At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 28th day of June 2024.

PRESENT: HON. Ingrid Joseph, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORKCOUNTY OF KINGS

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ALEKSANDER PIECHOWICZ,

Plaintiff,

-against-

Index No. 524985/2020

TECHNICO CONSTRUCTION SERVICES, INC.,

Defendant.

DECISION AND ORDER

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TECHNICO CONSTRUCTION SERVICES, INC.

Third-Party Plaintiff,

-against-

AMP TECH INC.,

Third-Party Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	83-90; 102-115
Opposing Affidavits/Answer (Affirmations)	116, 117-118; 119, 120
Affidavits/ Affirmations in Reply	123; 122, 124

Upon the foregoing papers in this action to recover damages for personal injuries, Aleksander Piechowicz (plaintiff) moves, in (motion [mot.] sequence [seq.] number [no.] three), for an order, pursuant to CPLR 3212, granting summary judgment against defendant/third-party plaintiff, Technico Construction Services, Inc. (Technico), on plaintiff's Labor Law §§ 240 (1) and 241 (6) claims. Technico moves, in mot. seq. no. four, pursuant to CPLR 3212 for an order: (1) dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims; (2) granting it summary judgment against third-party defendant AMP Tech, Inc. (AMP) for full, partial, and/or conditional contractual indemnification, reimbursement of attorneys' fees, and on its breach of contract claim; and (3) dismissing any and all cross-claims and counterclaims asserted against it.

Plaintiff commenced the instant action by filing a summons and verified complaint on December 14, 2020 (NYSCEF Doc No. 1). According to the complaint, plaintiff was injured on or about February 5, 2019, while working at 797 Hicks Street, Brooklyn, New York (premises), a six-story building (*id.* at ¶¶ 5-

27).[1] Plaintiff asserts violations of Labor Law §§ 200, 240 (1), 241 (6) and common-law negligence. Technico filed its answer on April 21, 2021, and asserted 13 affirmative defenses (NYSCEF Doc No. 3).

On November 4, 2021, Technico filed a third-party summons and complaint (NYSCEF Doc No. 14). In its third-party action, Technico alleges that plaintiff was AMP's employee on the date of the accident (*id.* at ¶ 5). Technico asserts that it entered into a contract with AMP to perform certain work and services at the premises (the contract) (*id.* at ¶ 6). Technico claims that the contract included hold harmless and indemnification provisions in its favor in connection with AMP's work at premises (*id.* at ¶ 7). The third-party complaint asserts the following four causes of action against AMP: (1) common law indemnification; (2) contribution; (3) contractual indemnification; and (4) breach of contract for failure to procure insurance. AMP filed a verified answer to the third-party complaint denying the allegations and raising 25 affirmative defenses (NYSCEF Doc No. 20). During the discovery phase, plaintiff, Antonios Koumas (Koumas), and Arthur Rykiel (Rykiel) were deposed.[2]

Technico was the general contractor for the project and hired AMP as subcontractor.[3] The project consisted of replacing the roof and parapet walls[4] on 27 buildings as a result of damage sustained from Hurricane Sandy.[5] On the date of the accident, plaintiff was employed by AMP and was tasked with trimming down a parapet wall that had been built on the roof of the premises.[6] To perform the task, plaintiff testified that he was required to stand on a suspended scaffold hanging from the roof of the building, at the window level of the sixth floor on the outside of the building.[7] In order to access the scaffold, plaintiff claimed he was directed to use an eight-foot narrow ladder to get to the suspended scaffold from the roof of the building.[8] According to plaintiff, as he started descending the ladder and when he reached the third rung from the bottom, the ladder and scaffold started shaking, moving to the right, and something cracked at which point the plaintiff fell down onto the platform of the scaffold.[9] At the time of the accident, plaintiff alleges that the ladder and suspended scaffold were not secured or mounted to the building.[10] As a result of the fall, plaintiff contends that he sustained injuries to his right ankle, right calf, left knee, left shoulder, and lumbar spine requiring surgery (NYSCEF Doc No. 86).[11]

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[1] Piechowicz EBT tr dtd 6/28/2022 at page 91, lines 16-19; page 113, lines 2-10.
[2] Koumas is the Field Operations Manager for Technico and Rykiel is the project manager and 50% owner of AMP (Koumas EBT tr at page 16, lines 9-10; Rykiel EBT tr at page 11, lines 18-20; page 18, line 24 to page 19, line 2).
[3] Koumas EBT tr at page 15, lines 9-12; Rykiel EBT tr at page 20, lines 18-21.
[4] A parapet wall is a wall that extends, in this instance, three cinder blocks from the bottom of the roof floor (Piechowicz EBT tr dtd 6/28/2022 at page 124, line 2 to page 125, line 23).
[5] Koumas EBT tr at page 17, line 12 to page 18, line 4.
[6] Piechowicz EBT tr dtd 6/28/2022 at page 127, lines 11-13.
[7] Piechowicz EBT tr dtd 6/28/2022 at page 117, lines 10-15.
[8] Piechowicz EBT tr dtd 6/28/2022 at page 110, lines 15-25; page 117, lines 16-22.
[9] Piechowicz EBT tr dtd 6/28/2022 at page 128, line 6 to page 129, line 3.
[10] Piechowicz EBT tr dtd 6/28/2022 at page 110, lines 11-14; page 120, lines 10-14.
[11] Piechowicz EBT tr dtd 6/28/2022 at page 32, lines 4-7.

