Bingbo Liang v W & L Group Constr. Inc.
2024 NY Slip Op 34188(U)
November 20, 2024
Supreme Court, Kings County
Docket Number: Index No. 520504/2020
Judge: Heela D. Capell
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At an IAS Term, Part 19 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 20th day of November, 2024.

P R E S E N T:
HON. HEELA D. CAPELL,
Justice.

----------X

BINGBO LIANG,

Plaintiff,

-against-

W & L GROUP CONSTRUCTION INC., LKH 23RD, LLC, 154 EAST 23, LLC, 150 EAST 23RD ST. CONDOMINIUM A/K/A CELESTE CONDOMINIUM, AND FRONT WAVE CONSTRUCTION, INC.,

Defendants.

----------X

LKH 23RD, LLC AND 154 EAST 23, LLC,

Third-Party Plaintiffs,

-against-

G&Y MAINTENANCE CORP.,

Third-Party Defendant.

----------X

FRONT WAVE CONSTRUCTION, INC.,

Second Third-Party Plaintiff,

-against-

G&Y MAINTENANCE CORP.,

Second Third-Party Defendant.

----------X

Index No. 520504/2020

DECISION AND ORDER

Mot. Seq. Nos. 1, 4, 5

----------X
FRONT WAVE CONSTRUCTION, INC.,

Third Third-Party Plaintiff,

-against-

W & L GROUP CONSTRUCTION INC.,

Third Third-Party Defendant.
----------X
LKH 23RD, LLC AND 154 EAST 23, LLC,

Fourth Third-Party Plaintiffs,

-against-

W & L GROUP CONSTRUCTION INC.,

Fourth Third-Party Defendant.
----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Cross Motion, Affirmations, Memoranda of Law, and Exhibits Annexed	68-87, 89, 122-126, 128-143, 152-153
Affirmations in Opposition and Exhibits Annexed	150-151, 154-158, 160-162, 164-167, 169-187, 194-201, 203-205, 209-210
Reply Affirmations	188-193, 206-208, 211-216

Upon the foregoing papers, plaintiff Bingbo Liang ("plaintiff") moves (in motion [mot.] sequence [seq.] one) for an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability under Labor Law § 240 (1) against defendants, Front Wave Construction, Inc. ("Front Wave"), LKH 23rd, LLC ("LKH") and 154 East 23, LLC ("154 East").

Defendant/Third Third-Party Defendant/Fourth Third-Party Defendant W&L Group Construction Inc. ("W & L") cross-moves (in mot. seq. four) for an order, (1) pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) dismissing plaintiff's complaint, Third

Third-Party plaintiff's Complaint, Fourth Third-Party plaintiff's complaint, and any pending cross-claims against it or in the alternative, (2) for an order, pursuant to CPLR 3211(c) and 3212(c), converting the motion to a motion for summary judgment and granting summary judgment dismissing the case against it or in the alternative, (3) extending its time to answer the Complaint, Third Third-Party Complaint and Fourth Fourth-Party Complaint.

Defendants/Third-Party Plaintiffs/Fourth Third-Party Plaintiffs LKH and 154 East cross-move (in mot. seq. five) for an order, pursuant to CPLR 3212, (1) dismissing Plaintiff's Labor Law §§ 200, 240 (1), 241 (6) and common law negligence claims, (2) granting summary judgment on LKH's and 154 East's breach of contract, contractual and common law indemnification and contribution claims against Front Wave and Third-Party Defendant G & Y Maintenance Corp. ("G & Y"), (3) dismissing Front Wave's and G & Y's cross-claims for common law and contractual indemnification and contribution and G & Y's breach of contract claim.

Background and Procedural History

Plaintiff, a laborer employed by G & Y, commenced this action for personal injuries sustained as a result of a June 30, 2022 accident wherein plaintiff fell from an unsecured extension ladder during the course of construction taking place inside a new condominium being built at 150 East 23rd Street, New York, New York (the "Premises"). At the time of his accident, plaintiff was installing HVAC ducts in the ceiling of the first floor of the Premises. The Premises was owned by LKH and 154 East.

By contract dated January 15, 2015, LKH and 154 East retained W & L as a contractor to construct the Premises (the "General Contractor Agreement"). On June 17, 2017, W & L subcontracted with G & Y to perform HVAC work at the Premises (the "Subcontract"). One week prior to plaintiff's accident, on June 24, 2020, W & L allegedly assigned the General Contractor Agreement to Front Wave (the "General Contractor Agreement Assignment"), however, there is a dispute between the parties as to whether the Subcontract was assigned to Front Wave prior to plaintiff's accident. While Front Wave entered into its own agreement with G & Y dated June 24, 2020, (the "Second Subcontract"), G& Y contends that it was not executed until 2022, after plaintiff's accident.

The Pretrial Testimony

Plaintiff

Plaintiff testified through a Mandarin interpreter that on the day of the accident, he was employed installing HVAC systems for G & Y at the Premises. Hui Wen Shan ("Shan"), G & Y's foreman, was the only other G & Y employee who worked with plaintiff that day. That morning, plaintiff and Shan used an extension ladder belonging to another on-site company to work on the HVAC ducts in the ceiling. Plaintiff testified that G & Y had a ladder onsite, but that it was located in the basement and, in any event, was not tall enough for this work. Plaintiff did not know how high the ceilings were but testified that he had to work at a height of over ten feet. Plaintiff testified that he moved the extension ladder against the wall by himself. Plaintiff inspected the ladder and noticed that it was very old – the color faded over time and both rubber feet were missing because they had worn off. Plaintiff testified that although the ladder was old, it felt sturdy, but he had never

used this ladder before. Further, the ground on this floor was concrete and plaintiff did not notice any debris, liquid or anything else on the ground in the area where the ladder was set up (Plaintiff's June 1, 2022 EBT at 99), except for a layer of concrete dust covering the area (Plaintiff's aff para 12).

