Moreira v Brooklyn GC LLC
2023 NY Slip Op 32052(U)
June 21, 2023
Supreme Court, Kings County
Docket Number: Index No. 513010/2019
Judge: Debra Silber

At an IAS Term, Part 9 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 21st day of June, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

----------X

ODIEL DE ALMEIDA MOREIRA,

Plaintiff,

-against-

BROOKLYN GC LLC, EVERGREEN GARDENS II LLC and STANEV ASSOCIATES LLC.,

Defendants.

----------X

BROOKLYN GC LLC, EVERGREEN GARDENS II LLC and STANEV ASSOCIATES LLC.,

Third-Party Plaintiffs,

-against-

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Defendant.

----------X

DECISION / ORDER

Index No.: 513010/2019
Mot. Seq. # 1 & 2

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affidavits (Affirmations) Annexed	33-43; 44-58
Opposing Affidavits (Affirmations)	57-58; 59, 61
Affidavits/ Affirmations in Reply	60;

Plaintiff moves (in motion sequence number one) for an order, pursuant to CPLR 3212 (a), granting him partial summary judgment on the issue of liability under Labor Law

§ 240(1) against defendants BROOKLYN GC LLC and EVERGREEN GARDENS II LLC, the general contractor and the property owner, respectively.[1] All three defendants cross-move (in mot. seq. no. two) for an order, pursuant to CPLR 3212 (a), granting them summary judgment dismissing plaintiff's complaint in its entirety as against all defendants, or, in the alternative, granting them summary judgment on their third-party claims for contractual indemnification, contribution and common law indemnification against the third-party defendant Magellan CONCRETE STRUCTURES CORP. The plaintiff's complaint contains causes of action alleging violations of Labor Law §§ 240(1), 241(6), 200 and common law negligence.

BACKGROUND

On January 30, 2017, the day of plaintiff's accident, defendant EVERGREEN GARDENS II LLC was the owner of the property located at 54 Noll Street in Brooklyn, New York (hereinafter "the premises"). Defendant BROOKLYN GC LLC was the general contractor hired to oversee the construction project, which was a new eight-story residential building with more than four hundred apartments. It was completed in 2019.

Plaintiff testified that he was employed by the third-party defendant Magellan Concrete, and was working with a crew that was dismantling ("stripping") forms after concrete had been poured. He was bent over, pulling nails out of plywood, when he was suddenly struck on the back with a steel shoring post, which was eight to ten feet long, which caused him to fall to the ground and sustain serious personal injuries.

[1] The owner is in Chapter 11, and the Bankruptcy Court for the Southern District of New York issued a so-ordered stipulation on March 29, 2023 which permits this action to proceed during the automatic stay period, Doc 503 in Case No. 21-10335(MG).

Plaintiff commenced this action by filing a summons and verified complaint on June 12, 2019, and issue was joined by the filing of defendants' answer on July 19, 2019. Plaintiff filed his note of issue on November 18, 2022, and these motions timely followed.

Plaintiff's Motion

Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240(1), which provides, in pertinent part, as follows:

> "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]).

In falling object cases, "a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc*., 96 NY2d 259, 268 [2001]), "or that the falling object required securing for the purposes of the undertaking" (*Simmons v City of New York*, 165 AD3d 725, 727 [2018], quoting *Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2013]).

Here, there is no dispute that the object that fell, a shoring post, "required securing for the purpose of the undertaking." Miguel Garcia, a foreman for Magellan at the time of the plaintiff's accident, was deposed on July 28, 2021 [Doc 43]. He was asked many questions about the procedures for the company's work at the site. In brief, he testified that after the concrete for a floor of the new building was poured, it has to cure for about a month before they could remove the shoring posts. Removing a shoring post is not a one-person job. He said "one person have to hold the post, another person have to remove it" [Doc 43 Page 64]. He said the posts weigh about twenty to thirty pounds [id. Page 60]. They are meant to support the concrete for the floor poured above [id. Page 66]. They are secured with a "strap of metal, nail it to the top of the floor so this post cannot knock around" [id.]. He was asked "when you install it, you turn it to create the tension between

the floor and the ceiling, correct?" Mr. Garcia said "That's correct." Then he was asked "When you have the tension, then you use a device on the top to make sure that it's secure to the plywood, correct?" and he replied, "Yes" [id, Page 71].

