2015 WL 10550292 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Queens County

Juan P. MUNZON, Plaintiff,

v.

VICTOR AT FIFTH, LLC and Triton Construction Company, LLC, Defendants;
Victor at Fifth, LLC and Triton Construction Company, LLC, Third-Party Plaintiffs,

v.

Red Hook Construction Group I, LLC, Third-Party Defendant;
Victor at Fifth, LLC and Triton Construction Company, LLC, Second Third-Party Plaintiffs,

v.

Otal Safety Consulting, LLC, Second Third-Party Defendant.

No. 218382012.
November 30, 2015.

Short Form Order

Timothy J. Dufficy, Judge.

*1 Mot. Date: 7/17/15

Mot. Seq.: 4, 5 and 6

The following papers numbered 1 to 28 read on these separate motions by third-party defendant RED HOOK CONSTRUCTION GROUP I, LLC (Red Hook) for summary judgment in its favor dismissing plaintiff's complaint in its entirety; by plaintiff for partial summary judgment in his favor and against defendants/third-party plaintiffs VICTOR AT FIFTH, LLC (Victor) and TRITON CONSTRUCTION COMPANY, LLC (Triton) on the issue of liability on the third cause of action under N.Y. Labor Law § 240 (1), (2) and fourth cause of action under N.Y. Labor Law § 241 (6) and (3); and by defendants/third-party plaintiffs Victor and Triton for summary judgment dismissing plaintiff's complaint, or, in the alternative, if the complaint is not dismissed in its entirety for summary judgment dismissing the common-law and Labor Law § 200 causes of action and summary judgment in their favor for all the relief sought in the third-party complaint against third-party defendant Red Hook for contractual defense, indemnity, and hold harmless, including reasonable attorneys' fees.

	PAPERS NUMBERED
Notices of Motion - Affidavits - Exhibits	1-12
Answering Affidavits - Exhibits	13-22
Reply Affidavits	23-28

Upon the foregoing papers it is ordered that these motions, identified as Motion Sequence Nos. 4, 5 and 6, are consolidated for purposes of disposition and determined as follows:

This is an action by plaintiff seeking damages for personal injuries allegedly sustained in a construction accident, on December 9, 2011, at approximately 8:45 A.M., in the course of his employment as a laborer with third-party defendant Red Hook, at premises owned by defendant/third-party plaintiff Victor, located 239/241 Fifth Avenue, New York, New York. Defendant/third-party plaintiff Victor hired defendant/third-party plaintiff Triton to demolish the premises, a five-story building, and to construct a new 20-story building in its place. Third-party defendant Red Hook was a demolition/asbestos removal subcontractor hired by defendant/third-party plaintiff Triton, to demolish the old building.

Pursuant to the terms of the Trade Contractor Agreement between defendant/third-party plaintiff Triton and third-party defendant Red Hook, the latter party agreed "[t]o the fullest extent permitted by applicable law ... [to] assume entire responsibility and liability for all damages and injury of any nature to persons arising out of, or in any manner related to, the execution of the Trade Work, and ... at its own expense to defend, indemnify and hold harmless Triton, the Owner and their respective directors, officers, employees, architects, consultants, and agents for all demands, claims, causes of action, losses, costs, and expenses, including reasonable counsel fees, asserted against any of the Indemnitees, arising out of, or in any manner related to, the execution of the Trade Work, and whether or not the claim is predicated upon the violation of a statutory duty, regulation, ordinance or rule or obligation (provided that the violation arises out of or is any way connected with the Trade Contractor's performance or lack of performance of the work under the agreement..." The Trade Contractor Agreement also provides that the "Trade Contractor shall, at its own expense, defend (if requested by Triton), indemnify and hold harmless the Indemnitees from any and all demands, claims, costs (including counsel fees and expenses) and damages for injuries of any nature... arising out of, or resulting from, improper or untimely performance by the Trade Contractor of its obligations under the Trade Contract." Third-party defendant Red Hook was also required to procure Commercial General Liability insurance coverage and provide additional insured status defendants/third-party plaintiffs Victor and Triton, along with an Umbrella policy.

*2 The record on this motion indicates that on the subject date, plaintiff and approximately five of his co-workers were demolishing the fourth floor of the subject premises. Third-party defendant Red Hook provided plaintiff and his coworkers with all tools, materials and safety equipment, including harnesses. Plaintiff's instructions came from third-party defendant Red Hook's superintendent, Steven Holden through its bilingual foreman, Teodoro Loyola. According to Holden, his job as demolition supervisor was to make sure the job was done correctly and safely. He and Loyola held weekly on-site safety meetings, as well as, less formal daily gang-box safety meetings, before work began in the mornings. Red Hook workers were required to wear a harness/lifeline if they were taking apart floors or of they would be looking down; or it was a location where they could fall to a floor below. Holden testified that he supervised the tie-off points, and instructed the laborers, making sure that they connected the safety devices correctly. He described a tie off as a cable between two points, to which the lifeline was to be connected. Holden saw plaintiff tie off on the fourth floor at 7:00 A.M. on the subject date. According to Holden, the lifeline attached to the worker's harness in the back and was only long enough for the worker to remove the floor planks in front of the worker as the worker moved backward. He also testified that the workers' lifelines were not long enough for them to reach the edge of the floor.

The witness produced on behalf of defendant/third-party plaintiff Triton, Matthew Cordivari, testified that Triton did not have authority to instruct Red Hook's workers on how to perform their job, nor the power to stop their work if they were seen working in an unsafe manner. Defendant/third-party plaintiff Triton employed a site safety manager, Anthony Rafanello, who monitored manpower and ensured that work permits were in order and that a security guard was present for the work. Rafanello was to notify defendant/third-party plaintiff Red Hook's supervisor or foreman if he witnessed any unsafe conditions or practices, but was not empowered to stop the work.

Defendant/third-party plaintiff Victor's witness, Ron Korolik, its managing member, testified that Victor did not perform the demolition, direct, supervise, instruct or control the work.

Plaintiff testified to the following: As he worked removing the floor on the subject date, his co-worker Luis asked for his help removing a heavy piece of metal beam that Luis could not carry on his own. In order to reach where Luis was tied off working, plaintiff had to remove his own rope/lifeline from his harness. He then walked over to help Lewis throw that metal beam down to the third floor. At that time, there was a small section of flooring left on the fourth floor, as well as, wood floor beams and joists exposing the third floor down below. As plaintiff and Luis faced each other and lifted the approximately three feet long and 200 pounds beam to throw it down to the third floor, plaintiff straddled the edge of what was left of the fourth floor, with his left foot on the floor near its edge, and his right foot on a wood beam. There was approximately 16 inches of open space between plaintiff's feet. Plaintiff and Luis were in the process of throwing the heavy metal beam over the side of the wood beam that plaintiff had placed his right foot on, when Luis dropped his end of the metal beam onto that wood beam. This caused the wood beam to move, collapse and fall down to the third floor, which, in turn, caused plaintiff to lose his balance and fall down to the third floor, sustaining injuries.

Plaintiff, in his complaint, interposes claims for negligence and violations of Labor Law §§ 200, 240 (1), (2) and § 241 (6). Defendants/third-party plaintiffs Victor and Triton brought a third-party action against plaintiff's employer, third-party defendant Red Hook, seeking, among other things, contractual indemnification. [1]

Plaintiff now moves for partial summary judgment under labor Law § 240 (1) upon the grounds that the wood beam upon which he was standing was a work platform which moved, collapsed and fell, and the failure of that platform was a proximate cause of his injuries, and that defendants/third-party plaintiffs Victor and Triton failed to provide necessary and adequate safety devices such as a safe elevated work platform, scaffolding, safety rope or lifeline, netting or guardrails. Plaintiff also seeks partial summary judgment under Labor Law § 241 (6). Defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook, separately, seek summary judgment dismissing plaintiff's complaint in its entirety. Defendants/third-party plaintiffs Victor and Triton also seek summary judgment in their favor and against third-party defendant Red Hook on their third-party claims for contractual indemnification and defense.