Plaintiff testified that he was standing and working on the ladder from 11:00 am until around 12:00 pm when the accident occurred; he had been up on the ladder and did not come down during that time. For most of this time, Shan held the ladder and handed plaintiff equipment and pieces of duct to affix to the ceiling. Plaintiff stood on the second rung from the top, and when he needed to reach something that Shan passed to him, he stepped down a few rungs before stepping back up.

Just before plaintiff fell, his left foot was on second rung of the ladder with his right foot about to step down. As he was stepping down, he realized that Shan was no longer holding the ladder but did not have time to react before he fell. Plaintiff testified that he did not feel the ladder move or shake as he fell. At the time of his fall, plaintiff held on to the ladder with one hand and held a grinder tool with the other hand. Plaintiff testified at his June 1, 2022 deposition that the ladder fell backwards.

At that time of his fall, plaintiff was wearing a helmet, which was the only piece of safety equipment that G & Y provided him. Plaintiff testified that G & Y did not provide a safety belt or harness and that he did not have his own. Plaintiff asked Shan and/or the "boss" for a safety harness before starting to work onsite, but they responded "[w]ait until the boss deliver [sic] it." (Plaintiff's June 1, 2022 EBT at 113). Plaintiff also did not see any tie off points at this job site.

When asked if he could have used a scaffold, plaintiff responded "what is scaffolding, scaffold?" (*id.* at 87). Later in the deposition, plaintiff testified that in normal practice, they would have a "platform" to reach a higher place, but his company did not do that at this job site, though they did at other sites (*id.* at 118-119). He testified that there was previously one present, but after a government official in a uniform came to inspect, it was taken down, but he did not know the reason why (*id.* at 119-120).

At his second deposition held on June 10, 2022, plaintiff testified that he was on the ladder, on the second step from the top, about 10-15 feet off the ground, and that the feet of the ladder, when the ladder was leaning against the wall, were about one meter away from the wall. Plaintiff also corrected his earlier testimony and testified that he did not fall backwards but that he fell forward (*see* Plaintiff's June 10, 2022 EBT at 24). Plaintiff testified that when he fell, the ladder slipped down, and that it did not fall backwards (*id.* at 24). Plaintiff, in further unclear testimony, testified that before stepping down, he did not look to see if Shan was holding the ladder because Shan had always been holding the ladder. Also, while plaintiff was working that morning, he heard Shan, however, when plaintiff started walking down, just before he fell, Shan had let go of his hand (*id.* at 97).

LKH and 154 East

Kent Yee Cheng (Cheng), LKH and 154 East's member and manager, testified that he was the day-to-day manager of the project. Cheng testified that while the General Contractor Agreement was assigned from W & L to Front Wave, he understood that W & L was in charge of overall safety at the project because W & L had a site supervisor and project manager on site. Cheng testified that the site supervisor was initially Sean Liu but

at the time of the incident, he was replaced by Andy Liu, who Cheng testified was W & L's and Front Wave's project manager (Cheng's EBT at 50). Cheng did not know whether Andy Liu worked for Front Wave, W & L or for both. At the time of the accident, Andy Liu was still on the project. When asked who he worked with as the project manager for Front Wave, Cheng replied that "Andy's kind of filling the shoes for both. By the time he took over, as I said, the project was really winding down. And so he has been, I guess, doing both roles" (*id.* at 65).

Cheng testified that he was on site approximately once a week in 2020, that he walked the site with the "GC," and that when he saw an unsafe condition at the site, he would point it out, although he was not an expert in construction (*id.* at 69). Cheng testified that he did not know what work was being performed on the day of the accident.

G & Y

Shan testified that he was with plaintiff on the day of the incident from the time they started working until the time of the accident, and that they were the only two workers present at that time. Contrary to plaintiff's testimony, Shan testified that at the time of the accident, he did not observe plaintiff working, that plaintiff climbed up the ladder himself, and that he did not see plaintiff fall or how he fell (*see* Shan EBT at 19). Shan heard a sound and did not believe plaintiff was on the ladder too long before he fell. Later when Shan asked plaintiff, plaintiff told Shan that the ladder was not very stable (*id.*). The ladder plaintiff used was on the first floor that day and was raised up by Shan and plaintiff. Shan did not recall who the ladder belonged to but said that G & Y had many different sized ladders, including A-frame ladders, on site, but did not remember if there were any others

located on the first floor. Shan did not recall whether there were any scaffolds on the first floor at the time they chose the ladder (*id.* at 25).

When he and plaintiff set up the ladder, they set it up with the feet at a 45-degree angle to the wall. After they set up the ladder, they made sure it was stable, and then Shan went to cut up the connectors. A short time later, plaintiff fell. Shan did not see plaintiff climb up the ladder. Shan believed the ladder was in good condition and that the rubber feet on the bottom were "okay" (*id.* at 27). When asked about procedure for using a ladder, Shan testified that if it was not a very tall area then they do not have to hold the ladder; here, since the ladder was only eight feet, Shan turned around and worked on something else himself (*id.* at 28). Shan testified that he did not hold the ladder for plaintiff because he did not know that plaintiff actually climbed the ladder. Shan last saw plaintiff about one to two minutes before he fell.