In support of that branch of plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim and in opposition to Technico's motion to dismiss said claim, plaintiff asserts that it is well established that a plaintiff who falls from an unsecured ladder that tips over, moves, or slips out from underneath him while engaged in a covered activity, establishes prima facie entitlement to summary judgment as a matter of law (NYSCEF Doc No. 84 at ¶ 47). Plaintiff argues that the failure to adequately secure a ladder to ensure that it continues to support the plaintiff while in use constitutes a violation of Labor Law § 240 (1). Additionally, plaintiff maintains that the Second Department has repeatedly held that a worker's fall from an unsecured safety device, which was caused to sway or move when a person was on it, constitutes a violation (*id.* at ¶ 49). In support of his position, plaintiff submits an affidavit from Douglas D. Miller (plaintiff's expert), President of an occupational safety consulting company. Plaintiff's expert opines that the fact that neither the scaffold nor the ladder was secured, resulted in the movement of both devices, causing plaintiff to fall from the ladder (NYSCEF Doc No. 85, at ¶¶ 11, 13). Plaintiff's expert suggest that the fact that plaintiff was wearing a harness and attached to a safety line, did not protect him from his fall from the ladder since the safety line was intended to prevent him from a fall from the scaffold, not the ladder (*id.*). Plaintiff concludes by arguing that the scaffold and ladder should have been adequately secured or braced to protect him from the elevation-related risk to which he was exposed at the time of his accident (NYSCEF Doc No. 84, at ¶ 56).

In opposition to plaintiff's motion and in support of its own motion, Technico contends that a safety inspection checklist (checklist) and photographs produced herein demonstrate that the ladder at issue was properly secured on the date of plaintiff's accident (NYSCEF Doc No. 116 at 2). Technico alleges that a safety inspection was performed of all the ladders on the jobsite on the date of the accident by Technico's employee, Robert Constantinides (Robert), and submits a copy of the alleged checklist (*id.* at ¶ 6; NYSCEF Doc No. 113). Specifically, Technico highlights that the checklist indicates that all ladders were properly secured to the roof, extended at least 36 inches above the landing, were in good condition, were the appropriate ladders for the job, and that every safety checklist item was checked off as "satisfactory" with regard to the condition and safety of the suspended scaffolds (*id.* at ¶ ¶ 6-7; NYSCEF Doc No. 113).

Technico points to the deposition testimony of Rykiel asserting that the rigger foreman and the construction manager would check that the scaffolds and ladders were secured before every single shift (*id.* at ¶ 8). Additionally, Technico submits a photograph of the alleged ladder and suspended scaffold after plaintiff's accident and notes that the ladder was properly tied off (*id.* at ¶ ¶ 9-10; NYSCEF Doc No. 111). Moreover, Technico attaches an accident report stating that plaintiff's foot slipped and does not mention that the ladder moved causing plaintiff to fall (*id.* at ¶ 16; NYSCEF Doc No. 110). Lastly, Technico notes that Rykiel testified that ladders were required to be tied down with special clamps that clamp the ladder to an outrigger, that the tools would be on the roof and stayed on the roof with the ladders for the duration of

AMP's work at a particular building, and each individual AMP employee was responsible for tying down and securing the ladder (*id.* at ¶ 18). Technico emphasizes that the inconsistencies as to how the accident occurred, preclude finding, as a matter of law, in plaintiff's favor on his Labor Law 240 (1) claim (*id.* at ¶ 19).

Next, Technico argues that the ladder and scaffold were the appropriate safety devices, free from any hazards and defects, and the accident did not occur due to a violation of the statute but rather because plaintiff's injury caused the fall (*id.* at 7). In support of its conclusion, Technico submits the affidavit of Michael Cronin (Technico's expert), a licensed and registered professional engineer, who opines that the ladder and scaffold were the appropriate safety devices and were free from any defects or hazards (*id.* at ¶ 21; NSYCEF Doc No. 112). Technico contends that plaintiff fell not because the ladder was inappropriate or unsafe but because his right leg cracked (*id.* at ¶ 24). Technico asserts that plaintiff's testimony never explicitly stated that plaintiff was in the process of falling when he felt the crack but was still on the ladder when he felt his leg crack causing him to fall onto the platform (*id.* at ¶ 25). Technico therefore maintains that Labor Law 240 (1) is not triggered as plaintiff did not establish that a failed safety device was the proximate cause of his injures (*id.* at ¶ 31).

In support of its motion, Technico cites to Rykiel's deposition testimony wherein he testified that AMP stored their own tools and equipment in a construction staging area between the buildings, had extension ladders that could only be used by their employees, and that it was AMP's responsibility to build the scaffolds and put them up (NYSCEF Doc No. 103 at ¶ 35). AMP had an office trailer on site between the buildings on the date of the accident where safety meetings were held, and AMP employees were assigned their daily tasks each morning (*id.* at ¶ 34). AMP employees were required to be paired with another employee on the scaffold per AMP and Department of Buildings (DOB) regulations (*id.* at ¶ 36). Rykiel further testified that AMP employees could grab equipment on their own from the AMP trailer without asking (*id.* at ¶ 35).

AMP opposed plaintiff's motion for summary judgment and filed an affirmation in support of Technico's motion contending that plaintiff's Labor Law § 240 (1) claim should be dismissed (NYSCEF Doc No. 117 at ¶¶ 3-4). AMP adopted the arguments advanced by Technico in its affirmation and asserts that its owner and project manager, Rykiel, testified that AMP workers performed the subject project in pairs (NYSCEF Doc No. 117 at ¶¶ 5, 7, and 12). Rykiel further testified that the ladders that were used to access the scaffold were required to be tied down with rope, wire, or clamps and that the AMP scaffold crew, as well as each AMP employee, was responsible for tying down and securing the ladder (*id.* at ¶ 13). AMP contends that each morning the rigger foreman would check that the scaffold and ladders were secured before every shift, and AMP's foreman would inspect the ladders to make sure they were attached and secured to the scaffold (*id.* at ¶ 14). AMP asserts that plaintiff acknowledged that he ignored the company-

mandated procedures that he never work alone on a scaffold and ensure that the ladder was secured before use (*id.* at ¶ 15). AMP further claims that plaintiff testified that he took the ladder that was on the roof and placed it on the scaffold by himself without tying the ladder with a rope and that he failed to ask a coworker for help when he placed the ladder on the scaffold and descended it to get to the scaffold platform (*id.*). AMP notes that according to plaintiff's deposition testimony, plaintiff is "not sure what happened" (*id.* at ¶ 16).