***3** The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72, [2003]; *see also Ayotte v Gervasio,* 81 NY2d 1062 [1993]; *Winegradv New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (*See Giuffrida v Citibank Corp., supra; see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr., supra.*)

Labor Law § 240 (1) provides that "[a]ll contractors and owners ... shall furnish or erect, or cause to be furnished or erected ... 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 [construction workers employed on the premises]." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494,499-500 [1993]; *see also Mingo v Lebedowicz,* 57 AD3d 491 [2008].) The purpose of this statute, commonly referred to as the "scaffold law," is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." (*Zimmer v Chemung County Performing Arts,* 65 NY2d 513, 520 [1985] [internal quotation marks omitted].)

In order to prevail on a Labor Law § 240 (1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries. (*See Blake v Neighborhood Hous. Servs. of N. Y. City,* 1 NY3d 280 [2003]; *see also Melchor v Singh,* 90 AD3d 866 [2011]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007].) While the mere fact that a plaintiff fell from a ladder or scaffold does not, in and of itself, establish a violation of the statute, a plaintiff may establish his or her prima facie entitlement to judgment as a matter of law on a Labor Law § 240 (1) cause of action by showing both, that he or she fell from a defective or unsecured ladder or scaffold, and that the defect or failure to secure the ladder or scaffold was a proximate cause of his or her injuries. (*See Melchor v Singh, supra.*)

Labor Law § 240 (1) is a strict liability provision that imposes upon owners and contractors absolute liability for any breach of the statutory duty that proximately causes injury. (*See Panek v County ofAlbany,* 99 NY2d 452 [2003].) What is meant by "strict" or "absolute" liability in the Labor Law context is that any negligence on the part of plaintiff which contributes to his or her injuries is not a defense and will not diminish the owner's or contractor's liability under Labor Law § 240 (1) if it is established both that there was a violation of the statute and that the violation was a proximate cause of the injury. (*See Blake v Neighborhood Housing Services of New York, supra.*) Where, however, a plaintiff's conduct is the sole proximate cause of his or her injuries, no liability attaches under Labor Law § 240 (1). (*See Blake v Neighborhood Hous. Servs. of N. Y. City, supra; see also Rudnik v Brogor Realty Corp., supra; Marin v Levin Props., LP,* 28 AD3d 525 [2006].)

*4 This case clearly falls within the purview of Labor Law § 240 (1) because plaintiff fell from an elevated work site while engaged in the demolition of a structure. (*See Jock v Fien,* 80 NY2d 965 [1992].) Plaintiff demonstrated that the wood beam upon which plaintiff was standing was the functional equivalent of a scaffold or work platform and the movement, collapse and falling thereof, in and of itself, constitutes prima facie proof that Labor Law § 240 (1) was violated, and that the violation of this section of the Labor Law was the proximate cause of plaintiff's injuries. (*See Campbell v 111 Chelsea Commerce, L.P.,* 80 AD3d 721 [2011]; *see also Dos Santos v State,* 300 AD2d 434 [2002]; *Smith v Yonkers Contr. Co.,* 238 AD2d 501 [1997].) Since plaintiff met his initial burden on this branch of the motion seeking partial summary judgment in his favor on his Labor Law § 240 (1) claim, the burden shifts to the parties opposing the motion, to demonstrate the existence of a triable issue of fact. (*See Winegrad v New York Univ. Med. Ctr., supra.*)

Defendants/third-party plaintiffs Victor and Triton, in their opposition to this branch of plaintiff's motion, failed to meet their burden of raising a triable issue of fact. Contrary to the contention of defendants/third-party plaintiffs Victor and Triton, plaintiff was not recalcitrant in the sense that he deliberately refused to keep the safety line, which he was instructed to wear while performing his work, attached. Rather, plaintiff demonstrated that he did not have a sufficient length of rope to remain tied off and that the removal of his safety line was to facilitate his being able to reach his co-worker Luis, who requested his help on the demolition job. (*See Salzer v Benderson Dev. Co., LLC,* 130 AD3d 1226 [2015]; *see also Garzon v Viola,* 124 AD3d 715 [2015]; *Balzer v City of New York,* 61 AD3d 796 [2009]; *Moniuszko v Chatham Green, Inc.,* 24 AD3d 638 [2005].) Moreover, even if plaintiff was partially at fault for detaching his safety line, as noted herein, a worker's comparative or contributory negligence is not a defense to a claim based on Labor Law § 240 (1). (*See Stolt v General Foods Corp.,* 81 NY2d 918 [1993]; *see also Garzon v Viola, supra; Moniuszko v Chatham Green, Inc., supra.*) Furthermore, plaintiff's conduct cannot be found to be the sole proximate cause of the accident, as there is no question that the beam upon which he was standing, that moved, collapsed and fell from under him as he worked, was also a proximate cause of the accident, more than plaintiff's having detached his safety harness to go over to help his co-worker. (*See Garzon v Viola, supra; see also Milewski v Caiola,* 236 AD2d 320 [1997].)

Accordingly, that branch of plaintiff's motion seeking partial summary judgment in his favor and against defendants/ third-party plaintiffs Victor and Triton on the issue of liability pursuant to Labor Law § 240 (1) is granted.

In light of the foregoing, the branches of the motions of defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action are denied.

The branches of the motions of defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook seeking summary judgment dismissing plaintiff's Labor Law § 240 (2) cause of action are granted without opposition.

Turning to the cause of action under Labor Law § 241 (6), this statutory provision imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*See Rizzuto vL.A. Wenger Contracting Co.,*

Inc., 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co., supra; Miranda v City of New York*, 281 AD2d 403 [2001].) In order to support aLabor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR 23-1.1 et seq.) that is both concrete and applicable given the circumstances surrounding the accident. (*See Rizzuto v L.A. Wenger Contracting Co., Inc., supra.*)

***5** In his bill of particulars, plaintiff alleges violations of Industrial Code provisions 12NYCRR 21.9,23-1.7,23-1.11,23-1.15,23-1.16,23-1.17,23-5.1,23-1.21,23-1.2,23-1.3, 23-1.4,23-1.5,23-1.22,23-5.10,23-5.18,23-9.6,23-5.3,23-5.8,23-5.1,23-5.9,23-21.9,23-5.18, 23-5.3, 23-5.5 and 23-5.4. In support of his motion and in opposition to the motions of defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook, however, plaintiff only alleges violations of Industrial Code provisions 12 NYCRR 23-1.7 (b) (1) (iii) (b) and (c), and 23-1.16 (b) and (c). Since plaintiff, in his summary judgment motion and opposition papers, does not address the other sections of the Industrial Code previously cited by him in his bill of particulars, this Court deems the Labor Law § 241(6) claim as premised upon those sections abandoned. (*See Genovese v Gambino*, 309 AD2d 832 [2003].)

Industrial Code provision 12 NYCRR 23-1.7 (b) (1), which pertains to hazardous openings, provides: "(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: ... (b) An approved life net installed not more than five feet beneath the opening; or (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Industrial Code provision 12 NYCRR 23-1.16 pertains to safety belts, harnesses, tail lines, and lifelines. Subdivisions (b) and (c) of this section, on which plaintiff relies, provide that:
"(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.

(c) Instruction in use. Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline."

12 NYCRR 23-1.7 (b) (1) (iii) (b) and (c), and 12 NYCRR 23-1.16 (b) and (c) do constitute concrete specifications, and are sufficient to support a Labor Law § 241 (6) cause of action. (*See e.g. Przyborowski v A&M Cook, LLC*, 120 AD3d 651 [2014]; *see also Latchuckv Port Auth. of N. Y. & N.J.*, 71 AD3d 560 [2010]; *Ganger v Cimato*, 53 AD3d 1051 [2008].)

Defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook failed to establish, prima facie, that they did not violate these regulations, that the regulations are inapplicable to the facts of this case, or that the alleged violation of these provisions was not a proximate cause of plaintiff's injuries. (*See Ganger v Cimato, supra.*)

Accordingly, to the extent that plaintiff's Labor Law § 241 (6) cause of action is based upon alleged violations of Industrial Code sections 23-1.7 (b) (1) (iii) (b) and (c), and 23-1.16 (b) and (c), the branches of the motions of defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action are denied.

Plaintiff's motion for partial summary judgment as to liability on his Labor Law § 241 (6) claim, insofar as it is based on alleged violations of defendants/third-party plaintiffs Victor and Triton of Industrial Code provisions 12 NYCRR 23-1.7 (b) (1) (iii) (b) and (c), and 12 NYCRR 23-1.16 (b) and (c) is also denied as plaintiff failed to establish his prima

facie entitlement to judgment as a matter of law on this claim. Moreover, unlike Labor Law § 240 (1), comparative or contributory negligence is a defense to liability under Labor Law § 241 (6) (*see Misicki v Caradonna,* 12 NY3d 511 [2009]; *see also Rizzuto v L.A. Wenger Constr. Co., supra),* and plaintiff here has failed to make a prima facie showing that he was free from comparative or contributory negligence.

**6 Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work. (*See Rizzuto v L.A. Wenger Contr. Co., supra; see also Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876 [1993]; *Yong Ju Kim v Herbert Constr. Co., Inc.,* 275 AD2d 709 [2000].) Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 may be imposed on those who exercise control or supervision over the means and methods that the plaintiff employs in his or her work (*see Rizzuto v L.A. Wenger Contr. Co., supra; see also Russin v Louis N. Picciano & Son,* 54 NY2d 311 [1981]; *Cabrera v Revere Condominium,* 91 AD3 d 695 [2012]), or who have actual or constructive notice of an unsafe condition that causes an accident. (*See Gray v City of New York,* 87 AD3d 679 [2011].) General supervisory authority to oversee the progress of the work is insufficient to impose liability. (*See Cabrera v Revere Condominium, supra.*)

On this issue, defendants/third-party plaintiffs Victor and Triton have established their entitlement to judgment as a matter of law by demonstrating that they did not supervise plaintiff's work, or control the manner or method in which he performed his duties, and that they were not aware of the alleged unsafe condition. (*See Seepersaud v City of New York,* 38 AD3d 753 [2007]; *see also Lopez v Port Auth. of New York & New Jersey,* 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappinger Falls, LP,* 5 AD3d 648 [2004].) Plaintiff, in opposition, failed to demonstrate the existence of a triable issue of fact.

Accordingly, the branches of the motions of defendants/third-party plaintiffs Victor and Triton and third-party defendant Red Hook seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action are granted.

Since defendants/third-party plaintiffs Victor and Triton made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that they were free from negligence in the happening of the accident, and that third-party defendant Red Hook was contractually obligated to defend and indemnify them against liability arising from the plaintiff's claims, the branch of the motion of defendants/third-party plaintiffs Victor and Triton seeking summary judgment in their favor and against third-party defendant Red Hook on their third-party claims for contractual indemnification and defense is granted. (*See Brown v Two Exch. Plaza Partners,* 76 NY2d 172 [1990]; *see also Bermejo v New York City Health &Hosps. Corp.,* 119 AD3d 500 [2014]; *Tobiov Boston Props., Inc.,* 54 AD3d 1022 [2008].)

Dated: November 17, 2015

<<signature>>

TIMOTHY J. DUFFICY, J.S.C.

Footnotes

1 A second third-party action brought by Victor and Triton against second third-party defendant Total Safety Consulting, LLC was discontinued by stipulation, dated April 28, 2015.

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