**Supreme Court of the State of New York**
**County of Kings**

Part LL1

**Index Number 526945/2021**
Seqs. 004, 006, 007

# DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion.

| Papers Numbered | |
|---|---|
| Notice of Motion and Affidavits Annexed | 1–3 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 2–4 |
| Replying Affidavits | 5 |
| Exhibits | Var. |
| Other | |

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DOROTEO RIVERA,

Plaintiff,

against

RS JZ DRIGGS, LLC, FOREMOST CONTRACTING & BUILDING, LLC, CLUNE CONSTRUCTION COMPANY, L.P., ANFIELD INTERIORS, INC., BV NY, INC., BOND VET HOLDINGS, LLC d/b/a BOND VET, BOND VETERINARY, INC. d/b/a BOND VET, AND BOND VET,

Defendants.

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RS JZ DRIGGS, LLC AND FOREMOST CONTRACTING & BUILDING, LLC,

Third-Party Plaintiffs,

against

BV NY INC. AND ANFIELD INTERIORS INC.,

Third-Party Defendants.

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CLUNE CONSTRUCTION COMPANY, L.P.,

Second Third-Party Plaintiffs,

against

ANFIELD INTERIORS INC.,

Second Third-Party Defendants.

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ANFIELD INTERIORS INC.,

Third Third-Party Plaintiffs,

against

KILLEAVY BUILDERS CORP.,

Third Third-Party Defendants.

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RS JZ DRIGGS, LLC,

Fourth Third-Party Plaintiffs,

against

KILLEAVY BUILDERS CORP.,

Fourth Third-Party Defendants.

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Based on the foregoing papers, plaintiff's motion for summary judgment (Seq. 004), defendant RS JZ Driggs (Driggs)'s cross-motion for summary judgment and to amend (Seq. 006), and Driggs' motion for summary judgment on its third-party claims (Seq. 007) are decided as follows:

**Introduction**

Plaintiff commenced this action to recover for damages he claims to have sustained on October 11, 2021, when he fell from a Baker scaffold at a construction site. Driggs owned the premises. Bond Vet (Bond) was the commercial tenant. Bond contracted with Clune Construction Company, L.P. (Clune), to serve as the general contractor for renovation work at the premises. Clune sub-contracted Anfield Interiors Inc. (Anfield) to perform carpentry work. Anfield sub-sub-contracted Killeavy Builders Corp. (Killeavy) to perform interior carpentry work. Killeavy sub-sub-contracted Builders HQ, which employed the plaintiff.

**Factual Background**

The following is undisputed: Plaintiff was working on a Baker scaffold painting and taping the ceiling of the unit under renovation. During the course of his work, the scaffold plaintiff was working on fell over and plaintiff fell to the floor. The scaffold plaintiff was working on had a caster that was mismatched—specifically, the stem of one of the wheels was wrapped in tape and missing a hole for a cotter pin. These facts are supported by photographs contained in the record.

However, the parties dispute what was happening immediately prior to the accident. Plaintiff testified that the wheels were locked and he was working on the ceiling when the scaffold inexplicably fell (Rivera EBT at 62). Defendants offer an incident report, a purported business record of Clune, which contains a statement attributed to plaintiff that he was "surfing" the scaffold prior to his accident. (Defendant contends that surfing is self-propelling a scaffold while the worker is still atop it.) Richard McLaren, Clune's superintendent, authenticated the report and testified that plaintiff made comment about surfing the scaffold to him after the accident (McLaren EBT at 46–49, 193–194).

There is also some dispute about the origins of the scaffold. Plaintiff did not know who provided the scaffold (Rivera EBT at 52). Anfield admits that it provided a scaffold as a "gift" to Killeavy, its sub-contractor, but contends that scaffold had a sticker. No sticker is visible on the subject scaffold in the authenticated photographs.

**Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the

non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

**Labor Law § 240 (1)**

Liability under Labor Law § 240 (1) is "absolute" where a plaintiff is exposed to elevation-related risks and is not provided with adequate safety devices to prevent him from falling (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Driggs, Clune, Bond, and Anfield are statutory defendants under the Labor Law, as each was either an owner, a contractor, or an agent thereof by virtue of their authority over the work, irrespective of whether that authority was exercised or delegated (*see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521 [2d Dept 2008]). Plaintiff's testimony that the "scaffold collapsed without an apparent reason" is sufficient to make a prima facie showing of his entitlement to summary judgment on his Labor Law § 240 (1) claim.[1]

In opposition, defendants argue that plaintiff was the sole proximate cause of his accident because he was surfing the scaffold, and that this behavior was the sole proximate cause of plaintiff's accident. Since the accident report was authenticated as business record and the statement therein was attributed to the plaintiff, defendants have tendered sufficient evidence to raise an issue of fact as to whether plaintiff was surfing the scaffold prior to his accident (*see Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]). Mr. McLaren also testified that the plaintiff

[1] Plaintiff also offers an affidavit from Julio Ventura, a purported co-worker. Defendants object to this affidavit as not timely disclosed. However, this affidavit is not necessary for plaintiff to make out his prima facie case, and therefore the court need not consider either the affidavit or its admissibility here.

told him that plaintiff was surfing the scaffold immediately prior to the accident (McLaren EBT at 47). Mr. McLaren further testified that the plaintiff was instructed in safety trainings not to self-propel Baker scaffolds (*id.* at 164).

A plaintiff is not ordinarily required to state how a scaffold failed in order recover under Labor Law § 240 (1) (*see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]). However here, despite the evidence of a statutory violation in the form of the mismatched caster, ambiguities in plaintiff's testimony leave open a question of fact as to whether the statutory violation was a proximate cause of his accident. Defendants also provide an alternative account of how the accident occurred in which they contend that the plaintiff was the sole proximate cause of the accident. This contention is based on a statement against interest allegedly made by the plaintiff and memorialized in an authenticated accident report. Under these circumstances, there are outstanding questions of fact as to proximate cause which warrant denial of plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim.

**Labor Law § 241 (6)**

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In support of his claim, plaintiff alleges violations of 12 NYCRR 23-5.1 (b) (scaffold footings or anchorage) and 5.18 (e) and (g) (adequacy of casters and scaffold footing).

Plaintiff contends that the caster with a taped stem was an inadequate footing and violated these two Industrial Code provisions. In opposition, and in support of its own motion, Driggs argues the scaffold fell over because plaintiff was self-propelling the scaffold and the

lateral application of force caused the scaffold to tip. As explained above, plaintiff has not demonstrated as a matter of law that the caster caused his scaffold to fall. Additionally, defendants have presented an alternative account of plaintiff's accident where a statutory violation was not the proximate cause of plaintiff's accident. Therefore, both parties' motions for summary judgment are denied as to plaintiff's Labor Law § 241 (6) claim due to outstanding material questions of fact.

**Labor Law § 200**

In his opposition papers, the plaintiff withdrew his Labor Law § 200 claim against Driggs; therefore, this portion of plaintiff's motion is denied as moot.

**Contractual Indemnification**

The right to contractual indemnification is established by the "specific language of the contract" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722 [2d Dept 2011]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). "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" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]; *see also* General Obligations Law § 5-322.1).

It is undisputed that Driggs has a commercial lease with Bond which contains an indemnification provision in favor of Driggs. Bond has a construction agreement with Clune which contains an "arising out of" indemnification provision in favor of, *inter alia*, the owner (here, Driggs). Finally, Clune's sub-contract with Anfield contains an indemnification provision in favor of, *inter alia*, Clune, Bond, and Driggs, which is triggered by the "negligent acts or

omissions of the Subcontractor, anyone directly or indirectly employed by the subcontractor or anyone for whose acts Subcontractor may be liable."

Plaintiff withdrew his Labor Law § 200 claim against Driggs. There is no evidence that Driggs had authority over the work plaintiff was performing, and no party alleges that Driggs provided the subject scaffold. Since any liability that accrues to Driggs' under Labor Law § 241 (6) is wholly passive, Drigg's motion for summary judgment on its claims for contractual indemnification is granted.

**Amendment**

Pursuant to Justice Rothenberg's prior order resolving motion sequence 001, all claims against Foremost Contracting & Building, LLC (Foremost) were dismissed with prejudice. Therefore, Driggs' motion to amend the caption to remove Foremost is granted, and the primary caption shall now read:

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DOROTEO RIVERA,

Plaintiff,

against

RS JZ DRIGGS, LLC, CLUNE CONSTRUCTION COMPANY, L.P., ANFIELD INTERIORS, INC., BV NY, INC., BOND VET HOLDINGS, LLC d/b/a BOND VET, BOND VETERINARY, INC. d/b/a BOND VET, AND BOND VET,

Defendants.

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**Conclusion**

Plaintiff's motion for summary judgment (Seq. 004) is denied.

Defendant Drigg's motions (Seq. 006, 007) are granted as to its claims for contractual indemnification and amendment, denied as moot as to plaintiff's Labor Law § 200 claims, and otherwise denied.

This constitutes the decision and order of the court.

October 25, 2024
**DATE**

**DEVIN P. COHEN**
Justice of the Supreme Court