Yax v Services Now for Adult Persons, Inc.
2024 NY Slip Op 32265(U)
July 3, 2024
Supreme Court, Kings County
Docket Number: Index No. 500674/19
Judge: Wavny Toussaint

At an IAS Term, Part 70 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 3rd day of July 2024.

PRESENT:
HON. WAVNY TOUSSAINT,

Justice.

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LUIS ALFREDO YAX YAX and DELFINA VICTORIA TZIC,

Plaintiffs,

Index No. 500674/19

-against-

DECISION AND ORDER

SERVICES NOW FOR ADULT PERSONS, INC., THE ZENITH GROUP, LLC, and COW BAY SPRINKLER CORPORATION,

Mot. Seq. Nos. 11-13

Defendants.

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COW BAY SPRINKLER CORPORATION D/B/A COW BAY CONTRACTING CORP., and SERVICES NOW FOR ADULT PERSONS, INC.,

Third-Party Plaintiffs,

-against-

GRACE CONTRACTING COMPANY, INC. and GRACE CONTRACTING OF NYC, INC.,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Cross Motion, Affirmations, Memoranda of Law, and Exhibits Annexed	209-210, 212- 229, 235, 237-238, 251-275, 306, 308-339
Affirmations in Opposition and Exhibits Annexed	237-238, 239-250, 251-275, 293-297, 341, 342, 343
Reply Affirmations	301-302, 303-304, 344

Upon the foregoing papers, plaintiff Luis Alfredo Yax Yax ("Luis"), with his wife Delfina Victoria Tzic suing derivatively ("spouse" and collectively with Luis, "plaintiffs"),

move for an order, pursuant to CPLR § 3212, granting them partial summary judgment on the issue of liability on Luis's Labor Law § 240 (1) claim as against defendants/third-party plaintiffs Services Now for Adult Persons, Inc. ("SNAP") and Cow Bay Sprinkler Corporation, d/b/a Cow Bay Contracting Corp. ("Cow Bay"; collectively with SNAP, "defendants") (Motion Seq. 11). Defendants cross-move for an order, pursuant to CPLR § 3212, dismissing Luis's Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims (as well as the derivative claim) as against them (Motion Seq. 12). Separately, defendants move for an order, pursuant to CPLR § 3212, granting them summary judgment on their third-party claims for contractual and common-law indemnification, breach of contract, and contribution as against third-party defendants Grace Contracting Company, Inc. and Grace Contracting of NYC, Inc. (collectively, "Grace") (Motion Seq. 13).

BACKGROUND

In the afternoon of December 27, 2018 (the "incident date"), Luis, age 31, allegedly sustained personal injuries (including an alleged traumatic brain injury) as a result of his fall from a Baker-type metal pipe scaffold (the "scaffold") during construction/renovation of a two-story, approximately 50-foot tall commercial building in Queens County (the "building" or "worksite"). Luis alleges that he was performing construction-related work while standing on the scaffold when the latter unexpectedly shook, fell and collapsed, causing him, in turn, to fall to the ground below.

SNAP, as the building/worksite owner, retained Cow Bay as the successor general contractor.[1] Cow Bay, in turn, hired Grace as the brick/masonry subcontractor. On the incident date, Luis was working as a laborer for Grace. The pipe scaffold at issue was owned by Grace.

The amended complaint, filed on January 28, 2019, alleges causes of action as against defendants sounding in: (1) common-law negligence; (2) violations of Labor Law §§ 200, 240 (1), and 241 (6); and (3) a derivative claim. After defendants joined issue in the underlying action, they impleaded Grace (by way of the amended third-party complaint) for contractual and common-law indemnification, breach of contract, and contribution. Grace joined issue in the third-party action, asserting a counterclaim against defendants. Thereafter, defendants replied to Grace's counterclaim.

PRETRIAL TESTIMONY

Luis

Luis testified at his pretrial deposition that when he arrived at the worksite on the morning of the incident date, the scaffold had already been up and pre-assembled, although he did not know by whom. The scaffold, owned by Grace, was 20 feet high and had two levels, with the first level rising to the height of approximately 10 feet above ground. Luis testified that Grade had not trained him on how to assemble, set up, or use the scaffold. He further testified that he worked in the basement of the building in the morning of the

[1] Cow Bay's predecessor general contractor on the project – The Zenith Group, LLC – had been dismissed from this action, without opposition, by order, dated January 11, 2021 (NYSCEF Doc No. 98).

incident date until around noon when his supervisor, Grace's owner Mohammed Rana, who was then off-site, directed him (by way of a cellphone call) to work on the scaffold. According to Luis, Mohammed Rana, as a general matter, instructed him on how to perform his work. Luis testified that he never spoke to anyone from SNAP (the project owner) or Cow Bay (the general contractor), while he was working in the building or at the worksite, that he never received any instructions from Cow Bay's site supervisor Michael Carroll, and that he received all his instructions either from Mohammed Rana or from Grace's foreman Zahid Nawaz.

