SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JUAN ROMERO,

Plaintiff,

- v -

ONE57 52B LLC,EXTELL WEST 57TH STREET LLC,TOTAL HOME IMPROVEMENT SERVICES INC.,

Defendants.

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INDEX NO. 150976/2019

MOTION DATE 03/08/2022, 03/08/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

TOTAL HOME IMPROVEMENT SERVICES INC.

Plaintiff,

-against-

FJC CONTRACTOR CORP.

Defendant.

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Third-Party
Index No. 595083/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 162, 163, 164

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 117, 118, 119, 120, 121, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 165, 166, 167

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

This is an action to recover damages for personal injuries allegedly sustained by an electrician on May 4, 2018, when, while working at 157 West 57th Street, New York New York, Unit 52B (the Premises), the ladder he was standing on allegedly fell out from underneath him, causing him to fall.

In motion sequence number 003, defendant Extell West 57th Street LLC (Extell) moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against it and for summary judgment in its favor on its cross-claim for contractual indemnity against defendant/third-party plaintiff Total Home Improvement Services, LLC (Total Home).

In motion sequence number 004, plaintiff Juan Romero moves, pursuant to CPLR § 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim as against Extell and Total Home.

The motions are consolidated for disposition.[1]

BACKGROUND

On the day of the accident, the Premises was owned by Extell. Extell hired Total Home as the general contractor for a project that entailed renovating the lobby at the Premises. Total home subcontracted electrical work to third-party defendant FJC Contracting Corp. (FJC).[2]

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by FJC as an electrician. His supervisor was Francisco Javier (Javier) (plaintiff's tr at 45). He later testified that he understood that Javier "worked for Total Home" (plaintiff's second tr at 52). Plaintiff also testified that he was paid by check, by Javier (plaintiff's tr at 79-80). The checks were from Javier directly (plaintiff's second tr at 53).

Plaintiff testified that he was working on behalf of FJC at the time of the accident (plaintiff's tr at 47, plaintiff's second tr at 53). His work included "laying down electrical lines"

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[1] By notice dated May 20, 2019, the action was discontinued as against defendant One57 52B LLC (NYSCEF Doc. No. 14).

[2] FJC has not appeared in this action, and by decision and order dated September 22, 2021, Total Home's motion for default judgment against FJC was granted.

inside various apartments within the Premises (plaintiff's tr at 50). His work entailed the use of ladders. He believed that FJC provided a-frame ladders at the Project. FJC also provided him with all his work materials.

Plaintiff was provided a uniform shirt to wear at work. He presented the shirt at his deposition and confirmed that written on the back of the shirt was "Total Home Improvement Services" (*id.* at 56). He was provided the shirt by Javier.

Aside from Javier, he had two supervisors from Total Home (*id.* at 59). Those supervisors would supervise "when Javier was not there" (*id.* at 60). He also reported to the Total Home office at the Premises for his daily instructions (*id.* at 65), and he used a Total Home smartphone application to clock in for work.

Plaintiff testified that on the day of the accident, he was working in unit 52-B at the Premises. Specifically, he was installing electrical conduit and running wires through the ceiling of a large room that he believed would become a living room. Javier assigned this task (*id.* at 76). He had several coworkers, each of whom wore Total Home shirts, but he was unsure who they worked for.

There were three fiberglass A-frame ladders at the worksite (*id.* at 85). There was also a scaffold (*id.* at 109). Plaintiff used a blue colored "used"-looking 6-foot A-frame ladder (the Ladder) to perform his work (*id.* at 87). He did not know what company the Ladder or the scaffold belonged to.

As he began his work, plaintiff inspected the Ladder and did not observe any issues (*id.* at 92 ["it didn't seem or didn't look like it was broken"]). Plaintiff then stepped on the Ladder and thought that "it wanted to move, but then it stayed there . . . so [he] stayed there" (*id.* at 87). He

climbed to the fourth rung and began installing cable in the ceiling. He successfully installed cable in this manner at least two times that day, repositioning the Ladder as needed (*id.* at 97).

Immediately before the accident, plaintiff was standing on the Ladder's fourth rung, "moving the cables" through the ceiling (*id.* at 119-120). Then, as plaintiff was "pushing the cables with one hand" and "holding the U-shaped rail" attached to the ceiling with the other (*id.* at 120), "the ladder gave way, and the ladder turned, and then it fell over" (*id.* at 121). Plaintiff was able to hang on to the rail for a moment, but he lost his grip and fell to the ground.