Shan did not recall hearing from Jin Lau ("Lau"), G & Y's president, not to use ladders from other tradesmen. Shan was plaintiff's boss on the site that day and did not instruct plaintiff to refrain from using the ladder. Shan believed that Andy Liu was the site manager at the time but was not sure whether he was present that day. Shan testified that there was nothing securing the ladder to the wall to prevent it from falling at the time that plaintiff was using it. The ladder was just leaning against the wall.

Lau, G & Y's president, testified that G & Y did not own extension or leaning ladders but provided six feet tall A-frame ladders. G & Y also had scaffolds for interior use if work was performed at an elevation higher than six feet. Lau testified that at the beginning of the project, at safety training, G & Y told workers not to use other trades'

ladders. Lau testified that for work higher than six feet, G & Y workers were supposed to use a scaffold. However, Lau also testified that he did not recall seeing G & Y scaffolds onsite when he was present.

Front Wave

Amy Wang ("Wang"), Front Wave's president, testified that on the day of plaintiff's accident, she received a telephone call from Andy Liu, who was employed by W & L as the site supervisor, informing her that a worker fell off a ladder. Wang did not know if W & L had other paid employees on the Premises besides Andy Liu. Wang testified that while Andy Liu was not Front Wave's employee, and she was unsure of his duties, she usually dealt with him as the site supervisor and believed that he communicated with all the subcontractors. Wang testified that Andy Liu "kind of stayed behind" on the Premises because she "needed someone to follow up with if [she had] any question" (Amy Wang deposition at 26-27).

Wang testified that Front Wave was the general contractor that day. Wang asked the site safety manager, Julio Gomez ("Gomez"), employed by BKK Safety, about the accident, but Gomez did not observe it. Wang did not know who hired BKK Safety, but it was not Front Wave.

Wang testified that she did not visit the Premises in June 2020. As president, Wang supervised the timeline of the job, communicated with different contractors, and mostly did paperwork for the job. Wang further testified that Front Wave received a Department of Buildings (DOB) violation relating to the fall from the ladder on June 30, 2020. The DOB also issued a partial stop work order and prepared a report, which noted that at the

time of plaintiff's accident, he was working on a duct approximately 18 feet high while standing on an unsecured ladder.

(1)

Plaintiff's Partial Summary Judgment Motion - Labor Law § 240(1)

Plaintiff moves for partial summary judgment as to liability under Labor Law § 240 (1) against Front Wave, LKH and 154 East.

Parties' Contentions

Plaintiff contends that he is entitled to summary judgment under Labor Law § 240 (1) because Front Wave, as contractor, and LKH and 154 East, as owners, violated their non-delegable duty to provide him with adequate protection while he was on an unsecured ladder performing HVAC duct work, a job which involved a significant elevation differential. Plaintiff argues that he is entitled to summary judgment even though there are some differences in versions of events as testified to by plaintiff and Shan, because the essential facts are that plaintiff was on an unsecured ladder without safety protections. Plaintiff further contends that defendants cannot establish that he was a recalcitrant worker, as there is no testimony that there was a scaffold in the vicinity or that he refused to use it.

In support of his motion, plaintiff submits his affidavit, photos of the Premises, the accident investigation report, DOB records, and the Cheng, Wang, Lau and Shan deposition transcripts. Plaintiff does not attach his deposition transcript to his motion. In his affidavit in support of his motion, however, plaintiff states that there were no scaffolds present on the ground floor. Plaintiff states that the floor was composed of smooth concrete but was entirely covered by a thin layer of construction dust, including the area where he placed

the ladder. Plaintiff states that he used another trade's ladder, which appeared old, and the rubber feet had worn off. Plaintiff states that he worked with Shan, who held the ladder as he passed plaintiff tools. At some point just prior to his accident, as he stepped down, plaintiff saw that Shan was no longer holding the ladder and noticed him a few feet away. Plaintiff states that before he could ask Shan to come back and secure the ladder, the feet of the ladder slid away from the wall and plaintiff fell face down with the ladder. Plaintiff further states that he was not provided a safety harness or lanyard to prevent his fall and that there were no tie-off points of note.

In opposition, LKH and 154 East contend that plaintiff's motion should be denied because the only evidence to support a Labor Law § 240 (1) violation is plaintiff's non-credible testimony and affidavit, and because the evidence establishes that plaintiff was a recalcitrant worker. LKH and 154 East argue that there is a material contradiction between plaintiff's deposition and his affidavit. They contend that plainitff's affidavit states that the ladder slipped away from the wall as his right foot was stepping down and his left foot was on the second rung from the top of the ladder, while in his deposition, plaintiff testified that he did not feel the ladder move of shake as he stepped down. LKH and 154 East further point out inconsistencies between plaintiff's and Shan's testimony in that Shan testified that the ladder was in good condition while plaintiff testified that it was worn and old.

In its opposition, Front Wave contends that plaintiff's motion should be denied because he was the sole proximate cause of his accident. To that end, Front Wave argues that the testimony establishes there was nothing wrong with the ladder plaintiff was using, as Shen inspected it prior to plaintiff using it and testified that the rubber footings were in

good condition. Front Wave also contends that plaintiff was a recalcitrant worker and that his affidavit is an attempt to recant unfavorable earlier testimony. In that regard, plaintiff testified that there were other G & Y ladders in the basement that he could have used at the height that he needed, and further, Lau testified that at that height, a scaffold should have been used. Front Wave further highlights Lau's testimony that G & Y workers were trained in how to build a scaffold. Finally, Front Wave contends that plaintiff's affidavit should be disregarded because it is self-serving, conclusory, and contradicts his prior deposition testimony.

