SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 4

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RUCINSKI, ZBIGNIEW **Index №. 0303087/2012**

-against- **Hon. HOWARD H. SHERMAN**

MORE RESTORATION CO., INC. **Justice Supreme Court**

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The following papers were read on the following Motion Sequence numbers 10, 11, 12 and 13.

Motion Sequence #10, Noticed for June 1, 2018 and submitted on March 24, 2020.

Notice of Motion – Affirmation, Affidavit and Exhibits	Nos. 1-2
Answering Affirmation, Affidavit and Exhibits	Nos. 3, 4

Motion Sequence #11, Noticed for June 3, 2019 and submitted on September 26, 2019.

Notice of Motion – Affirmation, Affidavit and Exhibits	Nos. 1-2
Answering Affirmation, Affidavit and Exhibits	Nos. 3, 4, 5
Reply Affirmation, Affidavit and Exhibits	Nos. 6, 7

Motion Sequence #12, Noticed for June 5, 2019 and submitted June 23, 2020.

Notice of Motion – Affirmation, Affidavit and Exhibits	Nos. 1-2
Answering Affirmation, Affidavit and Exhibits	Nos. 3
Reply Affirmation, Affidavit and Exhibits	Nos. 4

Motion Sequence #13, Noticed for June 5, 2019 and submitted on June 23, 2020.

Notice of Motion – Affirmation, Affidavit and Exhibits	Nos. 1-2
Answering Affirmation, Affidavit and Exhibits	Nos. 3, 4
Reply Affirmation, Affidavit and Exhibits	Nos. 7,8
Cross Motion –Affidavit, Affirmation and Exhibits	Nos. 5-6

Upon the foregoing papers, the above referenced motions and cross motion are consolidated for purposes of this decision and are decided in accordance herewith.

This is an action seeking compensatory damages under the Labor Law for alleged personal injuries sustained by Zbigniew Rucinski, ("plaintiff") on August 8, 2011, while debris was being removed during the course of replacing the skylights of the premises located at 620/630 East 170th Street in the Bronx. Plaintiff alleges that he was struck by a 2x4 piece of wood that was being lowered in a bundle from the roof of the building, but which came loose and struck him on the head as he was standing on a sidewalk shed at the premises.

The parties in the actions are as follows: Zbigniew Rucinski, the injured plaintiff; Kadryzna Rucinski, his spouse who brings claims for loss of services and consortium; Franklin Kite Housing Development Fund Corporation, ("Franklin") the owner of the premises; Kraus Management Inc. ("Kraus"), managing agent of the premises; EEC Group Tech Inc. ("EEC"), which contracted with Kraus to replace the roof and skylights;

Skylights by George, Co., Inc. ("Skylights"), which sub-contracted with EEC to remove and replace the skylights, and was plaintiff's employer; More Restoration Co., Inc. ("More"), which sub-contracted with Skylights to remove and replace the skylights; Consulting Associates of New York, Inc. ("CANY"), which was hired by Kraus to draft the specifications for the project and to monitor compliance.

Motion Sequence #10

Motion Sequence #10 is a motion by plaintiff seeking summary judgment under Labor Law §240(1) against the defendants EEC, Kraus, and Franklin. Plaintiff argues that at the time the accident happened he was standing on top of a sidewalk shed and debris was being lowered from the roof of the building by rope to him. One of the bundles contained numerous pieces of wood and, as it was being lowered, one 2x4 piece came out of the bundle and fell about 20 feet, striking him on the head. As a result of this he claims to have sustained very serious injuries. He seeks summary judgment under his claim brought pursuant to Labor Law §240 (1) since: (1) all of the defendants are either owners, contractors or agents, (2) the defendants failed to properly secure work material that was being hoisted since one piece of debris came free and fell on him, and (3) there is no evidence that he was either a recalcitrant employee nor the "sole proximate cause" of the accident. He cites his deposition and separate affidavit as to how the accident took place as well as testimony of a witness from EEC which stated that it had the authority to inspect and stop work; testimony from a representative of More in which it was stated it was their employees who were lowering the debris from the roof. Plaintiff argues that the wood was obviously not properly secured since it fell, in violation of §240 (1), and that this violation was just as obviously a proximate cause of the accident. While acknowledging that some of the medical records which contain a "history" obtained from him have slightly different names for the debris that fell, he argues that this does not create a question of fact since his first language is Polish, and in that language the same word can stand for various types of "wood". He also contends that his failure to wear a hard hat at the time of the accident is irrelevant since that is not a "safety device" under the statute. Finally, he contends that just because he was the only witness to the accident to have been deposed does not preclude the granting of summary judgment.