Next, AMP argues that plaintiff was given every appropriate safety device and that he was the sole proximate cause of his accident (*id.* at 5). AMP asserts that the ladder and scaffold provided to plaintiff were adequate safety devices that were not defective at the time of the accident (*id.* at ¶ 24). AMP maintains that since plaintiff was wearing a safety harness that was properly secured, via his safety line, to a secured anchor point on the roof, had a proper working ladder and scaffold, and the means to obtain a rope to tie off the ladder, there were no other safety devices that could have been given to plaintiff to prevent this alleged accident (*id.* at ¶ 25). AMP notes that plaintiff's own testimony establishes that he failed to follow AMP procedure, and it was his own failure to do so that was the sole proximate cause of the accident by failing to enlist the help of his coworker while placing the ladder on the scaffold and then descending, even though he acknowledged that the coworker was on the roof and that it did not occur to him to ask the coworker for help (*id.* at ¶ 27).

In plaintiff's reply to his motion and in opposition to Technico's motion, plaintiff notes that Technico and AMP cannot rely on the safety inspection checklist, since it is unsworn, was not produced during discovery, and because no witnesses were questioned or provided testimony regarding same. Plaintiff therefore argues that it does not constitute proof in admissible form and cannot be relied upon to oppose plaintiff's motion or to support Technico's motion (NYSCEF Doc No. 123 at ¶¶ 2-5). Plaintiff argues that even if the checklist could be considered, it is not probative to the instant action since it is a general checklist for the Red Hook Houses project, which Technico testified consisted of work on 27 buildings, and does not include a time for the inspection which could have occurred after the incident (*id.* at ¶ 6). Specifically, plaintiff highlights that nothing in the safety inspection checklist references plaintiff's accident, the accident location, or the specific ladder and scaffold plaintiff was using at the time, and thus asserts that it cannot support Technico's argument that the checklist somehow shows that the ladder was inspected and was secure prior to the accident (*id.* at ¶ 7). Additionally, plaintiff notes that the checklist does not claim that the suspended scaffold was secured to the building and Technico does not dispute plaintiff's testimony that the suspended scaffold was unsecured (*id.* at ¶ 8). To the extent Technico attempts to validate the contents of the checklist through Rykiel's deposition, plaintiff argues that it cannot do so as Rykiel was not on site on the day of the accident and never performed the inspections on which Technico relies (*id.* at ¶¶ 9-13).

Next, plaintiff asserts that the photograph submitted by Technico attempting to prove that the ladder was secured does not make such a showing. Technico's witness, Koumas, when shown the photograph, testified that it depicts one of the buildings, but he could not identify the location of the photograph or which building it depicted (*id.* at ¶¶ 16-17). He further testified that he did not know who took the photograph and that he only saw it in preparation for his deposition. Plaintiff further notes that the time stamp on the photograph is 9:01 a.m. while the accident occurred at 7:30 a.m. and that the ladder in the photo "look[ed] new" but the ladder involved in his accident was old (*id.* at ¶ 17). Plaintiff asserts that the evidence fails to state that the photograph taken after the accident at an unidentified location, is a fair and accurate representation of how the ladder involved in his accident was set up (*id.* at ¶ 18). Plaintiff states that Technico failed to provide a single piece of evidence that proves the ladder was secured and notes that Technico provides no defense to the fact that the suspended scaffold was unsecured at the time of plaintiff's accident (*id.* at ¶ 19).

Plaintiff maintains that there are no inconsistencies regarding how the accident occurred and that Technico is attempting to create a question of fact by relying on a partially illegible, self-serving accident report prepared by AMP (*id.* at ¶ 22). Plaintiff contends that the incident report is unavailing since the report contains hearsay and a proper foundation for its admission as a business record was not provided (*id.* at ¶ 23). Furthermore, plaintiff does not know where Mr. Lukasz Kusmirek (Mr. Kusmirek), who prepared the accident report, obtained the information as he did not witness plaintiff's accident, plaintiff did not tell anyone his accident occurred because his foot slipped, and plaintiff states that he never read the accident report that day because he cannot read English (*id.* at ¶¶ 28-30). Plaintiff contends that he informed AMP that the ladder moved causing him to fall but AMP allegedly attempted to coerce him not to report the accident by telling him that if he made a report, he would only get paid for one hour of work rather than the whole day (*id.* at ¶ 33). Thus, plaintiff maintains that since the ladder and suspended scaffold were unsecured safety devices at the time of the accident, his fall from them constitutes a violation of Labor Law § 240 (1).

Plaintiff's Labor Law § 241 (6) cause of action is predicated on violations of Industrial Code §§ 23-1.21 (b) (4) (i) and 23-5.8 (g), which relate to ladders and ladderways and suspended scaffolds, respectively. Plaintiff contends that Technico violated Industrial Code § 23-1.21 (b) (4) (i) as the deposition testimony and Technico's expert opinion establish that the ladder plaintiff was required to use as a regular means of access from the roof onto the suspended scaffold was not securely fastened; nor were handholds provided since the ladder did not extend 36 inches above the upper level in violation of the Code (NYSCEF Doc No. 84 at ¶ 67). Furthermore, plaintiff asserts that defendant violated Industrial Code § 23-5.8 (g) since the deposition testimony established that the suspended scaffolds were not secured to the building when

plaintiff tried to access it from the ladder even though they were not intended to move as they were used to perform the removal and replacement of the parapet wall (*id.* at ¶¶ 71-73).