Luis testified that immediately before his incident at around 3:00 pm, he had been cleaning a section of the building wall, removing nails, and working with cement, in preparation for his principal task of applying "stucco California" to the building wall. In performing his preparatory work on the building wall, Luis used a spatula, knife, and screw gun, all of which belonged to him. Luis stated that although he was not provided with any safety equipment onsite (such as a hard hat or harness), he brought in and used his own safety equipment at the worksite on the incident date. Luis stated that he typically wore a safety harness, hardhat, jacket, vest, construction shoes, and construction gloves when he was working onsite.

On the day of (but shortly before) the incident, Luis had been going up and down the scaffold to get his tools and bring them up with him to clean the building wall, and then, while standing on the scaffold, he was applying cement to the building wall. Immediately before the incident, Luis was working on top (*i.e.*, on the second level) of the scaffold which was then standing parallel but approximately 8 inches (or 20 centimeters)

away from the adjacent building wall and was not attached to it by any means. Luis's coworker who was standing on the ground was filing buckets with cement, tying a rope to each bucket, and passing the rope to plaintiff who, in turn, would pull up the buckets, one by one. Luis testified that by the time of the incident, he already had pulled and placed on the scaffold one 15-pound bucket of cement. Luis further testified that both of his hands were on the rope pulling up the cement bucket onto the scaffold when the latter suddenly moved away from the building wall, causing him – together with the two cement-filled buckets (the one that he had already placed on the scaffold, and the one that he was in the process of pulling up to place on the scaffold) – to fall to the ground. Although Luis wore his own safety harness, he had been unable to attach the harness hooks to the adjacent building wall (or to anywhere else for that matter) because there were no tie-off points.

Michael Carroll

At his pretrial deposition, Michael Carroll ("Carroll"), Cow Bay's site superintendent, testified that, pursuant to the SNAP-Cow Bay contract (a copy of which is not in the record), Cow Bay possessed the authority to control the work performed by Grace. Carroll testified that he was at the building and worksite throughout the day every workday, documenting daily work logs, and taking photos of the ongoing construction at the work site. Carroll was the only Cow Bay's representative on the worksite on the day of the incident.

Carroll testified that he usually started at the worksite at 7:00 am and departed from the worksite between 3:00 pm and 3:30 pm. His duties including walk-arounds, inspections, as well as work monitoring and safety. Carroll testified that if a task was not

performed safely, he possessed the authority to correct the unsafe condition or to stop the unsafe work. If a worker was not wearing a hardhat or other personal protective equipment, or, if positioned at an elevation, a worker was not properly tied off, Carroll would address the safety issue with the worker. According to Carroll, Muhammed Rana from Grace was at the worksite several days per week and, when present, would supervise the work. In addition to Muhammed Rana, a Grace foreman supervised and directed its workers.

Carroll testified that Cow Bay did not provide Grace's workers with personal protective equipment such as harnesses or lanyards; nor did it ensure that there were tie-off points; nor did it provide any of the scaffolds at the worksite. When Carroll, at his pretrial deposition, was shown a photo of Luis standing on top of a scaffold without wearing a harness, he testified that, if he had noticed such an unsafe condition, he would have instructed Luis to stop working on the scaffold and would have scolded him for not wearing a harness and for not tying off.

Carroll testified that, as a matter of his work schedule, he departed from the worksite at 3:30 pm daily, and that he did not see Luis's fall about which allegedly happened approximately 15 minutes later at around 3:45 pm. Carroll explained that as he was leaving the worksite on the day of the incident, all of the workers were already packing up to leave, and he specifically told them to lock up the gate when they left. Carroll added that when he departed from the worksite on the incident date, no one was working, and that no one was standing on a scaffold. When Carroll was confronted with a time-stamped photo at 3:31 pm depicting a worker in a boom lift, he changed his pretrial testimony to state that *not* everyone was packing up to leave at the time, even though he (Carroll) had instructed

that particular worker to get off the boom lift and go home. When Carroll was next shown a photograph of a worker (later identified to him as Luis) standing on a scaffold, he reiterated that he had instructed everyone, including specifically the worker depicted on the photo, that it was time to leave, and, what's more, that particular worker (*i.e.*, Luis) turned to face him to acknowledge his (Carroll's) instruction. Carroll reiterated that when he departed from the worksite on the incident date, there was no one on the scaffold. One of Carroll's photographs, time stamped at 3:22 pm on the incident date (or eight minutes before his departure), showed Luis kneeling (and working on the building wall) at the ground level.