At his second deposition, plaintiff explained that the "the plastic part of the ladder" at the top "started to tear" immediately prior to his fall (plaintiff's second tr at 57).

There were three other workers in the area at the time of the accident. He did not know whether they saw the accident. "A few" of the workers helped plaintiff up and contacted Javier (plaintiff's tr at 127).

Deposition Testimony of Richard Coleman (Extell's Vice President of Construction)

Richard Coleman testified that on the day of the accident, he was Extell's vice president of construction. His duties included overseeing pre-construction through construction and turnover of the Premises to residents. Once a temporary certificate of occupancy (TCO) is issued, Coleman did not have any involvement with the construction work. The accident occurred post-TCO. The apartment where the accident occurred was a sponsor-owned unit and was still Extell's property.

Coleman was unaware of the accident, only learning of it the day before his deposition. He had no personal knowledge of the Project or the accident. He also was unaware of any accident report. He testified that issues with Extell-owned apartments at the Premises would be handled by Extell (Coleman tr at 17).

Coleman confirmed that Extell and Total Home entered into an AIA form agreement for general contractor services with respect to, amongst other things, the Premises (*id.* at 32). He was unaware of whether Total Home subcontracted any work (*id.* at 35). He had never heard of FJC.

Deposition Testimony of Thomas Quinn (Total Home's Project Manager)

Thomas Quinn testified that on the day of the accident, he was Total Home's project manager on the Project. Total Home is a general contractor company focusing on residential renovations. It was hired by Extell as the general contractor for the Project (Quinn tr at 16). Its scope of work included apartment renovation including, among other things, electrical work.

Quinn's duties included general supervision and oversight of the Project, Total Home's own employees and its subcontractors. Typically, there would be a mix of Total Home workers and subcontractor workers working on any given day (*id.* at 27). FJC was one of Total Home's subcontractors. FJC was responsible for paying its own workers (*id.* at 40). Quinn did not prepare any written reports or progress documents. He was unable to identify what subcontractors were onsite on any given day.

FJC did not have a foreman on site. Rather, "[a] lot of the supervision [of FJC] would be done by [Quinn] as the project manager for Total Home overseeing the entire project" (*id.* at 41). Quinn then testified that this supervision and direction would be done through Javier, FJC's owner.

Quinn testified that he was "probably" onsite on the day of the accident but did not specifically recall (*id.* at 37). He did not witness the accident and was unaware of any witnesses. He learned of it the following day (*id.* at 48).

Once he learned of the accident, Quinn called Javier to check on plaintiff's status. He was told that it was "nothing serious" (*id.* at 51). He then went to the accident site and "checked out the ladders that were in that area . . . . Everything seemed to be okay" (*id.* at 54).

Quinn also testified that the ladders present in Unit 52B were provided by "probably a combination of both" FJC and Total Home (*id.* at 55). He also testified that there were only two ladders in the room when he inspected the area (*id.* at 56).

Quinn did not prepare an accident report. He was unaware of whether FJC had prepared an accident report.

Finally, Quinn testified that Extell did not provide any workers, equipment or materials for the Project.

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 in 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 (*id.*).

The Labor Law § 240 (1) Claims (Motion Sequence Numbers 003 and 004)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim as against Extell and Total Home (hereinafter, defendants). Extell moves for summary judgment dismissing the same claim as against it.[3]

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . 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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Mememorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . or other protective device

[3] Total Home briefly raises several purported technical violations in plaintiff's summary judgment motion (the failure to submit a separate memorandum of law, the failure to affirm the word count). Total Home fails to cite to any case law that would establish that these ministerial violations should bar consideration of plaintiff's fully submitted and fully opposed, motion.

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]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v. Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) must be construed "liberally so as to accomplish its purpose of protecting workers" (*Greenfield v Macherich Queens Ltd. Partnership,* 3 AD3d 429. 430 (1st Dept 2004).