In opposition and in support of its own motion, Technico alleges that the ladder plaintiff was working on met all the requirements and conditions necessary under Industrial Code § 23-5.8 (g) as demonstrated in the safety inspection checklist and plaintiff fails to point to any evidence to the contrary (NYSCEF Doc No. 116 at ¶ 45). Technico highlights that plaintiff made no complaints and there were no defects found with the ladder (*id.* at ¶ 46). Technico's expert opines that the ladder plaintiff descended was fully extended and properly set up (*id.*; NYSCEF Doc No. 112). Technico argues that plaintiff cannot conclusively establish that the requirements of Industrial Code Section § 23-1.21 (b) (4) (i) were not met and thus cannot establish a violation under the Code (*id.* at ¶ 47). Technico concludes by asserting that this section of the Code only applies to ladder footings which are placed on a slippery surface or unstable object, a scenario that did not occur here as there is no evidence that the ladder was placed on either (*id.* at ¶ 48).

As for Industrial Code § 23-5.8 (g), Technico asserts that no evidence was submitted that it violated this section and highlights that plaintiff testified that the scaffold was fine and that these types of scaffolds were never mounted to the wall (*id.* at ¶ 53). Technico further asserts that Industrial Code § 23-5.8 pertains to general provision for scaffold and suspended scaffolds and since the scaffold plaintiff was using at the time of the accident was not dangerous or defective, the scaffold did not need to be tied down to the building since it was a moveable scaffold (NYSCEF Doc No. 103 at ¶ 68). Technico maintains that because plaintiff's accident did not result from the swaying of the scaffold while at a working level, plaintiff's Labor Law § 241 (6) claim predicated upon an Industrial Code § 23-5.8 (g) violation must be dismissed (NYSCEF Doc No. 116 at ¶ 55). Lastly, AMP asserts that the Industrial Code provisions cited by plaintiff are inapplicable and thus plaintiff's Labor Law § 241 (6) claim must be dismissed (NYSCEF Doc No. 117 at ¶¶ 3-4).

In support of its motion to dismiss plaintiff's Labor Law § 200 claim, Technico contends that the facts unmistakably demonstrate that Technico did not supervise, manage or control the means and methods of plaintiff's work (NYSCEF Doc No. 103 at 4). Technico asserts that plaintiff's work was solely supervised and controlled by his employer AMP, which directed every aspect of plaintiff's work, and provided him with the tools and equipment to do so including the ladder and scaffold giving rise to plaintiff's alleged fall (*id.*). Furthermore, Technico states that the case does not fall under the dangerous or defective condition prong of Labor Law § 200 as plaintiff never claimed that there was anything dangerous or defective with either the ladder or scaffold he was using on the date of loss or the area where he was working (*id.* at ¶ 48). Technico maintains that the facts clearly demonstrate that it is entitled to summary judgment as to the Labor Law § 200 claim as no triable issues of fact exist (*id.* at ¶ 49).

In opposition, plaintiff contends that Technico's superintendent attended daily safety meetings where plaintiff was instructed on the use of the ladders to access the suspended scaffold from the roof (NYSCEF Doc No. 120 at ¶ 75). Further, plaintiff highlights that Koumas testified that Technico would tell the workers how to access the hanging scaffolds (*id.* at ¶ 76). Lastly, plaintiff argues that since Technico had the authority to stop work at this project, it raises a triable issue of fact that warrants denial of that branch of Technico's motion seeking dismissal of plaintiff's Labor Law § 200 claim (*id.* at ¶ 78).

Technico contends that it entered into a contract with AMP in October 2017 for masonry work at the project and for AMP to trim and rebuild the parapet walls at the roof level (NYSCEF Doc No. 103 at ¶ 41; NYSCEF Doc No. 109). Technico asserts that AMP was contractually bound to hold Technico harmless and to indemnify it to the fullest extent permitted by law pursuant to the harmless and indemnification provisions in the contract (*id.*; NYSCEF Doc No. 109 at 5, 7). Technico notes that AMP's carrier has already accepted Technico's tender, with a reservation of rights (*id.* at ¶ 69). Technico asserts that if it is found liable to plaintiff under the Labor Law statutes, it would be solely by reason of the statutes as it did not exercise any actual supervision or control over the injury-producing work (*id.* at ¶ 72). Thus, Technico seeks common law and contractual indemnification from AMP and maintains that all cross-claims and counterclaims made by AMP against Technico should be dismissed (*id.* at ¶ 72). Additionally, Technico asserts that the contract provides that AMP must provide and maintain insurance coverage with total limits of liability, bodily injury and property damage that shall not be less than $2,000,000.00 per occurrence, combined bodily injury and property damage (*id.* at ¶¶ 43-44; NYSCEF Doc No. 109 at 6-7, 27).

In opposition, AMP asserts that Technico incorrectly argues that it is entitled to indemnification if plaintiff's injury merely arose out of AMP's work or that of its subcontractors regardless of Technico's own negligence (NYSCEF Doc No. 119 at ¶ 4). First, AMP notes that General Obligations Law (GOL) § 5-322.1 prohibits Technico from being indemnified for its own negligence and any such contractual language is void under the statute (*id* at ¶ 5). Next, AMP claims that the scaffold that plaintiff was descending at the time of the accident was owned by Technico and inspected daily by their rigger foreman (*id.* at ¶¶ 6-7). Technico's personnel performed daily walkthroughs wherever work was being performed, checking safety issues and had the authority to stop work if anything unsafe was observed (*id.* at ¶ 8). Technico attended the toolbox talk meetings with the subcontractors, and most of the time, someone from Technico led the meeting (*id.* at ¶ 9). Lastly, AMP asserts that since there is no finding as to AMP's negligence and such negligence being the proximate cause of plaintiff's fall, Technico is not entitled to contractual indemnification as the indemnification clause indemnifies Technico only to the extent the claim is caused by the negligent acts or omissions of AMP (*id.* at ¶ 10, 13). AMP did not respond to the portion of Technico's argument alleging that they failed to procure insurance as to the stated amounts in the contract.