Kraus/Franklin opposes the motion. It argues that a question of fact is presented since the plaintiff gave inconsistent versions of what struck him to various medical providers, at times referring to the substance as "garbage", "something" and "wood". Likewise, the failure of the plaintiff to wear a hard hat and protective eyewear would also create a question of fact. The applicability of §240 (1) is likewise open to question, it argues, since it has produced statements from two workers who stated that debris was being thrown from the roof by employees of Skylights. If that is believed, the material was not being hoisted or secured, which would be necessary to bring the protections of the statute into play. Kraus also argues that the motion is premature as all discovery is not yet completed; specifically the deposition of fifth third-party defendant T&J Contracting ("T & J").[1] Summary judgment should not be awarded to plaintiff, it further argues, because he is the only witness to the accident and should be subjected to cross-examination at trial so that his credibility can be assessed. Finally, Kraus contends that a question of fact exists as to whether plaintiff was the "sole proximate cause" of the accident since it was his choice to get on top of the sidewalk shed and he was not directed to do so.

EEC likewise opposes the motion. It argues that the motion is premature since the deposition of T & J has not yet been held, and some other discovery responses are likewise due and owing. A question of fact exists as to the accident, it argues, since the witness produced by Kraus stated that there was a yellow garbage chute being utilized at the premises. Additionally, plaintiff has not demonstrated prima facie entitlement to summary

[1] It is noted that a Stipulation of Partial Discontinuance was executed by the parties on February 25, 2019, discontinuing with prejudice the claims and cross-claims against T&J in the third party action, and discontinuing without prejudice in the fifth and sixth third-party actions.

judgment since there is no proof that the ropes provided were inadequate. It also argues plaintiff has failed to demonstrate that it was the "general contractor" on the job. It also joins in the arguments made by Kraus that there are inconsistencies in the history of the accident in the medical records; that summary judgment is not appropriate with the plaintiff as the only witness to the accident; and that a question of fact is presented as to whether the plaintiff was the "sole proximate cause" of the accident because of his failure to use a hard hat and protective eyewear.

CANY submitted an affirmation which was not strictly in opposition or support of the motion, but to correct what it claimed to be a misrepresentation in Kraus' papers to the extent that CANY was a "site safety Engineer". CANY denies that such was its function at the job site in question.

In reply, plaintiff argues that the motion cannot be considered to be premature because the deposition of T & J has not yet been held. That entity did not begin to work at the job site until after the instant accident took place. No question of fact exists as to the applicability of §240 (1) since the statements attached to the opposition by Kraus, to the effect that employees of Skylights were throwing debris off the roof, are not in admissible form and, in any event, the witness from More (from whom one of the statements was supposedly taken) specifically disavowed the substance of them at his deposition. In any event, the statements are unclear as to when the action was taking place, and do not specifically address the accident involving plaintiff. Even if it could be assumed that such throwing of debris resulted in plaintiff's injury, he argues that §240 (1) would still apply because the material in that event should have been secured.

