#005
C#006

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART IA-24

----------X

Rommel Robles,

Plaintiff,

-against –

552-562 United Housing Development Fund Corporation, et al.

Defendants.

----------X

Index №. 305124/2014E

Hon. **DORIS M. GONZALEZ**, Justice Supreme Court

AND THIRD PARTY ACTIONS

The following papers numbered ____ to ___were read on this motion **(NYSCEF Seq. Nos. 5, 6)** for noticed on _____and duly submitted as **Nos.** __ on the Motion Calendar of _____

NYSCEF Seq. Nos. 5, 6	Doc. Nos.
Motions and cross-motions, Exhibits and Affidavits Annexed, Opp., Reply, etc.	As indicated in NYSCEF

Upon the foregoing papers, Justice Suarez having recused himself in this action, the foregoing motions and cross-motions are decided in accordance with the annexed decision and order.

Dated: 10-4-2022

Hon. _____
Doris M. Gonzalez, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

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Index №. 305124/2014E

DECISION AND ORDER

Hon. Doris M. Gonzalez

In Motion Sequence No. 5, plaintiff moves for an Order granting summary judgment on the issue of liability in favor of the plaintiff against the defendants on his claims under Labor Law §§ 240(1) and 241(6). Defendants 552-562 United Housing Development Fund Corporation and 552-562 United, L.P. (collectively, "the United defendants") cross-move for summary judgment dismissing the complaint, and granting contractual indemnity against Mega Contracting Group, LLC (Mega). Defendant Flagge Contracting Inc. (Flagge) also cross-moves for summary judgment dismissing the plaintiff's complaint, and for contractual indemnification, common law indemnification, and breach of insurance procurement from third-party defendant Avarga Contracting Corporation (Avarga).

In Motion Sequence No. 6, Mega moves for summary judgment dismissing all claims and all cross-claims against it, and for summary judgment in its favor on its cross-claims and third-party claims against Flagge and Avarga for contractual indemnification.

On January 14, 2014, plaintiff was working at a construction site located at 552-562 Academy Street in Manhattan, which was owned by the United defendants. The general contractor, Mega, subcontractor the masonry and concrete work was Flagge. Flagge in turn subcontracted a portion of its work to Avarga, plaintiff's employer.

Plaintiff was injured when he was struck in the face by a plank of wood that had been erected to support a tarp providing protection from the rain. According to plaintiff's deposition testimony, his supervisor, also an Avarga employee, and he were working at the basement level

of the project, making masonry repairs to the basement door. Outside of the basement door, the supervisor had erected a make-shift "tent" using a blue tarp to protect plaintiff and other Avarga workers from the rain. On one side, the top of the tarp was attached to the fire escape, and on the other side, planks, approximately 10 to 12 feet in length,[1] were used to hold up the other side of the tarp, similar to the way that tent poles are used to hold up a tent. The bottom of the planks rested on the ground, and sand bags had been placed around them to hold them in place. The vertical planks were otherwise freestanding, and not secured at the top other than that they were tied to the tarp. As plaintiff was knelling down inside the basement, taking measurements of a door, one of the wooden planks struck him. According to the plaintiff, he believed it was toppled over by the wind. The plank fell onto the plaintiff, striking him in the face.

Plaintiff moves for summary judgment under Law §§ 240(1) and 241(6), contending that there is no dispute that the accident occurred when the unsecured plank of wood that was being used to support the tarp fell and struck the plaintiff in his face while he was on his knees taking measurements. He relies primarily on *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 [2011]), in which pipes, which were stored vertically at ground level and stood at approximately 10 feet, and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches tall. Plaintiff also asserts that he is entitled to summary judgment on his Labor Law § 241(6) claim predicated on Industrial Code §§ 23-1.7(a)(1), which requires that "every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection."

The United defendants cross-move for summary judgment dismissing the complaint, and for contractual indemnity against Mega.[2] As to common law liability, the United defendants contend that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law. With respect to Labor Law 200, they contend that no

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[1] Plaintiff at his deposition was not sure if the planks were 2x4, 2x6, 2x8 or some other nominal dimension. He testified that they were thick, because they were the type of plank used on scaffolds. In his affidavit his states that they were 3"x12".