W & L submits opposition to plaintiff's motion, contending that any finding of fact or conclusion of law made as a result of the motion should not apply to it because W & L did not appear in the case at the time the motion was filed, and currently has a pending motion to dismiss all claims against it.

In reply, plaintiff argues that defendants cannot identify a specific ladder in a specific location that the plaintiff was told to use and for some reason did not. Plaintiff also argues that no defendant produced evidence of a safety device that was present that plaintiff should have used but did not.

Discussion

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 factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]).

Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 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; *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 North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

"Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*Lochan v H & H Sons Home Improvement, Inc.*, 216 AD3d 630 [2d Dept 2023] [internal quotation marks omitted]). "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 N.Y. & N.J.*, 29 NY3d 27, 33 [2017] quoting Labor Law § 240[1]). "In other words, Labor Law § 240 (1) was designed to prevent those types

of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "[T]he 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*id.*).

An injured laborer must have been engaged in one of the statute's enumerated activities to avail himself of its protections and the focus is on the type of work the plaintiff was performing at the time of the injury (*see Joblon v Solow*, 91 NY2d 457, 465 [1998]). "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], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "[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 East 83rd Street Owners Corp.*, 217 AD3d 875, 878 [2d Dept 2023]).

In the instant matter, plaintiff has met his prima facie burden of demonstrating entitlement to summary judgment as a matter of law by submitting his affidavit in which he has demonstrated that he was working on a ladder installing ducts on the ceiling of the Premises and was therefore subject to an "elevation-related risk;" the ladder was unsecured, with no safety harnesses or tie-off points to secure it; that there was no scaffold available

on the first floor, that he was not prevented from falling, and was injured as a result of the fall (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993]; *Panfilow*, 217 AD3d at 878; *Alvarez v Yingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]; *Kozlowski v Ripin*, 60 AD3d 638, 638-639 [2d Dept 2009]).

While a fall from a ladder, in and of itself, is not sufficient to impose liability under Labor Law § 240 (1) (*see Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037, 1038 [2022]), here, plaintiff's assertion that the ladder was old with the rubber feet worn off, and that it needed to be held by Shan in order for it to be securely used is evidence that the ladder may have been defective *or* inadequately secured, which was a substantial factor in causing plaintiff's injuries (*see Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; *Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2d Dept 2012]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461 [2d Dept 2008]). "[T]here is no requirement that plaintiff identify exactly what caused the ladder to move, or his fall" (*Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 504 [1st Dept 2021]). Even if the ladder collapsed or malfunctioned for no apparent reason, courts have applied a presumption that the ladder was not good enough to afford proper protection (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289 n. 8 [2003]; *Panek v County of Albany*, 99 NY2d 452, 458 [2003]).

In opposition, LKH, 154 East and Front Wave failed to raise a triable issue of fact. While these defendants contend that the allegations in plaintiff's affidavit differ slightly from his deposition testimony, and that plaintiff's allegation that Shan was holding the ladder up until just before his fall differs from Shan's testimony that he did not hold the

ladder for plaintiff, those inconsistencies are immaterial. Plaintiff's affidavit does not differ materially from his deposition transcript, which was held through an interpreter and may account for any inconsistencies. "Regardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where, as here, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide protection as mandated by the statute" (*Poulin v Ultimate Homes, Inc.*, 166 AD3d 667 [2d Dept 2018]). It is uncontested plaintiff used the ladder without any additional safety devices being provided to him, such as a harness or a tie off point to prevent him from falling. Further, there is no evidence that a scaffold or a safer A-frame ladder was available for plaintiff's use. While Lau testified that G & Y workers were instructed not to use other trade's ladders, Lau conceded that G & Y only had six-foot tall A-frame ladders onsite, which were not tall enough to perform plaintiff's duties at the time of the accident. Further, while Lau testified that G & Y had scaffolds for work to be performed over six feet, Lau also testified that he did not recall seeing any G & Y scaffolds onsite when he was present. Both plaintiff and Shan testified that they did not recall scaffolds being present on the first floor.

There is also no evidence that plaintiff was a recalcitrant worker or that he was the sole proximate cause of the accident. "To establish, prima facie, that a plaintiff was the sole proximate cause of an accident, a defendant has to establish that the plaintiff misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available" (*Lochan*, 216 AD3d at 633). Defendants have not submitted any evidence that he misused the ladder or that there was a scaffold or a better ladder available to him.

Defendants have also not submitted any evidence that plaintiff was provided with a harness or other safety device that he either misused or failed to use. "The recalcitrant worker defense 'has no application where . . . no adequate safety devices were provided'" (*id.* quoting *Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]).

In sum, regardless of the precise manner in which the accident occurred, LKH, 154 East and Front Wave remain liable where plaintiff's injuries are at least partially attributable to their failure to provide protection mandated by Labor Law § 240 (1) (*see Poulin*, 166 AD3d AT 670). Since plaintiff's job that day was to work on the HVAC ducts in the ceiling, LKH, 154 East and Front Wave had a duty to provide him proper protection and equipment to do so safely (*see Canas*, 99 AD3d at 963). Plaintiff was only provided with an unsecured ladder and no other safety devices. Accordingly, plaintiff's motion for partial summary judgment on liability on his Labor Law § 240 (1) claims against LKH, 154 East and Front Wave is granted.

(2)

LKH and 154 East's Summary Judgment Motion

Initially, as the court has granted plaintiff's motion for partial summary judgment against LKH and 154 East on his Labor Law § 240 (1) claim, that portion of LKH and 154 East's motion seeking summary judgment as to this cause of action is denied.

Labor Law § 241(6)

LKH and 154 East contend that they are entitled to summary judgment on the Labor Law § 241 (6) claim because the Industrial Code violations that plaintiff alleges were

violated – Department of Labor Regulations (12 NYCRR) §§ 23-1.21 (b) (3) (i), (ii) and (iv) and 23-1.21 (b) (4) (ii), (iv) and (v) – are either too general to support a claim as a matter of law or are patently inapplicable as a matter of law. In opposition, plaintiff argues that there is evidence to support those contentions and therefore questions of fact preclude summary judgment.

Discussion

"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 Authority of New York and New Jersey*, 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" (*Aragona v State*, 147 AD3d 808, 809 [2d Dept 2017]).

12 NYCRR § 23-1.21 (b) (3) requires, in pertinent part, that "[a]ll ladders . . . be maintained in good condition" and that "[a] ladder shall not be used if . . . (i) . . . it has a broken member or part[,] (ii) . . . it has any insecure joints between members or parts[,] [or] . . . (iv) . . . it has any flaw or defect of material that my cause ladder failure" (12 NYCRR § 23-1.21[b][3]). Here, LKH and 154 East failed to meet their burden of demonstrating entitlement to summary judgment as a matter of law. Plaintiff testified at his deposition and stated in his affidavit that the ladder appeared old and that the rubber feet on the ladder had worn off while Shan testified that the footings were in good condition.

Further, there are questions about the ladder's stability in that, while the amount of time that Shan held the ladder is contradicted, the fact that at some point he did hold the ladder is not. Moreover, neither party submits any expert opinion regarding the safety or security of the ladder, thus, LKH and 154 East have failed to rule out the applicability of this Industrial Code section.

12 NYCRR § 23-1.21(b) (4) (ii) requires that "[a]ll ladder footings shall be firm" and that "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." 12 NYCRR § 23-1.21 (b) (4) (v) requires that "[t]he upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder." LKH and 154 East failed to meet their burden of proof as to these Industrial Code sections because plaintiff assertion that there was a thin layer of construction dust on the concrete floor creates a question of fact as to whether the surface upon which the ladder sat was slippery. There is also no dispute that the upper end of the ladder was not secured.

12 NYCRR § 23-1.21 (b) (4) (iv) requires that "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used." Here, LKH and 154 East failed to meet their

burden of proof as to this Industrial Code Section because there is no question that the ladder was unsecured, as well as the conflicting testimony regarding whether Shan was holding the ladder at the time that plaintiff fell.

Accordingly, that portion of LKH and 154 East's motion for summary judgment on the Labor Law § 241(6) claim is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Labor Law § 200 and Common Law Negligence Claims

LKH and 154 East contend that the Labor Law § 200 and common law negligence claims against them must be dismissed because plaintiff only received instructions regarding how to do his work from Shan, and because LKH and 154 East did not supervise plaintiff and did not have any workers in the area where plaintiff's accident occurred. In opposition, plaintiff maintains the ladder was placed on a slippery floor with construction dust on it, which constituted a dangerous condition, and therefore, LKH and 154 East must demonstrate that they did not have actual or constructive notice of the dangerous condition on the floor. In reply, LKH and 154 East assert that the incident arose out of the means and methods of plaintiff's work rather than a dangerous condition on the premises.

Discussion

"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" (*Paniflow*, 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 Construction Group, Inc.*, 219 AD2d 613 [2d Dept 2023]; *Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]). However, that duty "does not extend to hazards which are part of or inherent in the very work which the employee is to perform" and there is no duty "to secure the safety of an employee against a condition, or even defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age, intelligence and experience of the employee" (*Monahan v New York City Dept. of Educ.*, 47 AD3d 690, 691 [2d Dept 2008]; *see Gaspar v Ford Motor Co.*, 13 NY2d 104, 110 [1963]).

Here, contrary to plaintiff's contention, the allegations involve the manner of the work performed – i.e., whether plaintiff should have been using the extension ladder as opposed to a taller A-frame ladder or a scaffold, and whether plaintiff was provided adequate security equipment (*see Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1060-61 [2d Dept 2015] [allegation that laborer was injured when the foot of

an unsecured A-frame ladder twisted out from under him involved the manner in which the work was performed for the purposes of Labor Law § 200]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008] [allegations that laborer who fell from unsecured ladder when it slipped out from underneath him involved the manner in which the work was performed]). LKH and 154 East established that they did not have the authority to supervise or control the means and methods of the work. Plaintiff testified that Shan from G & Y supervised him and that he received his instructions from Shan. There is no evidence that Cheng or any other employee of LKH or 154 East was present and had supervisory authority over plaintiff. In opposition, plaintiff does not dispute that LKH and 154 East did not have supervisory authority over him or control over the means and methods of the work, and therefore has failed to raise a question of fact. As a result, that portion of LKH and 154 East's motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims is granted.

(3)

The Third-Party Claims

LKH and 154 East contend (in mot. seq. five), that they are entitled to summary judgment on their cross-claims for contractual and common law indemnification and contribution, as well as their cross-claims for breach of contract for failing to procure insurance.

