SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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FELIPE A. LAZARO LOPEZ,

Plaintiff,

- v -

18-20 PARK 84 CORP., ARGO REAL ESTATE LLC, THE ARGO CORPORATION, and MARISSA REESE,

Defendants.

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INDEX NO. 152028/2019

MOTION DATE 02/22/2023, 07/19/2023

MOTION SEQ. NO. 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 113, 128, 129, 130, 131, 132, 135

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 133, 134, 136, 137, 138, 156, 157, 158, 159, 160

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 161, 162, 163, 164, 165

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

In this personal injury action, plaintiff moves for summary judgment against defendant 18-20 Park 84 Corp. (18-20 Park) (mot. seq. 003). Defendant opposes, and defendants 18-20 Park, Argo Real Estate, LLC (Argo), and The Argo Corporation (Argo Corp) (collectively, building defendants) cross-move for summary judgment dismissing the complaint.

In motion sequence four, building defendants move for partial summary judgment on their cross-claim against co-defendant Reese. Reese opposes.

In motion sequence five, third-party defendant/second third-party defendant Dowd Interiors Incorporated (Dowd) moves to dismiss all third-party claims for contribution and

indemnification against it, thus severing and dismissing both third-party actions. Building defendants and Reese oppose the motion.

I. PERTINENT BACKGROUND

This action arises from injuries suffered by plaintiff while performing construction work at defendants' premises at 18 East 84th Street in Manhattan, which was owned by 18-20 Park and managed by the Argo defendants. Defendant was the owner and tenant of apartment B in the building at the time, and plaintiff's employer, Dowd, was the contractor on the project.

Before the work began, on June 21, 2018, Reese signed an alteration agreement with 18-20, which provides, as pertinent here, that:

> [Reese] indemnifies and holds harmless [18-20 Park] and other shareholders and residents of the Building against any damages suffered to persons or property as a result of the Work. [Reese] shall reimburse the [above-named parties] for any losses, costs, fines, fees[,] and expenses (including . . . reasonable attorney[']s fees and disbursements) incurred as a result of the Work . . .

(NYSCEF Doc. No. 105).

On July 30, 2018, while he worked at Reese's apartment, plaintiff fell from a ladder and sustained injuries. The complaint asserts several causes of action against defendants pursuant to Labor Law §§ 200, 240, 241, and 241-a, and Rule 23 of the Industrial Code.

On or about April 25, 2019, building defendants filed a joint answer with cross-claims against Reese, in which they denied the allegations in the complaint and asserted several affirmative defenses (NYSCEF Doc. No. 91).

In plaintiff's "Statement of Undisputed Material Facts," he asserts without dispute that he worked for Dowd at the apartment as a painter. To perform his work, he used ladders that Dowd had provided, including one that was six-feet tall with rubber feet (the ladder). According to

plaintiff, he inspected the ladder before using it and found it in good working order (NYSCEF Doc. No. 88).

Right before the accident occurred, plaintiff was using the ladder to reach the crown moldings of one of Reese's rooms. He held tools in both hands while he worked, and he stood on the fifth rung of the ladder, which he described as the second rung from the top. It is undisputed that Dowd did not direct him against using the ladder to perform his work (*id.*).

Approximately 10 minutes after he began his work, the ladder allegedly moved for an unknown reason, and plaintiff and the ladder fell to the ground, with the ladder landing on top of him (*id.*).

According to Dowd's president, a baker's scaffold was in the apartment and "the equipment was there for anyone to use" (NYSCEF Doc. No. 103). Indeed, Dowd did not know whether plaintiff had worked with ladders or scaffolds before and stated that he did not direct plaintiff to use a particular item (*id.*).

Building defendants' expert opines that plaintiff "caused the ladder-user system to become more top heavy than is safe and made it more likely that the ladder would tip over when he moved his body or applied a horizontal force while he was working (e.g. the contact force between his putty knives and the molding.)" Because plaintiff stood on the fifth rung, there was a limited amount of available surface space with which he could steady himself and/or the ladder, and he may have caused the accident by overreaching or applying excessive force, which is supported by the fact that the ladder fell on plaintiff. Moreover, plaintiff was tall enough to have reached the molding by standing on the fourth, rather than the fifth, rung of the ladder, which would not have been dangerous (NYSCEF Doc. No. 129).

II. PLAINTIFF'S MOTION AND BUILDING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (SEQ. 003)

Initially, plaintiff does not contest the dismissal of his claims of common-law negligence and Labor Law § 200, and thus the claims are dismissed.

A. Labor Law § 240(1)

Plaintiff's motion for summary judgment arises under Labor Law § 240(1), which provides that:

> All contractors and owners . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or a 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 . . .

"Plaintiff must demonstrate [both] that the statute was violated and that [the] violation was a proximate cause of his injuries" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012]). "The failure to provide a safety device is a per se violation of the statute for which an owner/contractor is strictly liable" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8 [1st Dept 2011]). Moreover, if a plaintiff shows that there was a failure to "properly secure [a] ladder against movement or slippage and to ensure that it remain[s] steady and erect," summary judgment is appropriate (*Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650, 651 [1st Dept 2021]).

Plaintiff contends that his fall from an unsecured ladder constitutes a violation of Labor Law § 240(1), even if the ladder was not defective, and that building defendants cannot establish that he misused the ladder and thereby caused the accident, as, even if true, it would not

constitute the sole proximate cause of the accident. Nor does it matter that he was the only witness to his accident, or that he may have disregarded any warning labels on the ladder.

In both their opposition to plaintiff's motion and in support of their cross-motion, building defendants argue that Labor Law § 240(1) is inapplicable because plaintiff's misuse of the ladder was the sole proximate cause of the accident. They observe that it is undisputed that plaintiff stood on the fifth rung of the ladder, despite a warning label on the rung telling users not to stand on it.

Building defendants rely on their expert's opinion that plaintiff made the ladder unsafe by standing on the fifth rung and that he may have caused the accident by overreaching or applying excessive force, which was buttressed by the fact that the ladder ended up falling on plaintiff.

Building defendants also argue that because plaintiff cannot show the ladder that he used was defective, he has the additional burden of demonstrating that the absence of additional safety devices was a proximate cause of the accident. Moreover, they contend that plaintiff's decision to use the ladder instead of an available baker's scaffold at the worksite is fatal to his claim, and that summary judgment is inappropriate as plaintiff was the sole witness to his accident, and especially given the fact that there was another worker present in the apartment who did not know that plaintiff had fallen, thereby raising an issue as to plaintiff's credibility.

In reply, plaintiff maintains that as 18-20 Park owns the building, it is subject to strict liability for a violation of Labor Law § 240(1), and that his testimony that the ladder moved and tipped over is unrefuted and constitutes proof of a statutory violation. Moreover, the absence of safety devices, in and of itself, is enough to establish a violation of Labor Law § 240(1), and building defendants' expert did not opine that plaintiff was the sole proximate cause of the accident.

The purpose of Labor Law § 240(1) is "to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015] [internal quotation marks and citation omitted]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 284-286 [2003]).

Thus, absolute liability exists if the defendant's failure to provide the worker with proper protection proximately causes the injury (*Nicometi*, 25 NY3d at 96), and the worker's comparative negligence is not a defense (*see Fundus v Scarola*, 214 AD3d 479, 479 [1st Dept 2023]). "To prevail on a Labor Law § 240 (1) claim, a plaintiff must demonstrate . . . that the failure to provide an appropriate safety device proximately caused [the] injury" (*Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 469 [1st Dept 2022]), and, concomitantly, where the worker is the sole proximate cause of the accident, there is no liability (*see Robinson v E. Med. Ctr.*, 6 NY3d 550 [2006]).

Here, plaintiff established a prima facie violation of the statute by proof that his accident occurred when, in the course of his work, the ladder on which he was standing moved and fell over for no apparent reason, causing him to fall (*see Blake*, 1 NY3d at 289 n 8; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]). Based on these undisputed facts, 18-20 Park may be held liable for the violation (*see Castillo v TRM Contr. 626, LLC*, 211 AD3d 430, 431 [1st Dept 2022] [section 240(1) violation established if ladder shifts or slips, causing injury to worker]; *Pierrakeas v 137 E. 38th St. LLC*, 177 AD3d 574, 574-575 [1st Dept 2019] [defendant's failure to provide safety device to secure ladder was dispositive]; *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 583 [1st Dept 2018] ["Plaintiff's fall from an unsecured ladder establishes a violation of the statute"]).

Moreover, plaintiff need not demonstrate that the ladder was defective in order to establish a violation of Labor Law § 240(1) (*Ping Lin*, 193 AD3d at 651), nor how or why the ladder moved (*see Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 504 [1st Dept 2021]), and even if he misused the ladder by stepping on the fifth rung, it would not preclude summary judgment in his favor (*id.* at 504; *Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 474 [1st Dept 2007] ["[i]t does not avail defendants to argue that the manner in which plaintiff set up and stood on the ladder was the sole cause of the accident, where there is no dispute that the ladder was unsecured and no other safety devices were provided"]).

In opposition, building defendants fail to raise a triable issue as to whether plaintiff's use of the ladder caused his injury, or whether a scaffold was available to him and he failed, without good reason, to use it (*see Sacko v New York City Hous. Auth.*, 188 AD3d 546, 547 [1st Dept 2020]). Likewise, that plaintiff was the sole witness to his accident does not preclude summary judgment (*see Rivera v Suydam 379 LLC*, 216 AD3d 495 [1st Dept 2023]). Building defendants thus do not establish that a triable issue exists, and plaintiff is entitled to an order granting summary judgment on liability on his Labor Law § 240(1) claim.

B. Labor Law § 241(6) claim

Building defendants argue that plaintiff has no claim for a violation of Labor Law § 241(6) as the statute does not apply to accidents occurring during "routine maintenance," as the code violations alleged by plaintiff are inapplicable to his accident, and as the accident was solely caused by plaintiff's actions in standing on the fifth rung of the ladder (NYSCEF Doc. No. 129).

Plaintiff asserts that his comparative negligence, if any, is irrelevant, that building defendants do not demonstrate that various industrial code provisions are not applicable, and that his work is a covered activity under the statute (NYSCEF Doc. No. 134).

In reply, building defendants maintain that plaintiff's comparative negligence is a defense to the claim (NYSCEF Doc. No. 135).

Absent any dispute that plaintiff was painting Reese's ceiling as part of a gut renovation of her apartment, his work is a covered activity under the statute (*see* Labor Law § 241[6] [statute applies where employed is engaged in, inter alia, painting of a building or structure]; *Soodin v Fragakis*, 91 AD3d 535 [1st Dept 2012] [commercial painting and plastering covered under Labor Law]; *Aarons v 401 Hotel, L.P.*, 12 AD3d 293 [1st Dept 2004] [plaintiff, employee of contractor hired to paint several rooms in hotel, was performing work including light scraping, plastering, skim coating, and painting, which did not constitute "routine maintenance"]; *see also Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596 [1st Dept 2015] [trial court correctly denied dismissal of claim where plaintiff fell from ladder while painting wall]).

Based on plaintiff's opposition to building defendants' motion to dismiss all of the alleged violations of the Industrial Code (NYSCEF Doc. No. 134), it appears that only two of the specific Industrial Code sections mentioned in plaintiff's pleadings are at issue here, which are:

(1) Industrial Code 23-1.21(b)(4)(ii), which provides that all ladder footings shall be firm; and

(2) Industrial Code 23-1.21(b)(3), which provides that all ladders shall be maintained in good condition, and shall not be used if any of the following conditions exist:

(i) If it has a broken member or part.
(ii) If it has any insecure joints between members or parts.
(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
(iv) If it has any flaw or defect of material that may cause ladder failure.

Here, building defendants do not address whether the ladder's footings were firm and thus do no establish that there was no violation of this subsection of the Code. In any event, there is a triable issue as the ladder suddenly shifted under plaintiff (*see Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013] [defendant failed to make affirmative showing that ladder complied with firm-footing requirement, and even if it had, triable fact raised as to whether lack of rubber footings caused fall]).

As to subsection 23-1.21(b)(3), building defendants likewise failed to address it, and thus do not meet their burden on their motion.

As plaintiff does not argue that any other Code section applies to this case, the remaining alleged violations are deemed waived (*Romano v New York City Tr. Auth.*, 213 AD3d 506 [1st Dept 2023]).

Finally, even if plaintiff's comparative negligence is a defense to a Labor Law § 241(6) claim, it does not require dismissal of the claim at this stage (*see Wein v E. Side 11th & 28th, LLC*, 186 AD3d 1579 [2d Dept 2020] [any comparative negligence by plaintiff does not preclude liability for violation of Labor Law § 241[6]).

III. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (SEQ. FOUR)

Building defendants seek partial summary judgment on their cross-claim for contractual indemnity against co-defendant Reese, relying on the alteration agreement signed by her before plaintiff's accident occurred. They argue that Reese is obliged to indemnify them under this provision because plaintiff was injured while working on the renovation project at issue in the alteration agreement. Moreover, as only plaintiff's employer supervised him and provided the ladder that he used, and as 18-20 Park was not involved with the project, it cannot be held liable

for any alleged negligence. While there has been not yet been a determination as to liability, building defendants assert that a conditional order granting indemnification may be granted.

In opposition, Reese contends that the indemnification agreement is overly broad and thus unenforceable, as it exempts the cooperative corporation and the managing agent from liability for their own negligence, does not limit Reese's liability to her own acts and omissions, and does not limit the amount that the cooperative corporation or managing agent can receive from Reese's insurance proceeds, all of which, she alleges, conflicts with General Obligations Law (GOL) § 5-321, which renders void any agreement that insulates the lessor from liability for its own negligence.

In reply, building defendants argue that GOL § 5-321, though distinguishable, is subject to the same restrictions as GOL § 5-322.1, namely, that indemnification agreements are only void if they purport to exempt owners and contractors from their own negligence related to construction work. In the case at hand, they observe that neither Reese nor plaintiff opposed their motion to dismiss plaintiff's Labor Law § 200 and common-law negligence causes of action against them, thereby conceding that they had not been negligent. Therefore, in the absence of negligence and as building defendants did not supervise or control plaintiff's work, the agreement is enforceable.

Here, Reese does not deny that, on its face, the agreement requires her to indemnify building defendants, and the exception upon which she relies is inapplicable because the negligence claims against building defendants have been voluntarily dismissed by plaintiff, thereby rendering the agreement enforceable and requiring Reese to indemnify them (*see Dwyer*, 98 AD3d at 884 [even if indemnity clause indemnified party against its own negligence, there was no view of evidence by which party was actually, instead of vicariously, negligent, and thus

agreement was enforceable]; *Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306, 306 [1st Dept 2002] [GOL §§ 5.321 and 5.322.1 did not bar indemnification as landlord did not supervise or control injured plaintiff's work and its liability to plaintiff was purely statutory]).

IV. DOWD'S MOTION FOR SUMMARY JUDGMENT (SEQ. FIVE)

Third-party defendant/second third-party defendant Dowd Interiors Incorporated (Dowd) moves to dismiss all third-party claims for contribution and indemnification against it, thus severing and dismissing both third-party actions.

Dowd, plaintiff's employer at the time of his accident, moves to dismiss on the ground that plaintiff's alleged injury is not covered by Workers' Compensation Law § 11(1), which limits an employer's liability to its obligation to maintain workers' compensation insurance under Workers' Compensation Law § 10, unless, as pertinent here, the party seeking indemnification:

> proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the followin: . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Here, according to Dowd, the only potential grave injury is plaintiff's alleged traumatic brain injury, but the relevant caselaw requires that a "grave" brain injury must render a worker completely disabled from working in any capacity. Dowd contends that plaintiff has not shown that he is completely disabled from working in any capacity, based on his deposition testimony wherein he admitted that no doctor diagnosed him as being unable to work, and the fact that while plaintiff is not currently working and alleges that he is permanently disabled, he nevertheless initially returned to work a few days after his July 30, 2018, accident and continued to work until August 23, 2018 (*see* NYSCEF Doc. No. 100).

Dowd also relies on the expert report of a board-certified neuropsychologist, in which the expert observed that plaintiff reportedly did not lose consciousness, vomit, or display other signs of a traumatic brain injury after the accident, and therefore plaintiff likely sustained a simple concussion. Moreover, in detailing plaintiff's tests and results, the expert found that plaintiff exhibited "poor effort," in that plaintiff exaggerated his symptoms and attempted to feign deficits in his cognitive abilities. The expert opined that there was no reliable evidence that indicated that plaintiff had suffered cognitive or psychological damage and that he could return to work full time, and thus plaintiff did not sustain a grave injury.

In opposition, building defendants contend that plaintiff suffered a grave injury, as indicated by plaintiff's bill of particulars (NYSCEF Doc. No. 9, *12), which reflects that he sustained numerous serious injuries relating to his brain, including post-concussion syndrome, post-traumatic headaches, and deficiencies in his cognitive and executive functions. They observe that Dowd bears the burden of showing that plaintiff does not have a grave injury, and it is not the nonmoving parties' burden to show that such an injury exists (NYSCEF Doc. No. 155). Finally, building defendants contend that plaintiff's medical record is incomplete, and therefore resolution of the matter is premature.

Reese also opposes the motion, arguing that Dowd's evidence is insufficient to support dismissal of the claims against it, and that plaintiff's physicians have reached conclusions that contradict Dowd's expert. She submits records from plaintiff's treating neurologist, who is certified in neurology, brain injury medicine, and electrodiagnostic medicine, and who examined plaintiff several times between October 2019 and August 2021. At each examination, the doctor concluded that plaintiff was totally disabled due to his traumatic brain injury and that he was unable to work.

In reply, Dowd reiterates that not all brain injuries are considered grave for the purpose of the Workers' Compensation Law, and emphasizes that plaintiff returned to work three weeks after the accident occurred. Moreover, plaintiff's treating doctor blamed his neurological disability on a head injury he sustained after the accident in question, while another physician concluded after a February 21, 2019 examination that plaintiff's post-concussion syndrome had resolved. Finally, Dowd contends that plaintiff's doctors' reports are not persuasive on this issue because they did not evaluate the difference in plaintiff's cognitive functions before and after his subsequent head injury.

Where there are conflicting expert or medical reports, as here, dismissal of claims against the employer is not warranted (*see Deschaine v Tricon Constr., LLC*, 192 AD3d 452, 453 [1st Dept 2021] [plaintiff's expert reports raised issue of fact as to whether plaintiff's brain injuries rendered him completely unemployable]). Although Dowd satisfied its prima facie burden through its expert report and plaintiff's deposition testimony, the records submitted by the opposing parties, among other evidence, raise issues of fact as to whether plaintiff sustained a grave injury as defined by under Workers' Compensation Law § 11" (*Rucinski v More Restoration Co. Inc.*, 210 AD3d 604, 605 [1st Dept 2022]).

While there may be some issues with plaintiff's medical evidence, including the failure to explicitly account for the impact of his subsequent head injury and the fact that he returned to work for a short period after the accident, these relate to the credibility and strength of the evidence, which must be determined by the factfinder (*see Carter v HP Lafayette Boynton Hous. Dev. Fund Co., Inc.*, 210 AD3d 580, 581 [1st Dept 2022]).

V. CONCLUSION

Upon the foregoing documents, it is hereby

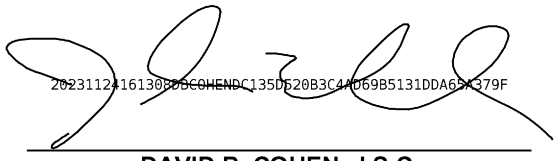
ORDERED that motion sequence number 003 is granted and summary judgment is granted as to liability on plaintiff's Labor Law § 240(1) claim against defendant 18-20 Park 84 Corp; it is further

ORDERED that the cross-motion is granted to the extent of severing and dismissing plaintiff's Labor Law § 200 and common law negligence claims, and is otherwise denied; it is further

ORDERED that the motion by defendants 18-20 Park, Argo Real Estate, LLC, and The Argo Corporation for partial summary judgment on the issue of contractual indemnification (mot. seq. 004) from co-defendant Reese is granted; it is further

ORDERED that third-party defendant/second third-party defendant Dowd Interiors Incorporated's motion (mot. seq. 005), which sought dismissal of the third-party actions, is denied; and it is further

ORDERED that the parties appear for a settlement/trial scheduling conference on March 27, 2024, at 10:00 a.m.



11/24/2023
DATE

DAVID B. COHEN, J.S.C.

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