Mohammed Rana

Mohammed Rana ("Rana"), as the owner of masonry subcontractor Grace, testified that in 2018, he would be present at the worksite most mornings, and that three to four people were working for him at the building, with Zahid Nawaz ("Nawaz") acting as the foreman or site supervisor. Rana testified that Nawaz was at the worksite on the morning of the incident date, but that he departed from the worksite before the incident. Rana also testified that he likewise had arrived at the worksite in the morning of the incident date and departed from the worksite between 3:00 pm and 3:30 pm. Rana testified that when he left the afternoon of the incident date, there were four workers remaining onsite dismantling the scaffold and cleaning up. Although not present at the worksite at the time of the incident, Rana testified that Luis subsequently informed that he fell while trying to move the scaffold.

Rana described that the scaffold was assembled every morning and dismantled (and left inside the building) when the workers left. Rana testified that not only did he train his workers in assembling and working on the scaffold, but that he also personally checked to ensure the scaffold was properly assembled. Rana also testified that he provided his workers with training in how to use a safety harness, and that, in any event, his workers also knew how to use a safety harness.

Rana testified that on the incident date, it took half an hour to assemble the scaffold, and that both he and Nawaz visually inspected the scaffold after its assembly. At the time, Rana deemed the scaffold safe to use. He testified that no one from Cow Bay had any responsibility in assembling or disassembling the scaffold. When he was shown photos of the scaffold taken on the incident date, Rana acknowledged that the scaffold would not have passed his inspection because, as assembled, it lacked back and side rails. Rana testified that anyone working on a scaffold was required to wear a safety harness because the elevation above ground exceeded six feet, and that such worker was required to tie it off his safety harness to a wall or to "whatever solid thing [such worker] observe[s]."[2]

Rana testified that Michael Carroll would never tell Grace workers what to do. Rather, Carroll would discuss with Rana what needed to be done, but not how specifically it needed to get done. He testified that Carroll sometimes would give safety instructions, check scaffolding, and check if the workers were wearing their personal protective equipment.

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[2] Rama's EBT tr (Dec. 28, 2022) at page 51, lines 20-21 (NYSCEF Doc No. 330).

Paola Miceli

SNAP's chief executive officer Paola Miceli ("Miceli") testified that although SNAP owned the building, it had not yet taken possession because of the ongoing renovation. Miceli testified that she visited the building infrequently, or at least once per annum from 2013-2018. Neither she nor her staff visited the building or the worksite in December 2018. Prior to the incident date, she had driven past the building several times merely to observe its exterior. Miceli added that she received a tour of the building from Michael Carroll at Cow Bay. Miceli testified that she never walked around the building or the worksite while construction/renovation was ongoing. She also testified that SNAP provided no scaffolds, ladders, or safety equipment at (or to) the worksite.

STANDARD OF REVIEW

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (CPLR § 3212 [b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR § 3212 [b]; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law,

are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]).

LABOR LAW § 240 (1) CLAIM

(1)

Plaintiffs contend that Luis is entitled to partial summary judgment on the issue of liability as against defendants on his Labor Law § 240 (1) claim because it cannot be seriously disputed that defendants failed to provide him with safety equipment to stabilize the scaffold and to keep it from collapsing/falling. In support of their contention, plaintiffs submit an expert affidavit from site-safety expert Kathleen Hopkins ("Hopkins"), who opines that defendants failed to ensure that: (1) the free-standing scaffold that Luis was working on was tied in to the building with tie-ins, ropes, irons, braces or other devices to prevent it from falling over; and (2) the scaffold had not been equipped with outriggers for stability/safety to prevent it from collapsing.[3] Hopkins also opines that defendants failed to provide Luis with a vertical lifeline as an anchorage point for his safety harness for fall protection, and that a vertical lifeline should have been anchored to the building's roof. Hopkins opines, in the alternative, that Luis should have been provided with a hoist (for example, "a scissor lift or a boom man lift") in lieu of the scaffold. Hopkins further notes that the scaffold photographs reflect that: (1) the scaffold lacked outriggers to stabilize it; (2) the scaffold was not adequately secured to the building walls with tie-ins to prevent it

[3] NYSCEF Doc No. 213.

from falling over; and (3) no material hoist was provided to Luis to raise buckets of concrete to the scaffold's second-floor level.