Contractual Indemnification

LKH and 154 East assert that they are entitled to contractual indemnification from Front Wave because their contract with W & L was assigned to Front Wave prior to

plaintiff's accident, and contained the scope of the work that would be indemnified under the agreement. LKH and 154 East further argue that Front Wave subcontracted with G & Y and that Front Wave remained fully responsible for the supervision and direction of all work. LKH and 154 East maintain that they are entitled to contractual indemnification from G & Y because the subcontract agreement required G & Y to defend, indemnify and hold harmless LKH and 154 East.

Front Wave, in opposition, argues that its carrier has already agreed to defend LKH subject to a reservation of right, but that their carrier denied coverage to 154 East because it did not qualify as an additional insured pursuant to Front Wave's general liability policy. In reply, LKH and 154 East contend that 154 East is an intended beneficiary of the Front Wave contract and is entitled to indemnification.

G & Y, in opposition, argues that that there was no contract at the time of plaintiff's accident because the General Contractor Agreement Assignment was not yet in existence at the time of plaintiff's accident. In reply, LKH and 154 East contend that G & Y's position is unsupported by either the facts or law.

Discussion

"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, the General Contractor Agreement between LKH and W & L provides, in pertinent part:

> "3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable bodily injury, sickness, disease or death . . . *but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, 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 causes in party by a party indemnified hereunder" (emphasis added).

The Assignment of Construction Contract between W & L, Front Wave and LKH states, in pertinent part:

> "9. Indemnification. . . . Assignee [Front Wave] shall defend, indemnify and hold harmless Owner . . . from and against claims, damages, losses and expenses . . . arising out of and resulting from the performance of Assignee's or Assignee's subcontractors' work . . . provided that such claim, damage, loss or expense is attributable bodily injury, sickness, disease or death . . . *caused in whole or in part by the acts or omissions of the Assignor, Assignee or any of Assignor and/or Assignee's subcontractors*, or anyone directly or indirectly employed by any of them" (emphasis added).

The Second Subcontract between Front Wave and G & Y states, in pertinent part:

> "4.7.1 To the fullest extent permitted by law, the Subcontractor (G & Y) shall indemnify and hold harmless the Owner, Contractor . . . and agents and employees of any of them 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 Work under this Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death . . . . *but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them,* or anyone for whose acts they may be liable, 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, LKH, the owner, is to be indemnified to the extent of any alleged negligent acts or omissions by W & L, the contractor and Front Wave as the assignee contractor, or G & Y, the subcontractor, during performance of its work. At this juncture, however, Front Wave's and G & Y's negligence (or lack thereof) has not been established, nor has LKH shown itself to be free from negligence. Accordingly, LKH has not demonstrated, prima facie, their entitlement to summary judgment on their third-party claim against Front Wave and G & Y for contractual indemnification.

Further, 154 East has not eliminated all issues of fact as to whether it is entitled to contractual indemnification. While 154 East submits a March 19, 2015 Joint Development Agreement between itself and LKH for the proposition that they were co-owners of the Premises, 154 East was not a contracting party to any of the above agreements. None of the agreements mention 154 East and 154 East was not a signatory to the agreements. Given the rule that contracts must be strictly construed, 154 East has not met its burden on the contractual indemnification claim.

Additionally, with respect to G & Y, movants LKH and 154 East have failed to eliminate all questions of fact as to whether that assignment of the subcontract was in

existence at the time of plaintiff's accident. G & Y's Gin Lau submits an affirmation stating that there was no signed contract in effect between G & Y and Front Wave on the date of plaintiff's accident, June 30, 2020, and that he did not sign the agreement until May 5, 2021. Lau states that while Amy Wang signed on behalf of Front Wave, he never countersigned the rider until after plaintiff's accident. "[A]n . . . agreement executed by a party after the plaintiff's accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date" (*Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 912 [2d Dept 2010]). Here, there is no evidence the agreement was executed prior to plaintiff's accident or that the parties intended it to apply as of that date. Accordingly, LKH and 154 East's motion for summary judgment on its contractual indemnification cross-claims is denied.

Common-Law Indemnification

LKH and 154 East contend that they are entitled to common law indemnification from G & Y because G & Y was responsible for providing plaintiff with all the necessary equipment to complete his work. LKH and 154 East argue that they are entitled to common law indemnification from Front Wave because it accepted sole responsibility and had control over the construction means and methods.

In opposition, G & Y contends that LKH and 154 East have not established that plaintiff sustained a grave injury which is a prerequisite for recovery against an employer for common law indemnification and contribution. Front Wave, in opposition, argues that

summary judgment as to common law indemnification is premature as Front Wave has not been found negligent.

Discussion

"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, Front Wave's negligence, if any, has not yet been determined. Nor have LKH and 154 East shown that Front Wave had the authority to supervise plaintiff's work. Further, although proof that plaintiff sustained a "grave injury" within the meaning of the Workers' Compensation Law would permit LKH and 154 East to seek common-law indemnification against G & Y as plaintiff's employer (*see Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488-489 [2d Dept 2006), LKH and 154 East have not established that plaintiff sustained a grave injury. Significantly, LKH and 154 East did not submit an affirmation or affidavit from a medical expert as to the nature and extent of plaintiff's injury. Thus, LKH and 154 East have failed to demonstrate, prima facie, their entitlement to summary judgment on their third-party claims against Front Wave and G & Y for common-law indemnification and this branch of their motion is denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853).

Breach of Contract to Obtain Insurance

LKH and 154 East allege that pursuant to the terms of the Subcontract, G & Y was obligated to name them as an additional insured, but that, to date, no insurer has agreed to provide additional insured status to them on behalf of G & Y. LKH and 154 East point to "Schedule A" of the Assignment of Construction Contract between W & L, Front Wave and LKH. LKH and 154 East also contend that Front Wave's and G & Y's cross-claims for breach of contract should be dismissed as there was no contract between Front Wave, LKH and 154 East requiring LKH and 154 East to add Front Wave or G & Y as additional insureds on their policies.

In opposition, G & Y contends that there was no contract at the time of plaintiff's accident because the General Contractor Agreement Assignment was not yet in existence at the time of plaintiff's accident. G & Y maintains that it does not assert any cross-claims against LKH and 154 East for contractual indemnification or breach of contract. Front Wave, in opposition, argues that there is no contract between LKH, 154 East and Front Wave, thus there can be no breach of contract.

Discussion

"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, LKH and 154 East do not meet their burden of establishing that a contract existed between them and G & Y or Front Wave at the time of plaintiff's accident. LKH and 154 East rely on the General Contractor Agreement Assignment as a basis for the duty to procure insurance. However, as the court has discussed above, LKH and 154 East have not demonstrated that that contract was in existence at the time of plaintiff's accident.

Accordingly, that branch of LKH and 154 East's motion with respect to the breach of contract causes of action is denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Contribution

An owner who is found liable for a laborer's damages may seek contribution from joint tortfeasors under certain circumstances (*see Burgos v 213 West 23rd Street Group LLC*, 48 AD2d 185, 186-187 [2d Dept 2008]; *Marte v St. John's Univ.*, 249 AD3d 373 [2d Dept 1998]). However, as the negligence of the parties has not yet been determined, that portion of LKH and 154 East's motion for contribution against Front Wave and G & Y is denied.

Front Wave's and G & Y's Cross Claims

As the court has denied that portion of LKH and 154 East's summary judgment motion to dismiss the Labor Law § 241 (6) claims, that portion of LKH's and 154 East's motion for summary judgment dismissing Front Wave's and G & Y's cross-claims for common law and contractual indemnification and contribution, and G & Y's breach of contract claim is denied.

(4)

W & L's Motion to Dismiss

W & L moves to dismiss plaintiff's complaint, the Third Third-Party Plaintiff's complaint, and the Fourth Third-Party Plaintiffs' complaint, and to dismiss all cross-claims for indemnification against them. In the Amended Complaint, plaintiff purports to assert causes of action against "defendants" for Labor Law §§ 200, 240 (1), 241 (6) and common law negligence. In the Third Third-Party Complaint, Front Wave purports to assert causes of action for contractual and common law indemnification against W & L. In the Fourth Third-Party Complaint, LKH and 154 East purport to state causes of action for common law indemnification and contribution, contractual indemnification, and breach of contract against W & L.

Parties Contentions

W & L contends that it is entitled to dismissal of plaintiff's complaint because it did not breach any duty to plaintiff. W & L argues that it did not own, rent or control the Premises and that W & L assigned all of its site safety responsibilities to Front Wave prior to plaintiff's accident. W & L also notes that it did not own or install the ladder that plaintiff used and had no contractual or common law duty to repair it. W & L further notes that it did not have any prior actual or constructive notice of any dangerous condition at the Premises. Although W & L acknowledges that one of its employees, Andy Liu, remained on the Premises to ensure a smooth transition, W & L, nevertheless, completed all its work on the Premises prior to plaintiff's accident.

In support of its motion, W & L submits an affidavit from Meng Hua Wang, its

president ("Meng Wang"). Meng Wang attaches the General Contractor Agreement Assignment and states that prior to its execution, W & L completed all the work which it was contracted to perform at the Premises, and that Front Wave was responsible for any work going forward. Meng Wang states that Andy Liu only stayed at the Premises to consult with Front Wave to ensure a smooth transition as the project neared completion.

Plaintiff submits an affirmation in support of W & L's motion to dismiss the third- and fourth-party actions against it, arguing that there are no facts that support a theory of liability against W & L, as it was not the general contractor at the time of plaintiff's accident, having assigned that contract to Front Wave. Plaintiff further contends that there were no facts adduced in discovery demonstrating that Front Wave was responsible for site safety. Plaintiff further argues that while Meng Wang's daughter, Amy Wang, owned Front Wave, she testified that she did not report to him, and that it was Front Wave who was responsible for site safety at the time of plaintiff's accident. Plaintiff does not advance any arguments specifically in opposition to W & L's motion to dismiss plaintiff's complaint against it.

In opposition, with respect to W & L's motion pursuant to CPLR 3211 (a) (1), LKH and 154 East assert that the court should disregard Meng Wang's affidavit as self-serving and conclusory. They also argue that Meng Wang's contention that Andy Liu was not responsible for ensuring site safety is disingenuous, given that it was Andy Liu who reported plaintiff's incident to Front Wave, and given Amy Wang's testimony that Andy Liu directed all work at the Premises. With respect to W & L's motion pursuant to CPLR 3211 (a) (7), LKH and 154 East argue that W & L has failed to annex the Fourth Third-Party Complaint to the motion, and that W & L fails to make any argument in support of

that branch of its motion. With respect to W & L's motion pursuant to CPLR 3211 (c), LKH and 154 East contend that that motion is premature as Andy Liu has not yet been deposed, and genuine issues of material fact exist as to W & L's responsibilities regarding supervision of subcontractors on the Premises at the time of plaintiff's accident.

Front Wave, in opposition, maintains that the documentary evidence does not support dismissal of the Third Third-Party Complaint with similar arguments to the above. With respect to the motion to dismiss for failure to state a claim, Front Wave contends that W & L has failed to annex the Third Third-Party Complaint, and in any event, the four corners of the pleading state viable claims. Finally, with respect to the motion for summary judgment, Front Wave argues that there are questions of fact as to what role W & L had at the Premises at the time of the accident and that W & L has not met its burden. In reply, W & L attach the Third Third-Party and the Fourth Third-Party Complaints.

Discussion

Initially, as plaintiff does not oppose that branch of W & L's motion to dismiss plaintiff's complaint against W & L, stating that W & L was not the general contractor at the time of plaintiff's accident and not responsible for controlling the work at the Premises, plaintiff's complaint against W & L is dismissed.

Turning to W & L's motion to dismiss under CPLR 3211 (a) (1), dismissal is warranted only if "documentary evidence" conclusively refutes a plaintiff's allegations (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]) or establishes a defense to the asserted claims as a matter of law (*see Spoleta Constr., LLC v Aspen Ins. UK Ltd.*, 27 NY3d 933, 936 [2016]; *Goshen v Mutual Life Ins.*

Co. of N.Y., 98 NY2d 314, 326 [2002]). The evidence submitted in support of such motions must be "documentary" or the motion will be denied (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010], quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Minchala v 829 Jefferson, LLC*, 177 AD3d 866, 867 [2d Dept 2019] quoting *Fontanetta*, 73 AD3d at 86). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta*, 73 AD3d at 84-85 [internal quotation marks and citations omitted]). "Conversely . . . [a]n affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit" (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]).

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115 [2d Dept 2019]; *Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017]). A court may consider affidavits submitted by plaintiff to remedy any defects in the complaint, but not for the purpose of determining whether there is evidentiary support for the pleading (*see Leon*, 84 NY2d at 88; *Sokol v Leader*, 74 AD3d 1180, 1181

[2d Dept 2010]). "If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Sokol*, 74 AD3d at 1181-1182 [internal quotation marks and citation omitted]). Allegations consisting of bare legal conclusions must not be considered (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Gorbatov*, 155 AD3d at 837, quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Here, the Third Third-Party Complaints and the Fourth Third-Party Complaints adequately state causes of action for contractual and common law indemnification and breach of contract under CPLR 3211 (a) (7). In addition, while the purported General Contractor Agreement Assignment (if it had been effective) would have constituted documentary evidence for the purposes of CPLR 3211 (a) (1), Meng Wang's affidavit does not (*see Phillips*, 152 AD3d at 807).

Further, conversion of W & L's motion to dismiss to one for summary judgment is not appropriate here. CPLR 3211 (c) permits the court, "after adequate notice to the parties," to treat a motion pursuant to CPLR 3211 (a) as one for summary judgment (*see Russo v Crisona*, 219 AD3d 920, 921 [2d Dept 2023]). However, conversion is inappropriate where a summary judgment motion would be premature (*id.*). A party who argues that summary judgment is premature must demonstrate that discovery might lead to relevant evidence or that facts essential to opposition of the motion are exclusively within the knowledge or

control of the movant (*id.*).

While all parties except W & L have been deposed, W & L's deposition, including the deposition of its site supervisor, Andy Liu, have not been held. Andy Liu's deposition would potentially shed light on the nature of his presence at the site and to what extent W & L was still responsible for site supervision in light of the ambiguous status regarding the General Contractor Agreement Assignment. Questions remain as to whether Andy Liu was a "special employee" of Front Wave (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]) and whether Andy Liu's presence conferred responsibility on W & L. Such evidence is within the exclusive possession of W & L, and its employee, Andy Liu, who has not yet testified. Thus, conversion to a summary judgment motion in this instance would be premature, and that portion of W & L's motion to convert its motion to dismiss to one of summary judgment is denied.

Accordingly, that branch of W & L's motion to dismiss both Front Wave's complaint and LKH and 154 East's complaints against it is denied and W & L shall file an answer to the Third Third-Party Complaint and the Fourth Third-Party Complaint within 45 days of receipt of this Order. That branch of W & L's motion to dismiss the pending cross-claims against it is likewise denied.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. one) for partial summary judgment on the issue of liability under Labor Law § 240 (1) against Front Wave, LKH and 154 East is **GRANTED**; and it is further

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ORDERED that the portion of W & L's cross-motion (mot. seq. four) to dismiss plaintiff's Complaint as against it is **GRANTED**; the portions of W & L's cross-motion seeking to dismiss Front Wave's Third Third-Party Complaint and to dismiss LKH and 154 East's Fourth Third-Party Complaint against it, as well as to convert its motion to one for summary judgment are **DENIED**; the portions of W & L's cross-motion to dismiss the cross-claims against it is **DENIED**; and it is further

ORDERED that the portion of LKH's and 154 East's cross-motion (mot. seq. five) for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims is **GRANTED**; the portions of LKH's and 154 East's cross-motion for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) are **DENIED**; and the portions of LKH's and 154 East's motion for summary judgment on their breach of contract, contractual and common law indemnification and contribution claims against Front Wave and G & Y, and the portions seeking dismissal of Front Wave's and G & Y's cross-claims for common law and contractual indemnification and contribution and G & Y's breach of contract claim are **DENIED**.

The court has considered the parties' remaining contentions and finds them to be unavailing. All relief not expressly granted herein has been considered and is denied.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

HON. HEELA D. CAPELL, J.S.C.

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