[2] In opposition to that part of the United defendants' motion which seeks contractual indemnity from Mega, Mega argues that the contract containing the indemnification agreement is not sufficiently authenticated.

liability attaches as they had no supervisory control over the work. Defendants further argue that the Labor Law 240(1) claim fails because Labor Law § 240(1) does not apply automatically every time a worker is injured by a falling object; instead, a worker must establish that the object fell because of the inadequacy or absence of a safety device of the kind contemplated by the statute. Lastly, they maintain that the cited Industrial Code regulation is not applicable as the area where the accident occurred was not normally subject to falling objects.

Defendant Flagge similarly moves to dismiss all Labor Law claims against it, and for contractual indemnity and/or failure to procure insurance as to Avarga.[3] Flagge argues, in opposition to plaintiff's motion and in support of its cross-motion, that Plaintiff was not within the protected class of people envisioned by the Labor Law, and is thus barred from recovery. Even if plaintiff is found to be protected by the Labor Law, defendant Flagge argues, his motion for summary judgment should be denied because there is no evidence that his alleged injuries resulted from the type of gravity-related risk envisioned by the Labor Law, or that Flagge had any authority to control his work. Finally, Flagge contends that uncontroverted evidence demonstrates that Flagge did not control the means and methods of plaintiff's work, or have notice of an alleged dangerous condition.

In opposition to the motion by Flagge for summary judgment on its cross-claims and third-party claims against third-party defendant Avarga, Avarga notes that Paragraph 4.6 of the Avarga Contract provides that Avarga shall indemnify Flagge "provided that any such claim, damage, loss or expense is attributable bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ." Avarga argues that indemnification is premature absent a determination that the alleged injury suffered by plaintiff was a result of negligence. Avarga also argues that Flagge may have been negligent and responsible for the accident.

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[3] Pursuant to the contract between Flagge and Avarga, Avarga allegedly agreed to the following insurance procurement language: "The Subcontractor shall purchase and maintain insurance...as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract..." Flagge contends that on October 13, 2016, it received correspondence from Avarga's insurer, Northland Insurance, advising that had disclaimed coverage under the policy's employer exclusion. Flagge argues that Avarga thus violated the terms of the contract with Flagge for failure to maintain insurance.

In Motion Sequence No. 6, Mega moves to dismiss all Labor Law claims against it, for reasons similar to those set forth by the moving defendants on the prior motions. Mega also submits the affidavit of Walter Konon, a P.E. and construction expert, who opines that is based on his review of the depositions in this matter, including the plaintiff's deposition, the Verified Bill of Particulars, and the accident reports, that "plaintiffs injury was not the result of the force of gravity upon the plank that allegedly struck him. Rather, it was the wind that pushed the tarp and the bottom of the plank into plaintiff's face."

With respect to contractual indemnity, Mega asserts that the contract between Mega and Flagge, provides in Par. 34 that the subcontractor, Flagge shall save, hold harmless and assume the defense of Mega, and in Par. 35, that Flagge shall indemnify and save harmless Mega and the owner. The subcontract between Flagge and the subcontractor, Avarga with respect to indemnification provides in 14.6/4.6.1 on p, 6 and on p. 3 of the Additions and Deletions Report for AIA Document A401 – 2007, that the subcontractor Avarga shall indemnify and hold harmless the general contractor, Mega and the contractor. The subcontract between Flagge and Avarga (Ex. U) in Article 1 in § 1.1 provides that "the Subcontract Documents consist of .... (3) Other documents listed in Article 16 of this Agreement." Article 16 in § 16.1.2 provides that "the Prime contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract documents enumerated in the Owner-Contractor Agreement." Mega argues that pursuant to those provisions in the subcontract between Flagge and Avarga, Avarga is required, by reference to the Prime Contract, to indemnify the Owner as well as the General Contractor, Mega.

In opposition to that part of Mega's motion for summary judgment for contractual indemnity against Avarga, Avarga argues that the Avarga contract does not provide for indemnification to Mega, but only to Flagge, Mega's subcontractor. Indeed, Mega is not named in the Avarga Contract and there is no privity of contract between Avarga and Mega. Further, Avarga argues that paragraph 4.6 of the Avarga Contract provides that Avarga shall indemnify Flagge "provided that any such claim, damage, loss or expense is attributable bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub- subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ." (emphasis added) Because there has neither been a determination that the alleged injury suffered by plaintiff was a result of negligence, nor who

was the negligent party or parties, Avarga argues that Mega's reliance on this paragraph for indemnification is premature and misplaced. Further, Avarga argues that Mega is not entitled to obtain conditional relief on a claim for contractual indemnification because it has failed to "establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability."

Flagge, in opposition to Mega's motion for summary judgment against it for indemnification, agrees that it was to provide Mega indemnification for damages "arising out of, or occurring in connection with the execution of the Work…," and similarly, that it would provide insurance against damages "arising out of, or occurring in connection with the execution of the Work…" Flagge maintains that the alleged accident did not arise out of or occur in connection with the execution of work performed by Flagge, precluding Mega from entitlement to summary judgment with regards to contractual indemnity. Further, Flagge contends that Mega would be entitled to contractual indemnification from Flagge only for damages arising out of Flagge's work, and only to the extent caused by Flagge's negligence.

In reply to the various motions set forth above, plaintiff cites various cases in arguing that Labor Law 240(1) does, in fact, apply in this "falling object" case.[4]

Discussion

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to

[4] See also Outer v. City of New York, 5 N.Y.3d 731, 799 N.Y.S.2d 770 (2005) (affirming summary judgment for the plaintiff where an unsecured dolly that was being stored on top of a "bench wall" that was 5 1⁄2 feet high and adjacent to the worksite, fell and hit him); Quattrocchi v. F.J. Sciame Const. Corp.,11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008) (240(1) applied where the plaintiff was struck by falling planks that had been placed over open doors as a makeshift shelf to facilitate the installation of an air conditioner above a doorway); Gonzalez v. Paramount Group, Inc., 157 A.D.3d 427, 66 N.Y.S.3d 122 (1" Dep't 2018) ("Contrary to Allianz's argument, the cinderblocks above the opening that fell were 'falling objects' under Labor Law §240(1)"); Orner v. Port Auth. Of N.Y. & N.J., 293 A.D.2d 517, 740 N.Y.S.2d 414 (2"d Dep't 2002) ("The plaintiff, an electrician, was injured while working on the ground floor of a construction project when he was hit upon the head and neck by unsecured roofing material that had fallen from the roof. The Supreme Court erred in denying the plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claims against the respondents."); Stawski v. Pasternack, Popish & Reif, P.C., 54 A.D.3d 619, 864 N.Y.S.412 (2st Dep't 2008) (240(1) applied where plaintiff struck by falling cinder block that had been left on the job site during the work).

the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Labor Law §240(1)

Labor Law §240(1) applies where elevation-related risks are at involved in the work. (*Narducci v Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267 [2001]; *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 [1st Dept. 2011] ["Labor Law § 240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control."") The fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1). (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 74 N.E.3d 307, 310, 52 N.Y.S.3d 68, 71 [2017].) To recover under Labor Law § 240(1) for injuries sustained in a falling object case, a plaintiff must establish both: (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking; and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential.

(*Flowers v Harborcenter Dev.,* LLC, 2017 N.Y. App. Div. LEXIS 8146, *1, 2017 NY Slip Op 08117, 1 [4th Dept. 2017].)

Labor Law § 240(1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7, 959 N.E.2d 488, 935 N.Y.S.2d 551). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*id.* at 7;) "The dispositive inquiry does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279; *Kandatyan v 400 Fifth Realty, LLC*, 2017 N.Y. App. Div. LEXIS 8064, *3-4, 2017 NY Slip

Op 07984, 1 [2d Dept. 2017] [worker pushing dolly up ramp, injured as object rolled backward, was within purview of Labor Law 240[1].)

The fact that the plaintiff in the instant case was working at the same level as the makeshift "tent" erected by his co-worker does not preclude liability under Labor Law § 240(1). In *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.* (18 N.Y.3d 1, 935 N.Y.S.2d 551 [2011]), the Court of Appeals specifically held that a plaintiff is not precluded from recovery under Lab. Law § 240(1) simply because he and the object that struck him were on the same level. In that case, debris from warehouse walls which were being demolished struck two unsecured, 10-foot pipes leaning on the a wall, causing them to topple onto the plaintiff. The pipes fell at least four feet before striking plaintiff, and thus the height differential was not de minimis. Plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity." The court noted that to it remains to be seen whether plaintiff's injury was the direct consequence of defendants' failure to provide adequate protection against the risk by providing the kinds of protective devices required under Lab. Law § 240(1).

The Court of Appeals summarized the law applicable to "falling object" cases in *Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, as follows:

> "In order to prevail on summary judgment in a section 240 (1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "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, 750 NE2d 1085, 727 NYS2d 37 [2001] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 618 NE2d 82, 601 NYS2d 49 [1993]). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being "hoisted or secured" (*Narducci*, 96 NY2d at 268), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732, 832 NE2d 1186, 799 NYS2d 770 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759, 896 NE2d 75, 866 NYS2d 592 [2008]). Contrary to the dissent's contention, section 240 (1) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268 [second emphasis supplied])." (*Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 662-663, 8 N.E.3d 791, 794, 985 N.Y.S.2d 416, 419 [2014]).

In *Fabrizi*, the plaintiff, an electrician, was injured when he was struck by a piece of falling conduit pipe, which was left dangling by a compression coupling connecting it to a similar

conduit. At the time of the accident, the plaintiff was "relocating a pencil box" (id. at 661). When he removed the pencil box, he left "the top conduit dangling by the compression coupling near the ceiling" (id.). About 15 minutes later, while drilling, "the top conduit fell, striking plaintiff on the hand" (id). Defendants established as a matter of law that the conduit did not fall on plaintiff due to the absence or inadequacy of an enumerated safety device.

The defendants rely on *Guallpa v. Leon D. DeMatteis Constr. Corp.* (121 A.D.3d 416, 418, 997 N.Y.S.2d 1, 3 [1st Dept. 2014]). In that case, concrete "stones" had been delivered to the worksite. The stones were stacked three to four feet in height, and some of the stones were placed on top of the stack to hold a trap in place. As plaintiff walked past a pallet, one of the stones that was resting on top to hold the tarp fell and struck plaintiff on the right knee. The block weighed approximately 25 pounds. The First Department found Labor Law § 240(1) was inapplicable to these facts. The Court noted specifically that "[p]laintiff does not contend that the block itself was inadequately secured." Rather, plaintiff argued that section 240 (1) applied because that the plastic tarp was inadequately secured. The First Department rejected plaintiff's claims because *the plastic tarp* was not an object that needed to be secured for the purposes of section 240 (1). *Guallpa* is of limited precedential value here because the plaintiff argues that the plank which allegedly fell was an object that needed to be secured for the purposes of section 240 (1), in contrast to *Guallpa*, in which no argument was raised that the falling object – the concrete stone—required securing.

This case turns on whether the plank which held up the tarp was an object that required securing within the meaning of the statute. Assuming the accuracy of the plaintiff's testimony, the plaintiff's co-worker erected a temporary structure to allow the work to proceed. That structure, as alleged by plaintiff, collapsed, as one of the planks toppled over. This case is therefore most similar to *Uvidia v Cardinal Spellman High Sch.* (167 A.D.3d 421, 86 N.Y.S.3d 881 [1st Dept. 2018), where the plaintiff and a co-worker were injured while erecting a temporary plywood structure for asbestos abatement. The temporary structure collapsed onto the plaintiff. The First Department in that case held that "[p]laintiff made a prima facie showing that the collapse was proximately caused by a violation of Labor Law § 240 (1), since the bracing of the structure was inadequate to prevent its collapse." (Id.)

The temporary rain shelter was erected here to facilitate the work, as was the plywood structure in *Uvidia*. The rain shelter was not a safety device or a scaffold, nor was the plywood

structure in *Uvidia*. These temporary structures were erected to facilitate the work, but required securing for the work to continue safely. Absent proper securing, they became falling objects within the meaning of the statute.

The foregoing assumes the truth of plaintiff's version of the events as described in his motion papers. The plaintiff's testimony was that although he did not see the plank falling and striking him, he observed the plank on the ground immediately after the accident. Walter Konon, defendant Mega's expert, claims the accident occurred because the wind caused the bottom of the plank to strike the plaintiff. This theory supposes, without any empirical support, that the heavy beam travelled in a vertical position for a number of feet before striking the plaintiff, which is contrary to common sense. The expert's theory is contrary to the undisputed evidence in this case, and is based purely on speculation. His affidavit is conclusory, and the expert does not explain his conclusion as to the manner in which the plank would move a number of feet toward the doorway in which the plaintiff was working and still be in a vertical position.

The plaintiff described the plank as the type used for scaffolds, 12 feet long. Given the height of the beam and the fact that the plaintiff was working in a kneeling position, the beam fell at least 8 feet vertically. This is a significant height differential. (Compare Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., supra, 18 N.Y.3d at 10, holding, "The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches tall. That height differential cannot be described as de minimis…"

The Court finds that the plaintiff has established an entitlement to summary judgment under Labor Law § 240(1).

Labor Law §241(6)

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. To sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (*Yaucan v Hawthorne Vil., LLC,* 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017].) "Whether a regulation applies to a particular condition or circumstance is a question of law for the court" (*Harrison v State of New York*, 88 AD3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Section

241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6].)

The plaintiff failed in the instant case has failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 241(6) cause of action, based upon alleged violations of 12 NYCRR 23-1.7(a)(1). Moreover, the moving defendants have established that such section does not apply as a matter of law. 12 NYCRR 23-1.7(a)(1) applies to areas "normally exposed to falling material or objects." The plaintiff failed to demonstrate that the area where he was working was such an area. The defendants have shown that the area cannot be considered an area requiring additional protective devices as "normally exposed to falling material or objects." (*See Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 A.D.3d 664, 665, 127 N.Y.S.3d 309, 310 [2d Dept. 2020]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965, 965 N.Y.S.2d 593; *Mercado v TPT Brooklyn Assoc.*, LLC, 38 AD3d 732, 733, 832 N.Y.S.2d 93.)

Common law and Labor Law § 200 claims

An owner may be liable under the common law or under Labor Law § 200 for a dangerous condition arising from either the condition of the premises or the means and methods of the work. (*See Cappabianca v Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 143-144, 950 N.Y.S.2d 35 [1st Dept. 2012]). An owner's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*id.* at 144). Where a dangerous condition in the premises caused the accident, liability only arises if the owner created the condition or had actual or constructive notice of it (*id.*). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]). However, "constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection." (*Curiale v Sharrotts Woods, Inc.*, 9 A.D.3d 473, 475, 781 N.Y.S.2d 47 [2d Dept. 2004].)

Defendants established the injury flowed from the erection of the temporary rain shelter,

which was entirely undertaken by Avarga. No other evidence exists that any of the other defendants were actively negligent. To the extent that it is argued that any of the defendant – especially Flagge, which explicitly assumed Mega's responsibility to supervise and direct the Work, defendants established prima facie that they did not have the authority and control over the injury-producing work necessary to support the Labor Law § 200 and common-law negligence claims (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352, 693 NE2d 1068, 670 NYS2d 816 [1998]). While some of the defendants had general supervisory and coordinating responsibilities, they did not have the requisite level of direct supervision and control over the injury-producing activity (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 855 NYS2d 495 [1st Dept. 2008]; *Scott v American Museum of Natural History*, 3 AD3d 442, 443, 771 NYS2d 499 [1st Dept. 2004]), nor is a general authority to control safety at the work site and stop work based on observed dangerous conditions sufficient to support the Labor Law § 200 and common-law negligence claims (*see Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 236, 829 NYS2d 498 [1st Dept. 2007]).

Indemnification

As to the United defendants' motion for summary judgment as to the cross claim for contractual indemnity against Mega, Mega argues that the underlying AIA contract was not properly authenticated. However, the United defendants' witness Ingrid Gomez-Faria testified at her deposition as to the contents of the contract, which included the AIA documents with indemnification provisions, and demonstrated that the document is a contract executed in the normal course of business between the parties under CPLR 4518(a). The same contract is annexed to Mega's motion filed as NYSCEF Doc. No. 122. The United defendants are entitled to full contractual indemnity from Mega.

Contrary to Flagge's arguments, the contract between Flagge and Mega does not require that Flagge be found negligent, but instead, Flagge must indemnify Mega for liability arising out of or in connection with the work. Further, it s clear that the accident herein arose out of the Flagge's work. The project involved the gut renovation of the building; defendant Flagge was hired by Mega for the project to perform masonry and concrete work; and third-party defendant Avarga Contracting Corp. was in turn hired by Flagge Contracting Inc. to perform masonry and

concrete work. The accident arose out of or in connection with Flagge's work, as it involved work Flagge was contractually bound to perform, which it in turn subcontracted to Avarga.

Mega argues that pursuant to those provisions in the subcontract between Flagge and Avarga, Avarga is required, by reference to the Prime Contract, to indemnify the Owner as well as the General Contractor, Mega. In opposition to that part of Mega's motion for summary judgment for contractual indemnity against Avarga, Avarga argues that the Avarga contract does not provide for indemnification to Mega, but only Flagge, Mega's subcontractor. Indeed, Mega is not named in the Avarga Contract and there is no privity of contract between Avarga and Mega. "Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244, 723 NYS2d 444 [2001]; *see Waitkus v. Metropolitan Hous. Partners*, 50 A.D.3d 260, 261, 854 N.Y.S.2d 388, 390 [2008].)

In opposition to the motion by Flagge for summary judgment on its cross-claims and third-party claims against third-party defendant Avarga, Avarga notes that Paragraph 4.6 of the Avarga contract provides that Avarga shall indemnify Flagge "provided that any such claim, damage, loss or expense is attributable bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . ." Avarga correctly argues that indemnification is premature absent a determination that the alleged injury suffered by plaintiff was a result of negligence.

Pursuant to the contract between Flagge and Avarga, Avarga allegedly agreed to the following insurance procurement language: "The Subcontractor shall purchase and maintain insurance...as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract..." Flagge has demonstrated sufficiently that Avarga failed to procure insurance as required by the contract.

Conclusions

Accordingly, based upon the foregoing, it is hereby

ORDERED that such part of the plaintiff's motion for summary judgment is granted to the extent of finding in favor of the plaintiff on his claim under Labor Law 240(1), and the plaintiff's motion is otherwise denied, and it is further

ORDERED that the motion of defendants 552-562 United Housing Development Fund Corporation and 552-562 United, L.P. for summary judgment dismissing the complaint is granted as to all of the plaintiff's claims except the claim under Labor Law 240(1), and that part of the motion seeking contractual indemnity against Mega Contracting Group, LLC is granted in full, and it is further

ORDERED Mega Contracting Group, LLC's motion for summary judgment dismissing all claims and all cross-claims against it is granted as to all of the plaintiff's claims except the claim under Labor Law 240(1); and on its cross-claims and third-party claims against Flagge Contracting Inc., the motion is granted awarding said defendant full contractual indemnification; and on its cross-claims and third-party claims against Avarga Contracting Corporation for contractual indemnification, the motion is denied, and it is further

ORDERED that defendant Flagge Contracting Inc.'s cross-motion for summary judgment dismissing the plaintiff's complaint is granted as to all of the plaintiff's claims except the claim under Labor Law 240(1); and that part of the motion seeking contractual indemnification, common law indemnification, and breach of insurance procurement from third-party defendant Avarga Contracting Corporation is denied as to contractual indemnification and common law indemnification, and is granted as to failure to procure insurance, and it is further

ORDERED that all other relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 10/4, 2022

Hon. Doris M. Gonzalez, J.S.C