In reply, Technico highlights that AMP's carrier has already accepted Technico's tender on behalf of Technico, with a reservation of rights (NYSCEF Doc No. 124 at ¶ 3). Technico contends that it was not involved in the means and methods of plaintiff's work, rather, AMP was the sole party responsible for the direction and control of plaintiff's actions at the premises and on the date of the accident (*id.* at ¶ 5). Technico argues that plaintiff received his daily instruction from his AMP supervisor and was instructed by his main foreman to trim a parapet wall on the exterior of the building at roof level on the date of the accident (*id.* at ¶¶ 6-8). Technico further asserts that the ladder was owned by AMP and plaintiff testified that he witnessed AMP employees building the scaffold he was using which he claims was owned by AMP as well (*id.* at ¶¶ 9-10). AMP provided plaintiff with a safety line as well as a drill to perform his work (*id.* at ¶¶ 11-12). Notably, Technico maintains that the case law is very clear that walk-throughs and general supervisory authority for the purposes of overseeing progress of the work is insufficient to impose liability as to them (*id.* at ¶ 14). Thus, Technico asserts that it is entitled to contractual indemnification and at the very least conditional summary judgment on their contractual indemnification claim if plaintiff received sole instructions from AMP who also controlled the means and methods of plaintiff's work (*id.* at ¶ 17).

"To obtain summary judgment it is necessary that the movant establish his [or her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*). If there are triable issues of fact as to how the alleged accident occurred, then the motion should be denied (*see Lima v HY 38 Owner, LLC*, 208 AD3d 1181, 1183 [2d Dept 2022]). "Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Murray v Community House Development Fund Company, Inc.*, 223 AD3d 675, 677 [2d Dept 2024]; *Chiara v Town of New Castle*, 126 AD3d 111 [2d Dept 2015]).

Additionally, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and where conflicting inferences may be drawn, the court must draw those most favorable to the nonmoving party" (*Murray*, 223 AD3d at 676-677; *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002, 1005 [2d Dept 2016]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2d Dept 2023]; *Schumacher v Pucciarelli*, 161 AD3d 1205 [2d Dept 2018]).

Labor Law § 240 (1) mandates that all building owners and contractors:

> "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists,

> stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) imposes on owners, general contractors, and their agents a nondelegable duty to provide safety devices to protect against height-differential hazards on construction sites, and they will be absolutely liable for any violation that results in injury, regardless of whether they supervised or controlled the work (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-288 [2003]). "Section 240 (1) aims to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015]). "To achieve that goal, the statute imposes absolute liability where the failure to provide proper protection is a proximate cause of a worker's injury" (*id.*).

However, the protections of the statute apply to a narrow class of dangers and Labor Law § 240 (1) "relates only to special hazards presenting elevation-related risks"(*id.*). "Liability may, therefore, 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" (*id.*). "To recover under section 240 (1), the plaintiff must demonstrate that a violation of section 240 (1) proximately caused his or her injury" (*Thorpe v One Page Park, LLC*, 208 AD3d 818, 820 [2d Dept 2022]). "[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Lazo v New York State Thruway Authority*, 204 AD3d 774, 776 [2d Dept 2022]; *quoting Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762 [2d Dept 2006]).

"Although comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law § 240 (1)" (*Mushkudiani v Racanelli Construction Group, Inc.*, 219 AD3d 613, 614-615 [2d Dept 2023]). "A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she (1) had adequate safety devices available, (2) knew both that the safety devices were available and that he or she was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had he or she not made that choice" (*Guaman-Sanango v 57 East 72nd Corp.*, __AD3d__, 2024 NY Slip Op 02305, *1 [2d Dept 2024]; *quoting Iannaccone v United Natural Foods, Inc.*, 219 AD3d 819 [2d Dept 2023]). Furthermore, a plaintiff may be the sole proximate cause if "he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (*Mushkudiani,* 219 AD3d at 615; *Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160 [2d Dept 2020]).

"Although a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1), liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Baugh v New York City Sch. Constr. Auth.*, 140 AD3d 1104, 1105 [2d Dept 2016]). "The Appellate Division, Second department has repeatedly held that a worker's fall from an unsecured safety device, which was caused to sway or move when a person was on it, constitutes a violation of Labor Law § 240 (1)" (*Whitted v One Hudson Yards Owner, LLC*, 73 Misc 3d 1214[A] [Sup Ct, Kings County 2021]; *see Whalen v F.J. Sciame Const. Co., Inc.*, 198 AD2d 501 [2d Dept 1993]; *see also Mejia v African Methodist Episcopal Allen Church,* 271 AD2d 583 [2d Dept 2000]).