But not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, Extell, as the owner, and Total Home, as the general contractor, are proper Labor Law defendants and plaintiff has established his prima facie entitlement to

summary judgment on his Labor Law § 240 (1) claim, because he has sufficiently established that the ladder that he was working on at the time of his accident failed to protect him from falling (plaintiff's tr at 120 ["the ladder gave way, and the ladder turned, and then it fell over"]). "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr, Inc.,* 8 AD3d 173, 174 [1st Dept 2004], quoting *Kijak v 330 Madison Ave. Corp.,* 251 AD2d 152, 153 [1st Dept 1998]; *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]). Further, "[w]hether the device provided proper protection is a question of fact, except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials" (*Duran v Kijak Family Partners, L.P.*, 63 AD3d 992, 994 [2d Dept 2009] [internal citations and quotation marks omitted]).

In opposition, defendants raise several arguments. First, they argue that plaintiff is not entitled to summary judgment because there remains a question of fact as to how the accident occurred. Specifically, they argue that there are conflicting versions of the accident, one in which plaintiff fell from the Ladder (where defendants would be liable under section 240 [1]) – and one where plaintiff tripped and fell (where defendants would not be liable under section 240 [1]) (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate"]). In support of this, defendants rely on an uncertified hospital record that purports to indicate that plaintiff's accident occurred when he tripped (Total Home's affirmation

in opposition, exhibit J, p. 8; NYSCEF Doc. No. 155 ["Patient was working . . . States he was walking, tripped and went to grab a hold of an object"]).

This document does not raise an issue of fact as to how the accident occurred. The information contained therein is inadmissible hearsay. Specifically, defendants have failed to establish that any information found in this medical record is attributable to plaintiff (*Gomez v Kitchen & Bath by Linda Burkhardt, Inc.*, 170 AD3d 967, 969 [2d Dept 2019] ["[N]otations in the [certified] hospital records upon which the defendant relies were not attributed to the plaintiff. As the defendant failed to offer evidence sufficiently connecting the plaintiff to the statements in the hospital records, the party admission exception to the hearsay rule does not apply"). Moreover, defendants cannot rely on this evidence as the information contained therein was not germane to plaintiff's diagnosis and treatment (*Greca v Choice Assoc. LLC*, 200 AD3d 415, 416 [1st Dept 2021] [finding medical records to contain inadmissible hearsay where the defendant "did not establish that the statements contained in them on which it relied either were germane to plaintiff's diagnosis and treatment or are directly attributable to plaintiff"]). Therefore, the statement in the medical records is inadmissible hearsay.

To the extent that the medical records indicate that plaintiff "states" that he tripped, such an out of court statement, without more to corroborate its accuracy fails to raise a question of fact. "While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated" *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018] [internal quotation marks and citations omitted]). Defendants offer no corroborating evidence of this purported version of the accident.

Next, defendants claim plaintiff's deposition testimony was internally contradictory. A review of the testimony establishes that it was not contradictory. That plaintiff initially testified that he did not know why the ladder fell (plaintiff's tr at 129) but subsequently testified that the ladder fell because "the plastic part" at the top "started to tear" (plaintiff's second tr at 95) does not raise a question of fact as to how plaintiff's accident occurred or how his injuries were sustained (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] (discrepancies in description of "how or why [the plaintiff] fell off the ladder are irrelevant since there is no dispute that his injuries were caused by his fall]").

To the extent that defendants rely on Quinn's statement that the ladders were in good condition on the day after the accident, such statement is insufficient to raise a question of fact as to the ladders' condition at the time of the accident (*see Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.,* 170 AD3d 509, 510 [1st Dept 2019] [testimony that the plaintiff's employer did not see any "signs of anything unusual . . . d[id] not raise a factual issue" where the employer "came onto the scene 20 to 30 minutes after the accident"]).

Next, defendants argue that plaintiff cannot be awarded summary judgment because the accident was unwitnessed. However, where there is no issue of plaintiff's credibility, "[t]hat the accident was unwitnessed presents no bar to summary judgment in favor of plaintiff" (*Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]). As discussed above, there is no evidence raising a question of fact as to plaintiff's credibility.

Defendants also argue that plaintiff has failed to establish that the ladder was defective. Plaintiff is not required to do so (*Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016] ["[d]efendants' argument that plaintiff was required to demonstrate that the ladder was defective in order to satisfy his burden as to the Labor Law § 240(1) claim is without merit"]).

Defendants further argue that plaintiff was a recalcitrant worker because he chose to use the Ladder rather than the scaffold. To find a plaintiff recalcitrant, a defendant must establish that the plaintiff knew "both that [adequate safety devices] were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 679 [2d Dept 1996], *affd* 88 NY2d 946 [1996] [the recalcitrant worker defense is "premised upon the principle that the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it"] [citation and internal quotation marks omitted]). Here, there is no evidence that plaintiff knew that he was expected to use the scaffold rather than the Ladder. Nor is there evidence that plaintiff was directed to use the scaffold, refused to follow this instruction, and for no reason chose not to use the scaffold (*see Morales v 2400 Ryer Ave. Realty, LLC,* 190 AD3d 647, 648 [1st Dept 2021] [holding that plaintiff's choice to use one safety device over another safety device did not, by itself, establish recalcitrance]). Therefore, defendants have failed to establish that plaintiff was recalcitrant.

To the extent that defendants argue that plaintiff was the sole proximate cause of his accident because of his choice to use the Ladder over the scaffold, such argument is also unpersuasive (*Orellano*, 292 AD2d at 291 ["where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence"] [internal quotation marks and citations omitted]).

In any event, any action on the part of plaintiff in using the ladder, rather than a scaffold goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law §

240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.,* 176 AD3d 627, 629 [1st Dept 2019]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"]).

Therefore, defendants have failed to raise a question of fact sufficient to overcome plaintiff's prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim.

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim as against Extell and Total Home and Extell is not entitled to summary judgment dismissing the same claim.

The Labor Law § 241 (6) Claims (Motion Sequence Number 003)

Extell moves for summary judgment dismissing the Labor Law § 241 (6) claim against it.

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

> "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, [and] equipped . . . 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 nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "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]; *Corona v HHSC 13th Street Dev. Corp.,* 197 AD3d 1025, 1026 [1st Dept 2021]).

Plaintiff lists several violations of the Industrial Code in his bill of particulars. Defendants materially address each of these Industrial Code provisions. Plaintiff does not oppose their dismissal. Therefore, these uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Accordingly, as no other Industrial Code violations remain at issue in this case, Extell is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 003)

Extell moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

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.

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see Ruisech v Structure Tone, Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012] ["Claims for personal injury under [section 200] and the common law 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"]).

Where a plaintiff's claim implicates the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr, LLC*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

However, where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Notably, "[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]).

Here, plaintiff's accident occurred when he fell from an insufficiently secured ladder that fell out from underneath him, therefore, his accident was caused by the means and methods of the work. The record is devoid of any evidence that Extel exercised actual supervision or control over the provision, maintenance, securing or use of ladders at the Project. Therefore, Extell cannot be liable for plaintiff's accident under the common-law or Labor Law § 200.

Accordingly, Extell is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it.

Extell's Cross-Claim for Contractual Indemnification Against Total Home (Motion Sequence Number 003)

Extell moves for summary judgment on its cross-claim for contractual indemnification as against Total Home.

"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'" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160

AD3d 82, 87 [1st Dept 2018], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Lexington Ins. Co. v Kiska Dev. Group LLC,* 182 AD3d 462, 464 [1st Dept 2020][denying summary judgment where indemnitee "has not established that it was free from negligence"]).

Further, unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Additional facts relevant to this claim

On June 30, 2017, Extell and Total Home entered into a "standard form of agreement between owner and contractor" that contemplated the Project (the Agreement) (Extell's notice of motion, exhibit L; NYSCEF Doc. No. 110). Annexed as an exhibit to the Agreement is an indemnification provision (the Indemnification Provision) that provides the following:

> "To the fullest extent permitted by law, [Total Home] shall defend, indemnify and hold [Extell] . . . harmless from and against all claims . . . to the extent arising out of or resulting from [Total Home's] Work under this Agreement, provided that such Exposure was caused, in whole or in part, by [Total Home] or anyone for whose acts [Total Home] legally is liable . . ."

(*id.*, exhibit F).

Here, plaintiff was injured when he fell from a ladder that collapsed underneath him. It is undisputed that, at the time of the accident, plaintiff was on the ladder performing work that fell

within the Agreement's scope of work.[4] Therefore, the accident arose out of Total Home's work at the Project and the Indemnification Provision is triggered and applicable to this action.

In opposition, Total Home argues that Extell is barred from seeking indemnification under the antisubrogation rule. Under that rule:

> [A]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. . . . In effect, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor – if that third party also qualifies as an insured under the same policy – for damages arising from the same risk covered by the policy.

(*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016] [internal quotation marks and citations omitted]).

The antisubrogation rule applies only up to the policy limits of liability under the policy (see *ELRAC, Inc. v Ward*, 96 NY2d 58, 78 [2001], citing *Curran v City of New York*, 234 AD2d 254, 255 [2d Dept 1996] [where the monetary limit of the insurance policy was "for a lesser sum than that sought by the plaintiff as damages" summary judgment dismissing contractual indemnification claim "should have been granted only up to the applicable limits of that policy"]). Further, where "exclusions in [the indemnitor's policy] rendered that policy inapplicable to the loss, the antisubrogation rule does not apply in that case" (*North Star Reins. Corp. v Continental Ins. Co.,* 82 NY2d 281, 296 [1993]).

Here, Total Home argues that its' insurer (nonparty Clear Blue Specialty Insurance Company), has accepted tender of defense and indemnification in this matter and, therefore, it is

[4] Extell and Total Home dispute whether plaintiff, in fact, worked for Total Home or for FVC. This dispute, however, has no bearing on whether plaintiff's work was performed pursuant to the Agreement for the purposes of the Indemnification Provision.

insuring both Total Home and Extell. Total Home also notes that it has a $10 million excess policy applicable in this action. Plaintiff's demand is $3 million. Based on this, Total Home argues that the antisubrogation rule should bar Extell from obtaining contractual indemnification from Total Home.

A review of both policies' tender letters reveals that they were accepted pursuant to a reservation of rights (*see* Total Home's affirmation in opposition, exhibit J [Clear Blue's tender letter] and P [AIG's tender letter]; NYSCEF Doc. Nos. 135 and 141). Further, Clear Blue's reservations of rights is explicitly based on policy exclusions.[5] Because it has yet to be determined whether Total Home's insurance policies are applicable to plaintiff's accident, there remains a question of fact as to whether the antisubrogation rule should apply to Extell's contractual indemnification claim against Total Home (*ELRAC, Inc.*, 96 NY2d at 78; *North Star Reins. Corp.*, 82 NY2d at 296). Therefore, while Total Home is required to indemnify Extell by the terms of the Agreement's Indemnification Provision, a question of fact remains as to whether Extell's claim is barred by the antisubrogation rule.[6]

Accordingly, Extell's motion for summary judgment on its contractual indemnification claim as against Total Home will be denied with leave to renew and/or reargue upon the determination of the coverage issues, if applicable.

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[5] The issue regarding the Clear Blue exclusion rests, at least in part, on the issue of whether plaintiff was an employee of Total Home or an employee of FVC. On these motions, who employed plaintiff was not explicitly raised as an issue for determination. Therefore, there has not been a determination on this issue as a matter of law.

[6] No insurer is a party to this action, and no request for relief seeking a declaration of rights is before the court.

Extell's Cross-Claim for Common-law Indemnification Against Total Home (Motion Sequence Number 003)

While Extell argues it is entitled to summary judgment on its cross-claim for common-law indemnification as against Total Home, it fails to request this relief in its notice of motion.

CPLR 2214 (a) requires that a movant identify the "relief demanded and the grounds therefore" in the notice of motion. Moreover, this court's part rules explicitly indicate that "[if] there is a discrepancy between the relief sought in your notice of motion and the relief sought in your supporting papers, the notice of motion is controlling" (Part 47 Rules, section II.D). As the notice of motion fails to identify the subject relief, it is not properly before the court.

To the extent that Extell argues that summary judgment in its favor is warranted as a matter of law upon a review of the record, such argument is unpersuasive. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia,* 259 AD2d at 65). As determined above, Extell is free from negligence. However there is no determination whether Total Home was guilty of some negligence that caused or contributed to plaintiff's accident.

Accordingly, in Extell's motion for summary judgment on its cross claim for common law indemnification as against Total Home will be denied.

The parties remaining arguments have been considered and are unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of defendant Extell West 57th Street LLC's (Extell) motion (motion sequence number 003) pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent of dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims against it, and the motion is otherwise denied, with leave to renew/reargue on its contractual indemnification claim, and it is further

ORDERED that the motion of plaintiff Juan Romero (motion sequence number 004), pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 240 (1) claim against Extell and defendant/third-party plaintiff Total Home Improvement Services, LLC is granted, and it is further

ORDERED that the remainder of the action is severed and continued.

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4/3/2023
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