Plaintiffs also argue that Labor Law § 240 (1) imposes absolute liability on the owner, general contractor and their agents for violation of the statute, and that their duty is non-delegable. Plaintiffs further argue that the failure to provide Luis with a safe and secure scaffold was a proximate cause of the incident.

In opposition, defendants, together with Grace (with the latter joining in opposition to plaintiffs' motion), contend that factual issues preclude summary judgment in plaintiffs' favor as Luis's pretrial testimony of the incident day's events is inconsistent, both internally and with the other parties' pretrial testimony. Defendants and Grace submit the affidavit of Shawn Rothstein, P.E. ("Rothstein"), a structural engineering and construction safety expert, to refute Luis's narrative of his alleged fall.[4] Rothstein opines that the photographs of Luis taken immediately after the incident are inconsistent with his pretrial testimony as to how his alleged incident happened. Rothstein notes that whereas Luis testified, as depicted in Carroll's photos, that he was wearing a safety vest prior to his incident, the post-incident photos show Luis without a safety vest. Rothstein further notes that contrary to Luis's pretrial testimony that he was wearing a safety harness while working on the scaffold, the post-incident photos of Luis show that a safety harness was lying on the ground near him.

[4] NYSCEF Doc No. 241 (Rothstein's affidavit, dated July 5, 2023); NYSCEF Doc Nos. 242-250 (Exhibits to Rothstein's affidavit).

Rothstein next opines that the manner in which the scaffold collapsed, as depicted by Luis's post-incident photos, is "scientifically impossible" and "not feasible." Further, Rothstein observes that although Luis testified that he had been hoisting a concrete-filled bucket up to the second level of the scaffold immediately before the scaffold collapsed and he (together with both buckets) fell, the post-incident photos show both buckets in the same locations as they had been in the pre-incident photos. What's more, the post-incident photos do not show that the cement or basecoat had spilled on the ground, or that the buckets were damaged, as a result of the incident. Hence, Rothstein concludes that it was unrealistic for the scaffold to have fallen in the manner that was shown in Luis's post-incident photos.

Separately from Rothstein's opinion, defendants point to additional inconsistencies in the record, which, in their view, raise triable issues of fact. They note that while Luis testified at his pretrial deposition that he arrived at the worksite in the morning, both Rana and Carroll testified that he arrived at lunchtime. In addition, although Luis denied constructing the scaffold at his pretrial deposition, Carroll (by way of his affidavit in opposition) avers that he observed Luis assemble the scaffold.[5]

Defendants next point out that while Luis (in his pretrial testimony) denied consuming any alcohol within 24 hours before the incident, his post-incident emergency room records reflect that he had a blood alcohol level of 106 md/dL.[6] In that regard,

[5] Carroll's affidavit at NYSCEF Doc No. 274, ¶ 9 ("Sometime after [Luis] arrived at the Subject Premises on December 27, 2018, I observed [him] constructing the scaffold that I have been informed he was upon at the time of his alleged accident.").

[6] NYSCEF Doc No. 270, Toxicology, page 3 of 4.

defendants contend that Luis was *the* sole proximate cause of his incident because he was intoxicated. In support of their position, defendants and Grace submit an affidavit from their forensic toxicology expert, Elizabeth Spratt, M.S. ("Spratt"), who reviewed Luis's emergency room records from the incident date.[7] Spratt observes that Luis's incident happened at (or shortly before) 3:49 pm, when the 911 call was received. Forty-four minutes later at 4:35 pm, Luis had his blood drawn for analysis. As noted, the emergency room lab sample revealed that Luis's serum alcohol level was at 106 mg/dL, which Spratt opines is equivalent to a 0.095% blood alcohol level. Spratt opines that with Luis's weight of 195 pounds, he would have had approximately five alcoholic drinks in his system when his blood was drawn, excluding any amount of alcohol that had already been consumed and metabolized while he was drinking. Spratt opines that with the 0.095% blood alcohol level, Luis's ability to concentrate and react would have decreased, his inhibitions would have been removed, his apparent level of confidence would have increased, his judgment would have been impaired, and his coordination (particularly, his balance and equilibrium) would have been impaired. Spratt further notes that Luis's hospital-discharge records assigned alcohol abuse as his secondary diagnosis.