Also in reply, plaintiff argues that although he is the sole witness who has testified about the happening of the accident so far, there were other workers around and the failure of other parties to produce them for a deposition should not preclude the granting of summary judgment to him. As to any claim that he was the "sole proximate cause" of the accident, there is no evidence of such, he argues, since no evidence has been produced that he was not in an area other than the one he was expected to be in. Finally, whether EEC wishes to differentiate itself from being a "general contractor" at the jobsite, §240 (1) is still applicable to it since it admittedly had the ability to control the work, and therefore would be a "contractor" under the statute.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . .Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925-926 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Labor Law § 240 (1), known as the Scaffold Law, provides, in relevant part, as follows:

> "All contractors and owners and their agents, . . . , 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 absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]; *Bland v Manocherian*, 66 NY2d 452, 459 [1985]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of NY* City, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

To prevail on a cause of action pursuant to Labor Law § 240 (1) in a falling object case such as the instant matter, "the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" (*Fabrizi*, 22 NY3d at 662, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In a falling object case, the plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268), or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Labor Law § 240 (1) "does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Fabrizi*, 22 NY3d at 663).

Plaintiff's motion for summary judgment is not premature. A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (*MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041 [2d Dept 2015]). Here, the allegation is that the motion is premature because the deposition of T&J has not yet occurred; but plaintiff has submitted unrebutted evidence that T&J had not even entered the job at the time of his accident. Additionally, the depositions of plaintiff and all parties to this motion have, in fact, occurred so that it cannot be said that discovery is incomplete in any meaningful sense.

Additionally, the argument that summary judgment should be denied because the plaintiff is the only witness to the accident is likewise unpersuasive. A plaintiff may be the sole witness to the occurrence giving rise to the claim and still satisfactorily present prima facie proof of his entitlement to summary judgment on liability (*DeOlio v. Charis Christian Ministries*, 106 AD3d 521 [1st Dept. 2013]; *Rodriguez v 5321 Third Avenue LLC*, 80 AD3d 434 [1st Dept. 2011]).

Plaintiff has demonstrated his prima facie entitlement to summary judgment on his claim brought pursuant to Labor Law §240 (1) since his unrebutted version of the accident is that he was struck by a piece of wood debris being lowered to him, which was insufficiently secured since it came loose and fell. In response, none of the defendants have raised a triable issue of fact. None of the other parties have provided any other version of the accident; even the alleged statements which claimed that debris was being thrown from the roof

were undermined by the sworn testimony of one of the people who supposedly gave the statement and, in any event, the statements did not speak directly to the happening of the accident. The differing names for the debris mentioned in the medical histories obtained from the plaintiff do not represent inconsistent versions of how the accident itself occurred. There is no evidence that the plaintiff was the "sole proximate cause" of the accident; he was in an area where he was permitted to be, and whether he was wearing a hard hat and protective eyewear has no relevance as to the manner in which the debris caused to fall on him.

Accordingly, plaintiff's motion for summary judgment on his cause of action pursuant to Labor Law §240 (1) is granted.

Motion Sequence #11

Motion sequence #11 is a motion by Kraus seeking a declaration that it is entitled to: (1) contractual indemnification from Skylights, (2) contractual indemnification from EEC, and (3) contractual indemnification from CANY. It argues that the contracts it entered into with each of those entities contains indemnification provisions in its favor. Further, it argues that there is no evidence that it was actively negligent in the happening of the underlying accident so there is no Labor Law §200 against it which would prevent the enforcement of the indemnification provisions.

EEC opposes the motion, arguing that the indemnification clause in the contract violates General Obligations Law ("GOL") §5-322.1 in that it would permit Kraus to be indemnified for its own negligent acts. Additionally, the language of the contract does not allow for any partial indemnification so it is impermissible under the statute. EEC further contends that the relief sought by Kraus should not be allowed because of "laches" in that the instant action has been pending for seven years and the request for indemnification was not made until this motion was brought. It further submits that the contract in question refers to the indemnitee as being NYCHA and "management", and no connection to Kraus established. