action against NSW and North Shore Window & Door Inc. (North Shore) seeking common-law and contractual indemnification. In an order dated August 15, 2019, the court granted North Shore's motion to dismiss KSW's action against it. On January 4, 2019, NSW commenced a third-party action against Above All seeking common-law and contractual indemnification, as well as damages for breach of contract to procure liability insurance. However, in a stipulation dated August 6, 2020, NSW discontinued this third-party action with prejudice. On August 21, 2020, 59 South commenced a third-party action against Above All seeking contractual indemnification. Discovery is now complete and the instant motions are before the court.

Affirmative Defenses

Plaintiff moves for summary judgment dismissing all affirmative defenses alleging that the accident was caused by his comparative negligence and that he assumed the risk of being injured. In support of this branch of his motion, plaintiff maintains that, given his uncontroverted description of how the accident occurred in his deposition testimony, there is no basis for any finding that the accident was caused by his own negligence or that he assumed the risk of being injured. Here, plaintiff has made a prima facie showing of his entitlement to summary judgment on these grounds. KSD and 59 South have failed to submit any opposition to this branch of plaintiff's motion. Accordingly, these affirmative defenses are dismissed.

Plaintiff's Labor Law § 240 (1) Cause of Action

Plaintiff moves for summary judgment under his Labor Law § 240 (1) cause of action against KSD and 59 South. 59 South, KSD, and NSW separately cross-move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them.[2] In support of his motion, plaintiff initially notes that 59 South and KSD are subject to liability under the statute inasmuch as 59 South owned the building and KSD served as the general contractor on the underlying project. In further support of his motion, plaintiff submits an expert affidavit by Robert T. Fuchs, a licensed professional engineer in the State of New York and a Board-Certified Safety Professional. According to Mr. Fuchs, more than four

[2] The court notes that NSW moves, in mot. seq. 6, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), and 200 claims against it. However, it does not appear that plaintiff has asserted any claims against NSW. In any event, plaintiff does not oppose NSW's motion for summary judgment dismissing all Labor Law claims against it.

workers should have been used to manually hoist and transport a window weighing between 250–500 pounds. Mr. Fuchs further opines that plaintiff and his coworkers should have been provided with hoists, ropes, lifts, platforms, wheeled carts or other similar devices in order to hoist and transport the window, and the failure to do so was a violation of Labor Law § 240 (1) inasmuch as this failure subjected plaintiff to the gravity-related hazard posed by the weight of the fallen window.

In further support of his motion for summary judgment under Labor Law § 240 (1), plaintiff maintains that his injuries directly flowed from the application of the force of gravity notwithstanding the fact that he did not fall from a height and was not struck by a falling object. In particular, plaintiff notes that when his co-worker dropped the window, the gravitational forces acting upon the part of the window that he was carrying greatly increased, thereby causing injuries to plaintiff's right hand, wrist and arm. According to plaintiff, this is similar to the fact pattern in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]). In addition, plaintiff argues that the mere fact that he was at the same level as the window at the time of the accident does preclude recovery under Labor Law § 240 (1) given the Court of Appeals' ruling in *Wilenski v 334 E. 92nd Housing Dev. Fund Corp.* (18 NY3d 1 [2011]).

Finally, in opposition to KSD, 59 South, and NSW's cross motions for summary judgment dismissing his Labor Law § 240 (1) claim, and in further support of his own motion for summary judgment under the statute, plaintiff raises the alternative argument that the statute was violated inasmuch as crane or "lull" should have been used to hoist the window to the RO from outside the building. In support of this argument, plaintiff points

to his own deposition testimony, wherein he stated that the windows were flanged and were meant to be installed from the outside of the building. According to plaintiff, had the defendants used a lull to install the windows, his accident would not have occurred.

In opposition to this branch of plaintiff's motion, and in support of their own respective cross motions to dismiss plaintiff's Labor Law § 240 (1) cause of action, 59 South, KSD and NSW all argue that the accident was not the result of an elevation-related hazard or gravity-related risk encompassed by the statute. Instead, these defendants maintain that gravity only played a tangential role in the accident, and the use of the safety devices enumerated in the statue was not warranted given the nature of the work and the lack of a significant elevation-related hazard. In support of this argument, 59 South, KSD and NSW note that plaintiff did not fall from a height, nor was he struck by a falling object. Instead, plaintiff was merely carrying a window at the time of the accident and his injuries occurred when his coworker lost his grip on the window, thereby causing the weight to shift. According 59 South, KSD, and NSW, numerous Appellate Division decisions issued both before and after the Court of Appeals' determination in *Runner* have ruled that accidents of this type do not fall under the protection of Labor Law § 240 (1), but instead are deemed to have arisen out of the usual and ordinary dangers associated with construction work.

In further support of its cross motion for summary judgment, NSW submits an expert affidavit by Robert Flynn, a Licensed Professional Engineer. According to Mr. Flynn, the methods used by Above All's workers to install the windows conformed to industry standards. Mr. Flynn also avers that the use of a lull or hoist was not required for

the installation of the windows. As a final matter, NSW maintains that plaintiff's Labor Law claims must be dismissed against it since it was not an owner or general contractor, and is not subject to liability under the Labor Law.

In reply to KSD, 59 South, and NSW's arguments, plaintiff agrees that NSW is not a proper Labor Law defendant and does not oppose its motion to dismiss all Labor Law claims against it. However, plaintiff contends that the defendants' arguments that the accident is not covered under Labor Law § 240 (1) are without merit. In particular, plaintiff argues that all of the cases cited by the defendants either pre-date the Court of Appeals' rulings in *Runner* and *Wilensky* or are distinguishable given the facts in the instant case.

Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . 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 enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield an injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513,

520 [1985]). Further, "[t]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500).

Given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). However, "the applicability of the statute in a falling object case . . . does not . . . depend upon whether the object has hit the worker. The relevant inquiry . . . is whether the harm flows directly from the application of the force of gravity to the object (*Runner*, 13 NY3d at 604). At the same time, the mere fact that an object fell and caused injury is insufficient to demonstrate a violation of Labor Law § 240 (1) (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 269 [2001]). The plaintiff must show that the object fell while being hoisted or secured because of the absence of or inadequacy of a safety device listed in the statute or that the falling object required securing given the nature of the work (*Chuqui v Amna, LLC*, 203 AD3d 1018, 1020 [2022]; *Simmons v City of New York*, 165 AD3d 725, 727 [2018]).

As an initial matter, there is no merit to plaintiff's argument that his injuries were proximately caused by a violation of Labor Law § 240 (1) inasmuch as KSD and 59 South failed to provide a crane or lull to hoist the windows into position from outside the building. While it may be true that it would have been easier to install the windows using this method,

plaintiff was not injured while installing the window into the RO. Rather, he was injured while carrying the window from a storage area to the RO. In any event, Above All's *Service and Installation Manager, Mike Temple,* testified that there was no room to position a lull outside the building because the building was located on a city street and scaffolding was erected outside the building. Plaintiff has failed to submit any evidence refuting this claim.

Turning to plaintiff's alternate theory of liability under Labor Law § 240 (1), the Appellate Division has long held that injuries sustained by workers who are manually lifting, maneuvering, or carrying heavy objects across level surfaces at construction sites are not covered by the statute (*Branch v 1908 West Ridge Rd. LLC*, 199 AD3d 1362 [2021]; *Christie v Live Nation Concerts, Inc.*, 192 AD3d 971, 973 [2021]; *Lemus v New York B Realty Corp.*, 186 AD3d 1351, 1352 [2020]; *Simmons v City of New York*, 165 AD3d 725, 727 [2018]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [2018]; *Narrow v Crane-Hogan Structural Sys.*, 202 AD2d 841, 842 [1994]). In ruling that these types of accidents are not covered under Labor Law § 240 (1), the courts have found that the injuries were the result of routine workplace risk (*Branch*, 199 AD3d at 1362; *Lemus* 186 AD3d 1351, 1352), were not caused by the failure to provide protection against elevation-related hazards (*Christie*, 192 AD3d at 973, did not involve a falling object that was being hoisted or secured or that required securing given the nature of the work (*Simmons*, *165 AD3d at 727*; *Narrow*, 202 AD2d at 842), and/or did not involve a physically significant height differential (*Jackson*, 161 AD3d at 667).

Here, the window that plaintiff and his coworkers were manually carrying at the time of the accident was not being hoisted, nor did it require securing given the fact that the window was being carried to the RO. Thus, the accident was not caused by the failure to provide protection against a risk arising from a physically significant elevation differential and is not covered under Labor Law § 240 (1). Rather, the accident was caused by the ordinary and usual dangers associated with construction sites. Contrary to plaintiff's argument, the fact that plaintiff was injured when his co-worker dropped the portion of the window that he was carrying does not mandate a finding of a Labor Law § 240 (1) violation (*Simmons*, 165 AD3d at 726; *Narrow*, 202 AD2d at 841-842). Moreover, plaintiff's reliance on the Court of Appeals rulings in *Runner* and *Wilensky* is misplaced as the facts in the instant case are readily distinguishable. In particular, in *Runner*, the plaintiff was injured during a hoisting operation when a "jerry-rigged devise" comprised of a rope wrapped around a pole proved inadequate to safely lower an 800-pound reel of wire down a staircase (*Runner*, 13 NY3d at 602). In contrast, the instant accident did not take place during a hoisting operation as plaintiff and his co-workers were merely carrying the window across a level floor. In *Willenski*, the Court ruled that there was an issue of fact as to whether Labor Law § 240 (1) safety devices should have been employed to secure two vertical pipes that fell on top of a plaintiff during demolition operations since the pipes were not slated for demolition at the time the accident occurred (*Willenski*, 18 NY3d at 11). Here, no Labor Law § 240 (1) devices could have been used to secure the window since it was being manually carried across the room at the time of the accident.

Accordingly, those branches of KSD and 59 South's cross motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them are granted and plaintiff's motion for summary judgment against KSD and 59 South under Labor Law § 240 (1) is denied. Further, to the extent that plaintiff has asserted a Labor Law § 240 (1) claim against NSW, said claim is dismissed on consent.

Plaintiff's Labor Law 241 (6) Cause of Action

NSW, 59 South, and KSD separately cross-move for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action. In so moving, these defendants all raise the same argument. Specifically, the defendants contend that the New York State Industrial Code provisions which plaintiff alleges were violated are either inapplicable given the circumstances of the accident, or are not specific enough to support a Labor Law § 241 (6) claim. Plaintiff has not submitted any opposition to these branches of NSW, 59 South, and KSD's respective motions.

Labor Law § 241(6) provides, in pertinent part, that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross,* 81

NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a specific standard of conduct rather than a mere reiteration of common-law principles (*id.* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]).

Here, plaintiff's bill of particulars alleges violations of 12 NYCRR 23-1.2 (a), 1.7 (a) (2), 1.5 (a), 1.5 (c), 1.15(a-e), 1.16 (b-f), 1.17 (b-e), 5.1 (a), (c) (1), (c) (2), (e) (1), (f), (g), (h), (j) and (l), 23-5.3 (e), 5.4 (a), 5.6 (e), 5.8 (a-h), 5.9, 5.9 (d) and (e) (2). The moving defendants have made a prima facie demonstration that these regulations are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances surrounding the underlying accident. Further, as noted above, plaintiff has failed to submit any opposition to this branch of KSD, 59 South, and NSW's respective motions. Accordingly, the moving defendants' cross motions for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action is granted.

Plaintiff's Labor Law § 200/Common-Law Negligence Claims

KSD and 59 South separately cross-move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them. In support of this branch of their respective motions, both defendants argue that they did not exercise control and supervision over plaintiff's work and did not have notice of any dangerous condition that may have caused the accident.

In opposition to KSD's cross motion to dismiss his Labor Law § 200 and common-law negligence claims, plaintiff maintains that there is evidence that KSD supervised the manner in which Above All carried out its window installation work. Plaintiff further maintains that there is evidence that KSD controlled Above All's work by making the determination not to use a lull to install the windows from outside of the building.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, "[w]here a premises condition is at issue, property owners [and contractors] may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). On the other hand, "[w]here a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory

control over the work, no liability attaches under Labor Law § 200 or the common law" (*LaRosa v Internap Network Serv. Corp.*, 83 AD3d 905 [2011]).

Here, the accident arose out of the means and methods that plaintiff and his Above All co-workers employed in transporting the window to the RO. Accordingly, in seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, it was incumbent upon KSD and 59 South to demonstrate that they lacked the authority to control and/or supervise the performance of the work. However, neither KSD nor 59 South have met their prima facie burden in this regard. In particular, 59 South's *memorandum of law in support of its summary judgment* cross motion merely states that it "will demonstrate that apart from having general control over the project as a whole and retaining a general power to stop any unsafe work practices, it neither knew of the specific unsafe work practice that allegedly led to the plaintiff's accident, nor did it have specific supervisory control over the alleged unsafe work practice." 59 South has not submitted any affidavits or pointed to any specific deposition testimony which demonstrates that it lacked the authority to control and supervise the work. Further, 59 South has failed to point to any evidence that its representative Max Bent, who was present at the jobsite on a daily basis, lacked such authority. Similarly, KSD's memorandum of law merely states in conclusory fashion that "[t]here is no evidence that [KSD] directed, controlled, or supervised the means and methods of the work at the site" and that "[p]laintiff received his instructions from his foreman and not from anyone on behalf of [KSD]." KSD has failed to submit any affidavits or point to any specific deposition testimony supporting these claims. Accordingly, those branches of KSD and 59 South's respective cross motions

which seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims must be denied regardless of the sufficiency of the opposing papers (*Cruz v Cablevision Systems Corp.*, 120 AD3d 744, 748 [2014]). However, NSW's cross motion for summary judgment dismissing these claims is granted without opposition.

59 South's Contractual Indemnification Claim Against Above All

Above All cross-moves for summary judgment dismissing 59 South's contractual indemnification claim against it. At the same time, 59 South cross-moves for summary judgment under its contractual indemnification claim against Above All to the extent that a judgment is entered against 59 South in excess of the additional insured coverage extended to 59 South by Above All's liability insurance carrier.

In support of its cross motion for summary judgement dismissing 59 South's contractual indemnification claim against it, Above All points to the contract between NSW and Above All. In particular, this contract contained a clause whereby Above All agreed to indemnify the property owner (*i.e.* 59 South) for claims "arising out of or *resulting from* performance of [Above All's] work to the extent caused by the negligent acts or omissions of [Above All]." Above All maintains that its obligation to indemnify 59 South was never triggered inasmuch as the accident was not caused by its negligent acts or omissions. In support of this contention, Above All points to Mr. Flynn's aforementioned affidavit in which he avers that the methods used by Above All's workers to install the windows conformed to industry standards.

In opposition to this branch of Above All's cross motion, and in support of its own cross motion for summary judgment under its contractual indemnification claim against

Above All, 59 South maintains that if it is ultimately found liable for plaintiff's injuries, it will be due to Above All's failure to provide the proper equipment to hoist and transport the window.

The right to contractual indemnification is dependent upon the specific language in the contract (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2010]). In this regard, the obligation to indemnify should only be found where it is clearly indicated in the language in the contract (*George v Marshalls of MA., Inc.*, 61 AD3d 925, 930 [2009]). Finally, a party seeking contractual indemnification must demonstrate that it was free of negligence since a party may not be indemnified for its own negligent conduct (*Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2009]).

As an initial matter, the court notes that, inasmuch as the court has already dismissed plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against 59 South, the subject contractual indemnification claim is only relevant as it relates to attorney's fees. Here, there are issues of fact as to whether the accident was caused by Above All's negligence in only assigning four workers to carry the window. In particular, while Mr. Flynn opines that four workers were sufficient, plaintiff's expert Mr. Fuchs opines that this was not an adequate number of workers given the weight of the window. *Accordingly, since Above* All's obligation to indemnify 59 South is dependent upon a finding that its negligence *caused the accident, both 59 South* and Above All's cross motions for summary judgment on the contractual indemnification claim must be denied.

59 South's Contractual Indemnification Claim Against NSW

59 South cross-moves for summary judgment under its contractual indemnification claim against NSW. In support of this branch of its cross motion, 59 South points to the indemnification clause in the contract between NSW and KSD. In particular, under the terms of this clause, NSW agreed to indemnify 59 South against "any and all claims ... arising from or in connection with [NSW's] performance of the work." Here, 59 South maintains that the accident clearly arose out of the window installation work that NSW subsequently delegated to plaintiff's employer, Above All. Accordingly, 59 South maintains that it is entitled to summary judgment under its contractual indemnification claim against NSW.

In opposition to this branch of 59 South's cross motion, NSW argues that there are issues of fact regarding whether 59 South's own negligence caused the accident. In particular, NSW notes that plaintiff testified that an individual that meets the description of 59 South's project manager (Mr. Bent) directed that the window be carried by four individuals instead of six. NSW further notes that plaintiff's expert, Mr. Fuchs, states in his affidavit that four workers could not safely lift and carry the window given its weight. Accordingly, given this issue of fact regarding 59 South's negligence, NSW argues that 59 South is not entitled to summary judgment under its contractual indemnification claim as against it.

As previously noted, a party seeking contractual indemnification must demonstrate that it was free of negligence (*Cava Constr. Co., Inc.*, 58 AD3d at 662). Here, 59 South has failed to make such a demonstration. Moreover, given plaintiff's testimony that an

individual who meets the description of Mr. Bent directed that the window be carried by only four workers, there are issues of fact regarding whether 59 South was negligent. Accordingly, 59 South's cross motion for summary judgment under its contractual indemnification claim against NSW is denied.

59 South's Contractual Indemnification Claim Against KSD

59 South also cross-moves for summary judgment under its contractual indemnification claim against KSD. In support of this branch of its motion, 59 South points to the indemnification clause in the contract between 59 South and KSD. In this regard, the clause provides that, "[KSD] shall indemnify and hold harmless [59 South] ... from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [KSD], [or] a Subcontractor." Here, 59 South maintains that, if it is ultimately held liable in this case, it will be based upon the negligence of either KSD, NSW, or Above All because plaintiff was not furnished with adequate equipment to lift and carry the window. 59 South further contends that under the terms of the indemnification clause, KSD's obligation to indemnify will be triggered regardless of which contractor is found to be negligent.

In opposition to this branch of 59 South's cross motion, KSD argues that 59 South has failed to demonstrate that it was free from negligence with regard to the occurrence of plaintiff's accident and that it is possible that the jury may determine that 59 South was negligent with regard to plaintiff's accident. KSD further maintains that, inasmuch as 59

South tendered its defense to KSD's insurance carrier, 59 South's contractual indemnification claim against KSD violates the law regarding anti-subrogation.

Here, the court has already determined that 59 South has failed to demonstrate that it was free from negligence and that there are issues of fact regarding whether 59 South's negligence contributed to the accident. Accordingly, 59 South's cross motion for summary judgment under its contractual indemnification claim against KSD is denied.

KSD's Contractual Indemnification Claim Against NSW[3]

KSD cross-moves for summary judgment under its contractual indemnification claim against NSW. In support of this branch of its motion, KSD relies upon the aforementioned indemnification clause in the contract between KSD and NSW. In particular, KSD notes that this provision required that NSW indemnify KSD for any claims or accidents arising out of the work regardless of whether or not they were caused by NSW's negligence. KSD further maintains that the accident clearly arose out of the work that NSW was hired to perform inasmuch as NSW subsequently delegated this work to plaintiff's employer, Above All. Finally, KSD maintains that this indemnification provision is fully enforceable since the accident was not caused by any negligence on its part.

In opposition to this branch of KSD's cross motion, NSW argues that there are triable issues of fact regarding whether KSD's negligence caused the accident. In

[3] The court notes that in its reply affirmation (NYSCEF Doc. No. 209), NSW maintains that KSD did not oppose NSW's cross motion to dismiss KSD's third-party claims against NSW. However, NSW's cross motion (mot. seq. 6) did not contain any argument in support of its motion to dismiss KSD's third-party claims.

particular, NSW notes that KSD's owner (Mr. Kalaitchev) testified that he supervised the work performed by Above All employees and was responsible for ensuring that the work was performed in a safe manner. NSW also notes that plaintiff testified that an employee that he believed worked for the general contractor gave instructions that the window being transported at the time of the accident should be carried by four employees instead of six.

As previously noted, a party moving for summary judgment on a contractual indemnification claim must demonstrate that it is free of any negligence. Here, KSD has not met this burden. In this regard, KSD merely states, in conclusory fashion, that there was no evidence that it was negligent. Moreover, there is a triable issue of fact regarding whether KSD's negligence played a role in the accident. In particular, Mr. Kalaitchev testified that he supervised the work performed from Above All and when asked if he supervised the manner in which the windows were installed "to make sure it was safe," he replied, "I make sure people are safe" (Kalaitchev Deposition, pp. 23-24). Accordingly, that branch of KSD's cross motion which seeks summary judgment under its contractual indemnification claim against NSW is denied.

Summary

In summary, the court rules as follows: (1) that branch of plaintiff's motion, in mot. seq. 4, which seeks summary judgment under his Labor Law § 240 (1) claim against KSD and 59 South is denied. That branch of plaintiff's motion which seeks summary judgment dismissing all comparative negligence and assumption of risk affirmative defenses against him is granted; (2) those branches of NSW and Above All's cross motion, in mot. seq. 6,

which seek summary judgment dismissing plaintiff's Labor Law claims against NSW is granted. That branch of NSW and Above All's cross motion which seeks summary judgment dismissing 59 South's contractual indemnification claim against Above All is denied; (3) those branches of 59 South's cross motion, in mot. seq. 7, which seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against it are granted. That branch of 59 South's cross motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law indemnification claims against it is denied. Those branches of 59 South's cross motion which seeks summary judgment *under its contractual indemnification claims* against Above All, NSW, and KSD are denied; and (4) those branches of KSD's cross motion, in mot. seq. 8, which seek summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against it is granted. That branch of KSD's cross motion which seeks summary judgment dismissing Labor Law § 200 and common-law indemnification claims against it is denied. That branch of KSD's cross motion which seeks summary judgment under its contractual indemnification claim against NSW is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

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HON. WAVNY TOUSSAINT
J.S.C.