Mr. Garcia testified that he did not learn of the plaintiff's accident in 2017. He first learned of it when he was asked to appear at the deposition. Nobody reported it to him at the job site. He testified that plaintiff did not work for Magellan, "because I don't see his name on the timesheet that they have to sign in every morning" [id. Page 20]. From this answer, defendants' attorney concludes that plaintiff worked for a company called New Age, which was a subcontractor of Magellan's [Doc 58 ¶¶30-36]. There is no actual evidence of this, nor is there any legal significance if he worked for a subcontractor of Magellan or for Magellan with regard to this motion. Plaintiff testified that he worked for Magellan, and that Joao Bueno was his supervisor. He said he had never heard of New Age Contractors [Doc 52 Page 29]. Mr. Garcia testified that Mr. Bueno was a supervisor for New Age. Mr. Garcia said he was not sure what work was going on the day of the accident. Mr. Garcia doesn't work for Magellan any longer, and so he could not look at the daily logs before coming to the deposition. He said "we was working on the third floor or the fourth floor. Probably we was doing the clean up removing the form after the pour. After the concrete is cure we have to remove the form, we have to clean it up, you know. That probably was the process that we were doing on that day" [id. Page 21].

Mr. Garcia said that a worker would use a hammer and a pry (crow) bar, and one or two people would be needed to remove a form, depending on the type of form. After the form is removed, there may be nails that need to be removed [Page 24]. Mr. Garcia

testified that there were thirty to forty men working for Magellan at this job site [id. Page 47], and he did not know who plaintiff is. He did not remember ever speaking to him [id. Page 34]. He had no records to confirm that he (Garcia) was on site at the time of the plaintiff's accident, and said "I may have a day off or I may go to the doctor" [id. Page 39]. He was asked [id. Page 67] "can you think of or do you know of any particular reason why one of these eight- or ten-foot vertical posts would fall?" He responded "Maybe if it's a -- maybe -- maybe because the other worker is not concentrating or he joking or whatever, they not concentrating on whatever they doing, the post may go out of his hand. That's very rarely to happen." Then, he was asked "What about, would it potentially fall as well if it wasn't properly secured either to the ceiling or to the floor?" and he replied, "The post pressure that they had between the floor and the slab on the top, it's very rarely that's going to happen unless somebody lose it." He was asked "So normally the safe way to perform that task is to have one worker hold it, meaning the vertical beam, while the other worker detaches it from the ceiling?" and he responded "yes" [id. Page 69].

In addition to plaintiff's EBT transcript and Mr. Garcia's EBT transcript, plaintiff also provides the EBT transcript for Moshe Blum, Document 42. He testified on behalf of defendant general contractor Brooklyn GC LLC. He no longer works for that company. He was their site superintendent for this job. He stated that they have been out of business since 2020. At the beginning of the job, when just the concrete company Magellan was working, he did not need to hold any safety meetings as "they would hold their own meetings. They would keep their own records" [Doc 42 Page 19]. He too did not learn of

plaintiff's accident until plaintiff started this lawsuit. He also said that he had never heard of plaintiff, and does not know him [id. Page 27].

Mr. Blum was asked to describe the use of the shoring posts. He said they are adjustable, so they can be tightened between the ceiling and floor, which he called a "screw jack" [id. Page 32]. He said the top of each post had a hook, and they are connected to each other with a piece of aluminum which is about two feet long, five inches high and two inches wide. The posts are placed two feet apart [id. Page 34]. When the concrete is cured and they want to remove the posts, they use a hammer to tap the second screw jack, which is at the top of the post, and it releases the pressure and the post drops down so it is not touching the top plywood any longer [id. Page 36]. Then, a worker on a ladder unhooks the horizontal piece of aluminum and two workers are on the ground to dismantle it [id. Page 37]. He estimated the posts to weigh forty pounds each.

Mr. Blum said he had never heard of Stanev Associates, or of New Age Contractors [id. Page 42] and he stated that Magellan was the only subcontractor on site while they were doing their concrete work. The daily logs and daily photos he prepared were uploaded to a computer and were kept digitally. He testified that he does not know who, if anyone, has those records now that the business closed [id. Pages 22-23]. He has no access to them anymore.

Plaintiff makes a prima facie case for summary judgment on his claim that the owner and general contractor defendants violated Labor Law 240(1), and that this violation was the proximate cause of his injury.

In opposition, defendants cross-move for summary judgment dismissing plaintiff's complaint. The affirmation in support [Doc 58] states that plaintiff's motion should be denied, and their motion granted, based upon their accompanying memorandum of law. The memo of law, at Document 57, as pertains to Labor Law §240(1), states that this cause of action should be dismissed because it is inapplicable. Counsel argues that it would be illogical to find that this was a "falling object" case, urging the court to conclude that it is analogous to *Wilinski v 334 East 92nd Housing Development Fund Corp*., 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011), where the object that injured the plaintiff was itself being dismantled when it fell, so, as the fall of the shoring post was the goal of the work, there can be no claim. The court disagrees. Counsel misconstrues the case and the statute. Counsel continues [Doc 57 Page 11] "at the time of the alleged accident, he was working on the ground level of the third-floor pulling nails from a piece of plywood with a hammer. He denied using any scaffolding or ladders or being involved in the removal of any of the forms that were removed by his co-workers. Plaintiff's deposition testimony further reveals that he did not see or know if the vertical support pole from the form that allegedly fell on him was being hoisted or secured for the purpose of an undertaking that would require specific protective equipment against a gravity-related risk." Counsel concludes "As the alleged falling of the form being removed was not a risk giving rise to a need for any of the safety devices enumerated by Labor Law § 240(1), and constituted a usual and ordinary danger at the construction site, Plaintiff's Labor Law § 240(1) cause of action should be dismissed" [id.].

First, the case *Wilinski v 334 East 92nd Housing Development Fund Corp*., 18 NY3d 1 does not hold that Labor Law § 240(1) is inapplicable when the falling object was integral to the work being performed. In that case, the job was a demolition, and the plaintiff was standing on the ground when a stack of plumbing pipes which had been leaned against a wall fell on him. The pipes were not part of the demolition, but were for the subsequent construction. Defendant's counsel argued that the pipes and the plaintiff were "on the same level" so Labor Law § 240(1) did not apply, and the Court of Appeals disagreed, stating "such a circumstance does not categorically bar the worker from recovery under section 240 (1). However, in this case, an issue of fact exists as to whether the worker's injury resulted from the lack of a statutorily prescribed protective device" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011]). The court explains (at Page 11) "Here, the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell. In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan."

Defendants' "integral to the work" defense has no merit here (see *Hyatt v Queens W. Dev. Corp.*, 194 AD3d 548 [1st Dept 2021]. The shoring posts were supposed to be secured. If they were being removed, one worker was needed to remove the "strap" holding it in place, and another was needed to hold it from falling. It is not clear that the

workers had even started the task of removing the shoring posts at the time of the plaintiff's accident. In any event, plaintiff's work at the time of the accident did not involve removing shoring posts (see *Diaz v HHC TS Reit* LLC, 193 AD3d 640 [1st Dept 2021]). He was removing nails from the plywood on the floor. It cannot be said, with regard to the shoring posts, that "their fall was the goal of the work" (*Wilenski* at 11). An expert's affidavit is not needed for the court to determine, based on the testimony in the record, that the shoring posts required securing for the purposes of the undertaking (see *Rincon v New York City Hous. Auth.*, 202 AD3d 421 [1st Dept 2022]; *Tinti v Alpha Omega Bldg. and Consulting Corp.*, 208 AD3d 1120 [1st Dept 2022]; *Pados v City of New York*, 192 AD3d 596 [1st Dept 2021]).

Accordingly, plaintiff's motion for partial summary judgment with regard to Labor Law §240(1) is granted, and the branch of defendants' motion which seeks to dismiss plaintiff's claim under Labor Law §240(1) is denied.

Defendants' Motion

Turning to the remaining causes of action, plaintiff has not opposed the branch of defendants' motion which seeks to dismiss his causes of action for a violation of Labor Law §200 and for common law negligence, and thus, that portion of defendants' motion is granted.

Labor Law §241(6)

Labor Law §241 states, in applicable part, as follows:

> "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, when constructing or demolishing buildings or doing any

> excavating in connection therewith, shall comply with the following requirements: . . .
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Defendants argue that this cause of action must be dismissed. Specifically, defendants aver that plaintiff has asserted violations of New York Industrial Code §§ 23-1.7(a)(1) and (2), 23-1.27, 23-2.1, and 23-2.2 (a) (b) and (c). In opposition, plaintiff states that defendants have not made a prima facie case for summary judgment with regard to his claim under 12 NYCRR §23-2.2 (a), which he argues is sufficiently specific and applicable to the facts herein. This section provides, in pertinent part:

> Section 23-2.2 - Concrete work
>
> **(a)** General requirements. Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.

Plaintiff's counsel asserts [Doc 61 ¶13] that defendants have not made a prima facie case for summary judgment, as their only argument is that "plaintiff's accident was not caused by forms failure to maintain position and shape, this section is inapplicable to the case." In addition, at paragraph 5 on page 3 of the Affirmation in Support of the Cross Motion, Defense Counsel states that 12 NYCRR 23-2.2 (a), (b) and (c) are not applicable because plaintiff's injury was not caused by an unstable form, shore or bracing during

placing concrete. This is the sum total of their argument and, as such, cannot possibly support the dismissal of the plaintiff's Labor Law §241(6) predicated upon Industrial Code Regulation 12 NYCRR 23-2.2 (a), which plainly mandates that forms, shores and reshores shall be properly braced or tied together so as to maintain position and shape."

Labor Law §241(6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2d Dept 2008]).

A sustainable Labor Law §241(6) claim requires the plaintiff to demonstrate that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d 494 [1993]) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 351). "To support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "such a violation . . . does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]).

The court finds that Industrial Code section 23-2.2(a) is sufficiently specific and concrete to support a Labor Law §241(6) cause of action, and that it is applicable to the plaintiff's description of how this accident occurred in this case (*see Harsch v City of New York*, 78 AD3d 78, 783 [2010]).

Defendants have not made a prima facie case for summary judgment dismissing the plaintiff's claims under this section of the Industrial Code. Thus, the branch of the cross motion seeking dismissal of plaintiff's Labor Law § 241(6) claim, as predicated upon a

violation of Industrial Code § 23-2.2(a), is denied, as defendants have failed to establish that there was no violation of this industrial code provision.

Plaintiff's Labor Law § 241(6) claim asserted against defendants as predicated upon a violation of the other Industrial Code sections is deemed abandoned, as a result of the plaintiff's failure to oppose defendants' motion with regard to said code provisions (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *see also Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012] [holding that "[w]here 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"]; *Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2d Dept 2010], citing *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

Lastly, as plaintiff's attorneys have not submitted one word in their papers submitted with either motion with regard to defendant STANEV ASSOCIATES LLC, all of plaintiff's claims against this defendant are dismissed.

Defendants' Cross Motion for Summary Judgment Against Magellan

Defendants' cross motion seeks an order, if plaintiff's complaint is not dismissed, for summary judgment on their third-party claims for contractual indemnification, contribution and common law indemnification against the third-party defendant Magellan.

The third-party claims for common-law indemnification and contribution against Magellan must be dismissed. It is not disputed with any evidence in admissible form that plaintiff was an employee of Magellan at all relevant times. Employers, such as Magellan

herein, are immune from common-law indemnification except in a narrow class of cases in which the plaintiff sustained a "grave injury" (Workers' Compensation Law § 11; *see also Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415-416 [2004]). A "grave injury" is, by statute, "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia, or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). Here, there is no allegation that plaintiff sustained any of the listed injuries. Since plaintiff did not suffer a "grave injury," and since it is undisputed that Magellan was plaintiff's employer at relevant times, defendants' contribution and common-law indemnification claims against Magellan are unsustainable (*see e.g., Spiegler v Gerken Bldg. Corp.*, 36 AD3d 715 [2006]; *Angwin v SRF Partnership*, 285 AD2d 568, 569 [2001]).

However, the court finds that the defendants are entitled to summary judgment with respect to contractual indemnification against Magellan. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Here, the applicable written agreement [Doc 55 ¶1] demonstrates that Magellan must hold the property owner and general contractor harmless for all personal injury claims arising out of or resulting from the superstructure work, "excluding only liability created by the

sole and exclusive negligence of the indemnified parties." It is not disputed that the instant claims arose from Magellan's work. Since the applicable indemnity provision was in effect at relevant times, and since there is no indication that defendants are attempting to have Magellan indemnify them for their own negligence, and as their liability is purely vicarious, defendants are awarded summary judgment on the issue of contractual indemnification against Magellan with regard to plaintiff's Labor Law 240(1) claim. With regard to plaintiff's Labor Law 241(6) claim, defendants are entitled to a defense, and a conditional order of indemnification against Magellan, until the fact finder at trial determines whether defendants or either of them are vicariously liable. If the fact finder finds defendants or either of them to be vicariously liable, such defendant or defendants are entitled to contractual indemnification.

CONCLUSIONS OF LAW

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion (mot. seq. one) for summary judgment on his Labor Law § 240(1) claim as against defendants BROOKLYN GC LLC and EVERGREEN GARDENS II LLC is granted; and it is further

ORDERED that the branch of defendants' cross motion (mot. seq. no. two) for summary judgment dismissing plaintiff's complaint with regard to Labor Law § 240(1) is denied with regard to BROOKLYN GC LLC and EVERGREEN GARDENS II LLC and is granted with regard to defendant STANEV ASSOCIATES LLC; and it is further

ORDERED that the branch of the defendants' cross motion seeking to dismiss plaintiff's Labor Law § 241(6) claim is granted ***except*** to the extent that said claim is

predicated upon Industrial Code § 23-2(a), which claim is not dismissed; and it is granted in its entirety with regard to defendant STANEV ASSOCIATES LLC; and it is further

ORDERED that the branch of the defendants' cross motion seeking to dismiss plaintiff's Labor Law § 200 and common law negligence claims is granted as against all defendants; and it is further

ORDERED that the branches of the defendants' cross motion for summary judgment on their third-party claims for contribution and common law indemnification against third-party defendant Magellan is denied; and it is further

ORDERED that the branch of the defendants' cross motion on their claim for summary judgment on their third-party claim for contractual indemnification against third-party defendant Magellan is granted with regard to plaintiff's cause of action under Labor Law §240(1), and Magellan is directed to immediately assume their defense and reimburse their legal fees and disbursements incurred thus far; and it is further

ORDERED that the branch of the defendants' cross motion for summary judgment on their third-party claim for contractual indemnification against third-party defendant Magellan with regard to plaintiff's cause of action under Labor Law §241(6), predicated on an alleged violation of industrial code section 23-2.2(a), is granted to the extent that defendants are entitled to conditional indemnification against Magellan under their contract, provided there is a finding of vicarious liability against defendants or either of them by the fact finder at trial; and it is further

ORDERED, that any dispute as to the amount of the attorneys' fees and disbursements which defendants have incurred and are entitled to reimbursement for, for

the period from the date the action was commenced to the date the third-party defendant assumes their defense, shall be submitted to this Court, by motion, and the court shall schedule a hearing to determine the amount of attorneys' fees and disbursements to be awarded.

Any other relief requested not specifically granted herein has been considered and is denied.

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

E N T E R:

Hon. Debra Silber, J.S.C.