Here, plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability under the statute by showing that, although he was provided a ladder to access the base of the suspended scaffold as required by the statute, neither the ladder nor the suspended scaffold were secured so as to prevent plaintiff from falling off the ladder onto the scaffold base. At his deposition, plaintiff testified that he was going down the ladder from the roof to get onto the scaffold, and when he reached the third step from the bottom, the ladder shifted to the right.[12] Additionally, plaintiff stated he did not know if the ladder, scaffold, or both shook but something moved and swayed together with the ladder causing him to fall.[13] Plaintiff further testified that the ladder was not secured to anything and there were no security measures in place and asserted that the scaffold was moving as it was not mounted to the wall.[14] Based on the foregoing testimony, the court finds that plaintiff established his entitlement to judgment as a matter of law by demonstrating that he was injured when the unsecured scaffold and ladder swayed causing him to fall (*Lochan v H & H Sons Home Improvement, Inc.,* 216 AD3d 630, 632 [2d Dept 2023] [finding that plaintiff satisfied his burden on the Labor Law § 240 [1] claim by the submission of his deposition transcript showing that an unsecured ladder slid causing plaintiff to fall while he was standing on the ladder and painting]; *see Blanco v NBC Trust No. 1996A*, 122 AD3d 409, 410 [1st Dept 2014] [holding that plaintiff was entitled to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim as the undisputed evidence established that the A-frame ladder plaintiff was descending to replace light fixtures swayed]; *see also Whalen*, 198 AD2d at 502 [holding that plaintiff's fall from an unsecured ladder that was caused to sway when a person was on it is sufficient to support a finding that defendants failed to provide proper protection as required by Labor Law § 240 (1)]).

As an initial matter, Technico's introduction of the safety inspection checklist and photographs submitted purportedly depicting a properly secured ladder and suspended scaffold are inadmissible. The

[12] Piechowicz EBT tr dtd 6/28/2022 at page 142, lines 14-23.
[13] Piechowicz EBT tr dtd 6/28/2022 at page 143, lines 2-19.
[14] Piechowicz EBT tr dtd 6/28/2022 at page 110, lines 11-14; page 120 lines 10-14.

business record exception to the hearsay rule applies to a writing or record and "a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]; *quoting Citibank, N.A. v Cabrera*, 130 AD3d 861 [2d Dept 2015]). Here, Rykiel testified that the scaffold would be checked by Technico's rigger foreman and the records of such inspection was kept by Technico.[15] The submissions failed to establish the foundation for the admissibility of the safety checklist as a business record exception as neither Technico nor AMP produced Robert Constantinides who allegedly completed the inspection, nor is there any testimony to establish that he had a business duty to prepare a safety checklist or that the checklist was made in the regular course of Technico's or AMP's business (*Vaughn v Westfield, LLC*, 216 AD3d 849, 851 [2d Dept 2023]). As for the photograph allegedly demonstrating that the ladder was properly tied, it is not admissible as Koumas testified that the photograph was taken of one of the 27 buildings, but he did not know which one was captured in the picture and failed to state that it was a fair and accurate depiction of the suspended scaffold plaintiff was utilizing on the date of the accident (*see Rosa v Gordils*, 211 AD3d 1060, 1061 [2d Dept 2022] [holding that photographs were inadmissible as they were not properly authenticated]; *see also People v Price*, 29 NY3d 472 [2017] [holding that a photograph was inadmissible as no witness testified that it was a fair and accurate representation of the scene depicted]).[16]

Despite the inadmissibility of the foregoing, Technico and AMP have raised a triable issue of fact as to whether the plaintiff was recalcitrant in deliberately failing to use available safety devices or whether his actions were the sole proximate case of his injuries (*Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640, 649 [2d Dept 2023]). Rykiel testified that the ladder on the suspended scaffold would be secured by the use of a tie down with the wire or clamps with a special clamp that can clamp to an outrigger.[17] Rykiel further testified that he believed the ladders would stay on the suspended scaffold at the end of the workday and the wires and clamps would be found on the roofs with the ladders and it was the scaffold crew, as well as each employee, who was in charge of tying down or securing the ladders.[18] He further testified that the rigger foreman would inspect the scaffold each morning.[19] Rykiel noted that there is a Department of Buildings (DOB) requirement that two workers are on each hanging scaffold, that it was a two-person job, and that it would be impossible that plaintiff worked alone on the date of the accident.[20]

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[15] Rykiel EBT tr dtd 9/21/2022 at page 114, lines 7-25.
[16] Koumas EBT tr at page 47, lines 2-5.
[17] Rykiel EBT tr dtd 9/21/2022 at page 56, lines 17-24.
[18] Rykiel EBT tr dtd 9/21/2022 at page 56, line 17 to page 58, line 6.
[19] Rykiel EBT tr dtd 9/21/2022 at page 60, lines 13-19.
[20] Rykiel EBT tr dtd 9/21/2022 at page 110, line 11 to page 112, line 5.

Additionally, plaintiff testified that he took the ladder from the roof and placed it on the scaffold, no one was on the scaffold with him, and the ladder was not secured as there were no security measures.[21] Koumas stated that ladders would be secured with a rope, wire, and straps, that the ropes were available on the site, and the individual workers were trained to use those items when using the ladder.[22] Plaintiff further testified that no one was available to help him place the ladder onto the scaffold, that everything was fine after plaintiff put the ladder down, and the ladder felt like it was on firm footing and in a locked position.[23] Technico's expert opines that AMP employees were responsible for placement and securing of their ladders, all of the equipment was appropriate for the intended work, plaintiff had ladders and ropes available to him for use, and was instructed by his employer, AMP, on how to properly utilize this equipment (NYSCEF Doc No. 112 at ¶ 13). It concludes that plaintiff was the sole proximate cause of his accident as he injured his leg while descending the ladder, not from falling from the ladder and the ladder was safe and appropriate for its intended use (*id.* at ¶ 14). Thus, the court finds that Technico and AMP raised triable issues of fact as to whether the plaintiff was a recalcitrant worker thereby precluding summary judgment as to plaintiff's Labor Law § 240 (1) claim (*Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 676 [2d Dept 2021] [holding that functional ladders were available for plaintiff to use and plaintiff did not have express or implied permission to use other defective ladders]; *see also Cioffi v Target Corp.*, 188 AD3d 788, 791-792 [2d Dept 2020]).