In reply, plaintiffs contend that Luis's emergency room records are inadmissible hearsay because they are uncertified, and there is no evidence that he consumed any alcohol before the incident. Because Spratt's report is grounded on the inadmissible, uncertified emergency room records, plaintiffs contend that her report should be disregarded.

[7] NYSCEF Doc No. 269.

Plaintiffs maintain that, in any event, Luis cannot be *the* sole proximate cause of the incident because the scaffold did collapse. In this regard, plaintiffs submit the affidavit of Luis's coworker, Domingo Mendoza Zepeta ("Zepeta"), who allegedly witnessed the incident. Zepeta averred in his affidavit that "[he] witnessed that Luis was on an exterior pipe scaffold, approximately 20 feet from the ground, when the scaffold collapsed causing Luis to fall to the ground. Prior to the scaffold's collapse, it was not secured to the structure whatsoever."[8]

(2)

> "Under Labor Law § 240 (1), contractors and owners engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure must provide 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" (*O'Brien v Port Auth. of NY & NJ*, 29 NY3d 27, 33 [2017] [internal quotation marks omitted]).

"Liability may . . . be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015] [internal quotation marks omitted]). "[T]o succeed on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her resulting injuries" (*Panfilow v 66 E. 83rd St. Owners Corp.*, 217 AD3d 875, 878 [2d Dept 2023]).

[8] Zepeta's affidavit, dated January 21, 2019, ¶ 3 (NYSCEF Doc No. 304).

Here, plaintiffs have met their prima facie burden of demonstrating entitlement to summary judgment as a matter of law on Luis's Labor Law § 240 (1) claim, in that he testified that: (1) he was working on a scaffold applying "stucco California" to the building wall and thus was subjected to an "elevation-related risk"; (2) the scaffold was not secured to the wall; and (3) although he was wearing a harness, he could not tie off (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993]; *Panfilow*, 217 AD3d at 878).

In opposition, however, defendants have raised triable issues of fact precluding summary judgment. Defendants' evidence raises questions as to whether Luis was actually working on top of the scaffold at the time when he said he fell from it. In this regard, Carroll testified that when he departed for the day, he told everyone (Luis included) to stop working, and that in fact, no one was (or should have been) working at the time of the alleged incident. Carroll's photographs show Luis on the scaffold that the latter was working on the scaffold at 3:01 pm and 3:02 pm. Subsequently, Carroll took another photograph of Luis (with the time stamp at 3:22 pm) showing the latter working on the ground next to the scaffold. The post-incident photographs of Luis further corroborate defendants' position in several respects, including that the cement-filled buckets remained undisturbed and did not fall off the scaffold following the incident. Luis's pretrial testimony regarding the time when he arrived at the worksite and that the scaffold had already been assembled is at odds with Rana's and Carroll's respective pretrial testimony as to when Luis arrived at the worksite, reinforced by Carroll's affidavit averring that Luis assembled the scaffold himself. Further, the effect of Luis's intoxication at the time of the alleged incident cannot be disregarded at this fact-identifying juncture.

Where, as here, there is conflicting deposition testimony as to material facts, any determination is necessarily based on the credibility of the deponents, which is to be resolved at trial, rather than on a motion for summary judgment (*see S.J. Capelin Assoc. v Glob Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept 2013]; *see also Xirakis v 1115 Fifth Ave. Corp.*, 226 AD2d 452, 453 [2d Dept 1996]). A court cannot (and should not) weigh the credibility of witnesses on a motion for summary judgment unless it clearly appears that the issues are feigned, which is not the instance here (*see Conciatori v Port Auth. of NY & NJ*, 46 AD3d 501, 503 [2d Dept 2007]).

Contrary to plaintiffs' contention, the court may consider Luis's medical records indicating that he had an elevated blood alcohol level – despite such records not being certified – because such records do not form the sole basis for the denial of summary judgment (*see Erkan v McDonald's Corp.*, 146 AD3d 466, 468 [1st Dept 2017]; *Castle v Bawuah*, 101 AD3d 922, 924 [2d Dept 2012]; *Moffett v Gerardi*, 75 AD3d 496, 498 [2d Dept 2010]).

Conversely, Domingo's affidavit does not mandate the grant of summary judgment in plaintiffs' favor on Luis's Labor Law § 240 (1) claim. Luis's pretrial testimony contradicts Domingo's affidavit because Luis testified that Domingo had been working on the other side of the building at the time of the incident, did not observe the incident, and responded to the scene of the incident after he (Luis) had already fallen.

Because multiple factual questions exist about the nature of Luis's incident and its proximate cause, the branch of plaintiffs' motion for partial summary judgment on the issue of liability on Luis's Labor Law § 240 (1) claim as against defendants is denied.

LABOR LAW § 241 (6) CLAIM

"Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Toussaint v Port Auth. of NY & NJ*, 38 NY3d 89, 93 [2022] [internal quotation marks omitted]). "To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Aragón v State*, 147 AD3d 808, 809 [2d Dept 2017]).

Defendants contend that Luis's Labor Law § 241 (6) claim should be dismissed because the Industrial Code sections cited by plaintiffs in their bill of particulars are either inapplicable or not sufficiently specific to form a predicate for a Labor Law § 241 (6) violation; in particular, Industrial Code §§ 23-1.16, 23-1.17, 23-5.1 (j), and 23-5.3 (e).

In opposition, plaintiffs observe that inasmuch as discovery is still ongoing, they were entitled to file their eighth supplemental bill of particulars on September 12, 2023 wherein they allege violations of Industrial Code §§ 23-1.5 (c) (3), 23-5.3 (h), 23-5.4 (a) (1), 23-5.4 (b) (1), 23-5.4 (b) (2), and 23-5.18 (d). Plaintiffs submit a supplemental expert report from Hopkins in which the latter avers that each of the foregoing provisions was violated.

In reply, defendants contend that they are prejudiced by the eighth supplemental bill because they have not had an opportunity to conduct discovery with respect to those sections. Nonetheless, defendants submit a supplemental expert affidavit from Rothstein, in which the latter opines that not one of the new asserted Industrial Code provisions are applicable.[9] Defendants further argue that the previously pleaded Industrial provisions which were not restated in the eighth supplemental bill should be deemed abandoned.

The Court agrees with defendants that, plaintiffs, by supplementing their extant bills of particulars without including the previously pleaded provisions of the Industrial Code, have abandoned those provisions. However, the Court rejects defendants' contention that they are prejudiced by the addition of the newly pleaded Industrial Code provisions. Indeed, the newly pleaded Industrial Code provisions focus on the condition of the scaffold and whether Luis was provided with other safety equipment – issues that have been extensively explored in discovery.

Industrial Code § 23-1.5 (c) (3)

Industrial Code § 23-1.5 (c) (3) requires that all safety devices, safeguards, and equipment "be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Here, there is an issue of fact as to whether the scaffold was "sound and operable" within the meaning of this Industrial Code provision. In her supplemental report, plaintiffs' expert Hopkins opines that the scaffold

[9] NYSCEF Doc No. 302 (Rothstein's affidavit, dated September 27, 2023).

was not provided with outriggers, and that its cross braces were not secured to the scaffold's end frames as required.

Industrial Code § 23-5.3 (h)

Industrial Code § 23-5.3 (h) requires every metal scaffold to be securely tied into a building or other structure at intervals not exceeding 30 feet horizontally and 26 feet vertically. It is clear that defendants are not entitled to summary judgment with respect to this provision because it is undisputed that the scaffold was not tied to the building wall or to any other structure. Further, plaintiffs' expert Hopkins opines that the post-incident photographs show that the scaffold's cross braces had not been secured to the end frames and that, therefore, the scaffold was not correctly put together.

Industrial Code § 23-5.4 (a) (1), (b) (1), and (b) (2)

Industrial Code § 23-5.4 (a) (1) requires tubular welded frame scaffolds to be properly braced by cross bracing or diagonal bracing, or both. Plaintiffs' expert's opinion that the scaffold was not properly braced precludes summary judgment in defendants' favor.

Industrial Code § 23-5.4 (b) (1) requires that "[c]oupling pins, sprockets or other safe positive couplers . . . be used to connect scaffold frames at every vertical frame extension." Next, Industrial Code § 23-5.4 (b) (2) requires that "[e]ach frame leg [of a scaffold] . . . have a positive lock or fastener to hold one frame member to the other vertically." Plaintiffs' expert's opinion that defendants failed to ensure compliance with the foregoing provisions likewise precludes summary judgment in defendants' favor.

Industrial Code § 23-5.18 (d)

Industrial Code § 23-5.18 (d) provides that "[f]or any free-standing manually-propelled mobile scaffold[,] the ratio of the platform height above the ground, grade, floor or equivalent surface to the minimum base dimension shall assure scaffold stability when in use, but in no case shall such height be more than four times the minimum base dimension." In this regard, plaintiffs' expert opines that defendants failed to ensure compliance with this provision because the scaffold at issue was not equipped with outriggers.

In sum, plaintiffs' expert's supplemental affidavit in which Hopkins opines that defendants violated the Industrial Code provisions enumerated in the eighth supplemental bill raises triable issues of fact precluding summary judgment in defendants' favor. Accordingly, the branch of defendants' cross motion for summary judgment dismissing Luis's Labor Law § 241 (6) claim, insofar as predicated on the *newly pleaded* alleged violations of §§ 23-1.5 (c) (3), 23-5.3 (h), 23-5.4 (a) (1), 23-5.4 (b) (1), 23-5.4 (b) (2), and 23-5.18 (d), is *denied*. Conversely, the branch of defendants' cross motion for summary judgment dismissing Luis's Labor Law § 241 (6) claim, insofar as predicated on the *previously pleaded, but since-abandoned*, alleged violations of Industrial Code §§ 23-1.16, 23-1.17, 23-5.1 (j), and 23-5.3 (e), is *granted*.

LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE CLAIM

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Panfilow v 66 E. 83rd St. Owners Corp.*, 217 AD3d 875, 878-879 [2d Dept 2023]; *Saitta v Marsah*

Props., LLC, 211 AD3d 1062, 1063 [2d Dept 2022]). "Where the allegations involve the manner in which the work was performed, the property owner and/or general contractor will be held liable only if they possessed the authority to supervise or control the means and methods of the work" (*Panfilow*, 217 AD3d at 879; *see also Saitta*, 211 AD3d at 1063). "Where the allegations involve dangerous or defective conditions on the premises where the work was performed, the property owner and/or general contractor will be held liable if they either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" (*id.*). "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 616 [2d Dept 2023]; *Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]).

Defendants contend the incident stemmed from the manner in which Luis performed his work, rather than as a result of a dangerous condition. They contend that Luis's Labor Law § 200 and common-law negligence claim as against them should be dismissed because: (1) they did not control Luis's work, and (2) they did not have notice of (nor caused or created) any allegedly dangerous condition. By contrast, plaintiffs contend that liability should be premised on the scaffold at issue because it represented a dangerous or defective condition at the worksite.

Contrary to plaintiffs' position, Luis's incident arose from the manner in which he performed his work, rather than from any dangerous or defective condition on the worksite

(*see e.g. Giglio v Turner Constr. Co.*, 190 AD3d 829, 830 [2d Dept 2021]; *Cody v State of NY*, 82 AD3d 925, 926 [2d Dept 2011]).

Unlike SNAP, however, Cow Bay has failed to meet its burden of demonstrating that it did not possess authority to supervise or control the means and methods of Luis's work. In that regard, Cow Bay's site superintendent, Michael Carroll, testified at his pretrial deposition that pursuant to the contract between SNAP and Cow Bay (as noted, a copy of their contract is not in the record), Cow Bay possessed the authority to control the work performed by Grace. In addition, Carroll testified that he was at the worksite daily, performed inspections, monitored the work and ensured that such work was performed safely. Carroll further testified that he raised safety issues with Grace employees, informing them if he saw that work was not performed safely. Lastly, Carroll testified that he had the authority to correct or stop any work at the site that was unsafe. In light of Carroll's foregoing testimony, Rana's pretrial testimony to the contrary (*i.e.*, that Carroll did not supervise or control Grace's work) fails to meet Cow Bay's prima facie burden.

In contrast, SNAP has met its burden of demonstrating, prima facie, that it did not control Grace's work, as shown by Miceli's pretrial testimony. In opposition, plaintiffs have failed to raise an issue of fact as to SNAP's supervision of the worksite.

Accordingly, the branch of defendants' motion for summary judgment dismissing Luis's Labor Law § 200 and common-law negligence claim is granted as to SNAP, but is denied as to Cow Bay.

THIRD-PARTY CLAIMS

Contractual Indemnification

Defendants contend that they are entitled to contractual indemnification from Grace pursuant to Cow Bay's subcontract with Grace. In opposition, Grace contends that defendants have failed to meet their initial burden of establishing that Grace's duty to indemnify was triggered. In reply, defendants contend that the record before the court demonstrates Grace's negligence, thereby triggering contractual indemnification.

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*McNamara v Gusmar Enters., LLC*, 204 AD3d 779, 783 [2d Dept 2022]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*id.*). "In the absence of a legal duty to indemnify, a contract for indemnification should be strictly construed to avoid imputing any duties which the parties did not intend to assume" (*id.*).

Here, section 1.1 of the subcontract provides that:

> "To the fullest extent permitted by law, the Subcontractor [Grace] shall indemnify and hold harmless the Contractor [Cow Bay], Owner [SNAP] and their agents from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Contractor's Work or work of the Subcontractors hired by the Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, *cause[d] in whole or in part by 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, regardless of whether or not such claim, damage, loss or

> expense is caused in part by a party indemnified hereunder" (emphasis added).

As the italicized language indicates, defendants are to be indemnified to the extent of any alleged negligent acts or omissions by Grace during performance of its work. At this juncture, however, Grace's negligence (or lack thereof) has not been established. Accordingly, defendants have not met their burden of demonstrating, prima facie, their entitlement to summary judgment on their third-party claim against Grace for contractual indemnification.

Common-Law Indemnification

In addition, defendants contend that they are entitled to common-law indemnification from Grace because (1) there are not negligent, and (2) Luis suffered a "grave injury" as a result of the incident. In that regard, defendants submit medical records from Alpha 3T MRI & Diagnostic Imaging and Dr. Emilio Oribe in support of their contention that Luis suffered a traumatic brain injury. In opposition, Grace contends that defendants are not entitled to common-law indemnification because they failed to establish, prima facie, that Grace was negligent in causing the incident. Grace further contends that a traumatic brain injury is not equivalent to a "grave injury" under the Workers' Compensation Law.

> "In order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*Buffardi v BJ's Wholesale Club, Inc.*, 191 AD3d 833, 834 [2d Dept 2021] [internal brackets and ellipses omitted]).

As discussed above, Grace's negligence (if any) has not been determined, and, therefore, defendants have not met their burden of demonstrating, prima facie, that the incident resulted from Grace's negligent acts/omissions. Further, although proof that Luis sustained a "grave injury" within the meaning of the Workers' Compensation Law would permit defendants to seek common-law indemnification against Grace as Luis's employer, defendants have not established that Luis sustained a "grave injury." Significantly, defendants have failed to submit an affirmation affidavit from a medical expert as to the nature and extent of Luis's injury. The medical records submitted by defendants are uncertified and therefore inadmissible for this purpose (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]). Thus, defendants have failed to demonstrate, prima facie, their entitlement to summary judgment on their third-party claim against Grace for common-law indemnification.

Breach of Contract to Obtain Insurance

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dept 2022]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]).

Here, defendants have submitted the subcontract, which required Grace (in § 2.1 thereof) to purchase/maintain *primary* and *excess* insurance policies, as well as to have each defendant named as an additional insured under both policies. Defendants have also

submitted the determination by Grace's insurer, Hudson, that the latter would defend and indemnify them under the *primary* policy only.

In opposition, Grace contends that it acquired the required coverage and produced a copy of the certificates of liability insurance to that effect. Grace argues that the fact that Hudson denied coverage on the *excess* policy has nothing to do with Grace's obligation to procure insurance, as this is an insurance-coverage issue which is outside Grace's control. In reply, defendants appear to have conceded that Grace purchased the requisite *excess* insurance, noting that "Hudson continues to refuse to acknowledge the Defendants as additional insureds on the applicable excess policy."

Here, defendants have failed to meet their burden of demonstrating, prima facie, that Grace did not purchase the requisite insurance coverage. Rather, although defendants have not included a copy of the excess policy with their moving papers, the record before the Court reflects that Grace *did* purchase the excess coverage, as evidenced by Hudson's denial of coverage under the excess policy. In addition, Hudson's stated reason for denying coverage under the excess policy – that the excess policy lacks the necessary endorsements – raises an insurance-coverage issue, rather than a dispute over a failure to procure insurance. Accordingly, the remaining branch of defendants' motion for summary judgment on their third-party claim against Grace for failure to procure insurance is denied.

The Court has considered the parties' remaining contentions and finds them to be unavailing.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability on Luis's Labor Law § 240 (1) claim (Motion Seq. 11) is denied; and it is further

ORDERED that defendants' cross motion for summary judgment (Motion Seq. 12) is granted to the extent that (1) Luis's Labor Law § 241 (6) claim, insofar as predicated on the previously pleaded, but since-abandoned, alleged violations of Industrial Code §§ 23-1.16, 23-1.17, 23-5.1 (j), and 23-5.3 (e), as against both defendants is dismissed; and (2) Luis's Labor Law § 200 and common-law negligence claims as against SNAP only is dismissed; and the remainder of their cross motion is denied; and it is further

ORDERED that defendants' motion for summary judgment on their third-party claims against Grace (Motion Seq. 13) is denied in its entirety.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
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