Plaintiff seeks summary judgment on his Labor Law § 241 (6) claim while Technico seeks dismissal of plaintiff's claim. "Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers on the premises" (*Venezia v State*, 57 AD3d 522, 522 [2d Dept 2008]). "[T]o establish liability under Labor Law § 241 (6), a [plaintiff] is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command" (*id.*). "Liability under this statute is limited to accidents where the work being performed involves construction, excavation or demolition work" (*Peluso v 69 Tiemann Owners Corp.*, 301 AD2d 360, 360 [1st Dept 2003]).

In his bill of particulars, plaintiff's Labor Law § 241 (6) cause of action is predicated on numerous violations of the Industrial Code. However, plaintiff has abandoned all of the provisions with the exception of Industrial Code §§ 1.21 (b) (4) (i) and 23-5.8 (g) since plaintiff did not address the remaining provisions in his opposition to Technico's motion (*see Rivas v Purvis Holdings, LLC*, 222 AD3d 676, 678 [2d Dept 2023]; *see also Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). Industrial Code § 1.21 (b) (4) (i) provides that

[21] Piechowicz EBT tr dtd 6/28/2022 at page 110, lines 6-14; page 115, line 6 to page 116, line 8.
[22] Koumas EBT tr at page 70, line 14 to page 71, line 25.
[23] Piechowicz EBT tr dtd 6/28/2022 at page 120, lines 2-4; page 136, lines 12-19; page 137, lines 9-19.

> "[a]ny portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise."

Here, the portable extension ladder was not "used as a regular means of access between floors or other levels in any building or other structure," therefore plaintiff's Labor Law 241 (6) claim premised on a violation of Industrial Code § 1.21 (b) (4) (i) is dismissed as the provision is inapplicable to the facts of this case (*see* 12 NYCRR 23-1.21[b][4][i]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 462 [2d Dept 2008] [holding that a ladder used by an injured plaintiff when he attempted to access the roof to apply aluminum was not using a ladder that was a regular means of access between floors or other level in any building or structure for purposes of Industrial Code § 1.21 (b) (4) (i)]; *see also Arigo v Spencer*, 39 AD3d 1143, 1145 [4th Dept 2007] [holding that a ladder used by plaintiff to access a second story roof to install a chimney liner was not used as a regular means of access between floors or levels in a building]; *see also Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 870 [3d Dept 1998] [holding that plaintiff, who was injured when he fell from a stepladder accessed from a scaffold and planks while performing roofing work, did not fall from a stepladder that was being used a regular means of access between floors or other levels in any building or structure]).

Industrial Code § 23-5.8 (g) provides "[t]ie-ins. Every suspended scaffold shall be tied in to the building or other structure at every working level." In support of his motion, plaintiff failed to meet his prima facia burden establishing entitlement to summary judgment on the Labor Law § 241 (6) claim premised on a violation of 12 NYCRR § 23-5.8 (g) (*Saleh v Saratoga Condo.*, 10 AD3d 645 [2d Dept 2004] [holding that plaintiff failed to submit any evidence that the general contractor violated the provision of the Industrial Code requiring a suspended scaffold to be tied at every working level to prevent injuries resulting from swaying and concluding that plaintiff's injury resulted from plaintiff's coworker activating a motor rather than the scaffold swaying]). Although plaintiff testified that the scaffold was moving because it was not mounted to the wall and plaintiff's expert affidavit concluded that had the scaffold been properly tied in, it would not have moved when plaintiff attempted to access it, plaintiff also testified that he did not know what moved and whether the scaffold, ladder, or both shook.[24] Furthermore, plaintiff stated that "[he] did not know what moved" and when asked to describe what the shake was like, plaintiff testified that "[he] cant' describe because [he had] no idea. Something shook."[25]

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[24] Piechowicz EBT tr dtd 6/28/2022 at page 120, lines 10-14; page 143, lines 4-14. NYSCEF Doc No. 85 at ¶ 16.
[25] Piechowicz EBT tr dtd 6/28/2022 at page 143, lines 9-14.

Similarly, Technico failed to meet its burden on its motion to dismiss plaintiff's Labor Law § 241 (6) claim premised on a violation of the Industrial Code 23-5.8 (g) as it failed to submit admissible evidence as to whether the suspended scaffold was tied in to the building or other structure or if plaintiff's accident resulted from something other than the allegedly swaying scaffold.

"Labor Law § 200 is a codification of the common-law duty imposed on property owners, contractors, and their agents to provide construction site workers with a safe place to work" (*Sanchez v BBL Constr. Servs., LLC*, 202 AD3d 847, 849 [2d Dept 2022]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). The manner in which the work was performed is implicated here. As such, "[t]o be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work" (*Hamm v Review Associates*, LLC, 202 AD3d 934, 938 [2d Dept 2022]).

Here, the court finds that Technico met its burden establishing that it did not supervise, direct, or exercise any control over plaintiff's activities, nor did they have any actual or constructive notice of the allegedly dangerous or defective conditions at the premises. In opposition, plaintiff failed to raise a triable issue of fact as plaintiff's testimony that Technico directed that he cannot just go down onto the suspended platform without the use of a ladder, as ordered by the City inspectors,[26] is insufficient to impose liability pursuant to Labor Law § 200 (*Gonzalez v City of New York*, __AD3d__, 2024 NY Slip Op 02801, *3 [2d Dept 2024] [holding that the right to generally supervise the work or to ensure compliance with safety regulations does not amount to the supervision and control of the work necessary to impose liability on a general contractor pursuant to Labor Law § 200]; *see Murphy v 80 Pine, LLC*, 208 AD3d 492, 495-496 [2d Dept 2022] [holding that mere general supervisory authority over the project is insufficient to warrant recovery against the general contractor where they lacked supervision or control to perform the work other than general supervisory authority at the work site]; *see also Saleh*, 10 AD3d at 646 [holding that plaintiff's Labor Law § 200 claim must be dismissed as against the general contractor where the plaintiff was thrown to one side of the scaffold since the general contractor established that it did not supervise or control plaintiff's work]).

"The right to contractual indemnification depends upon the specific language of the contract" (*Crutch v 421 Kent Development, LLC*, 192 AD3d 982, 983 [2d Dept 2021]). "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" (*Selis v Town of North Hempstead*, 213 AD3d 878, 880 [2d Dept

[26] Piechowicz EBT tr dtd 6/28/2022 at page 117, lines 16-25.

2023]). "In addition, 'a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor'" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept 2010], quoting *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Here, the relevant indemnity provisions set forth in the contract include three different provisions, two found in the body of the contract and one as an Exhibit, all of which were signed by Technico and AMP. Article 9, under the heading "Hold Harmless," provides as follows:

> "To the extent permitted by law, the Subcontractor [AMP] shall indemnify, hold harmless and defend Owner, Contractor, Architect, Architect's consultants and agents and employees of any of them from and against all claims, damages, losses, expenses including but not limited to attorney's fees ***arising out of or resulting from the performance of the agreement***, providing any such claim, damage, loss or expense (a) is attribute to bodily injury...(b) is caused in whole or in part by any act or omission of the Subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable pursuant of the performance of the agreement" (NYSCEF Doc No. 109 at 5 [emphasis added]).

In addition, Article 12, under the heading "Indemnification," provides as follows:

> "To the fullest extent permitted by law, the Subcontractor (AMP) shall indemnify and hold harmless the Owner, Contractor (Technico)...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 Subcontractor's [w]ork under this Subcontract...but only to the extent caused by the ***negligent*** acts or omissions of the Subcontractor, the Subcontractor's [s]ub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable..." (*id.* at 7 [emphasis added]).

Lastly, Exhibit 3 to the contract, labeled "Hold Harmless," provides as follows:

> "To the fullest extent permitted by law, the Independent Contractor/Sob-Contractor and their subcontractors shall indemnify and hold harmless TECHNICO CONSTRUCTION SERVICES INC., and Owner from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, ***arising out of or resulting from the performance of the Independent Contractor/Sub-Contractor*** and any of their subcontractors' work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death... regardless of

> whether or not it is caused in part by a party indemnified there under" (*id.* at 28 [emphasis added]).

That branch of Technico's motion seeking summary judgment on its contractual indemnity claim against AMP is granted. As discussed above, Technico has established that it is free from any negligence. Further, it is undisputed that the plaintiff's injuries arose out of AMP's work at the project, thereby triggering, at the very least, two of the three indemnification provisions in the contract. In opposition, AMP failed to raise a triable issue of fact. Although AMP contends that the indemnification provision found under Article 12 requires a finding that AMP is negligent, AMP fails to address the remaining contract provisions in their opposition papers and thus does not provide a basis to find that the provisions do not require it to indemnify Technico for plaintiff's alleged injuries (*see Tkach v City of New York*, 278 AD2d 227, 229 [2d Dept 2000] [finding that indemnification was appropriate since there were two separate and distinct indemnification provisions, one narrower and one broader, and the Supreme Court erred in only interpreting the narrower provision as the broader provision encompassed plaintiff's injury since it arose out of or resulted from the subcontractor's work]). Thus, Technico's cause of action for contractual indemnification is granted.

That branch of Technico's motion for summary judgment on its breach of contract for failure to procure insurance claim is denied as Technico has failed to establish that insurance coverage was not procured in accordance with the parties' contract. The contract provides that the "[t]otal limits of liability, bodily injury and property damage shall not be less than $2,000,000.00 per occurrence, combined bodily injury and property damage" (NYSCEF Doc No. 109 at 6). Technico asserts that AMP breached the contract by failing to procure the appropriate amount of insurance as the Commercial General Liability (CGL) policy issued to AMP under policy number PSS 1800545 provides liability limits of $1,000,000 per occurrence, and $2,000,000 general aggregate, subject to a $10,000 self-insured retention (NYSCEF Doc No. 114 at 1). However, Exhibit C of the contract annexed to the motion states that the insurance requirements for independent contractors/sub-contractors shall be $2,000,000 in the aggregate and $1,000,000 per occurrence limit and must name Technico as an additional insured.

"While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Skrok v Grand Loft Corp.*, 218 AD3d 702, 704 [2d Dept 2023]). "A contract is ambiguous if the terms are susceptible to more than one reasonable interpretation" (*Szklarz v Racer*, __AD3d__, 2024 NY Slip Op 02836, *4 [2d Dept 2024]). Here, the court finds that Technico's motion for summary judgment on its failure to procure insurance as against AMP must be denied as the referenced contract is ambiguous as to the amount of insurance required per occurrence and in the aggregate since two different figures are provided in the same contract (*see EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 189 AD3d 1720, 1723 [3d Dept 2020] [holding

that a question of fact remained if plaintiff was contractually required to procure and maintain coverage for Labor Law liability and whether such failure to procure constituted a breach of contract]).

All arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (mot. seq. no. three) on his Labor Law §§ 240 (1) and 241 (6) claims are denied; and it is further

ORDERED that Technico's motion for summary judgment (mot. seq. no. four) to dismiss plaintiff's Labor Law § 240 (1) claim is denied, that branch of Technico's motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim is granted *except to the extent* that said claim predicated upon Industrial Code section 23-5.8 (g) shall survive, that branch of Technico's motion seeking to dismiss plaintiff's Labor Law § 200 and common law negligence claims is granted and said claims are hereby dismissed; that branch of Technico's motion seeking summary judgment on their third-party claim for contractual indemnification against AMP is granted and AMP shall reimburse Technico for their attorney's fees, in accordance with Article 12 of the contract; and that branch of Technico's motion seeking summary judgment on their third-party claim against AMP for breach of contract for failure to procure insurance is denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice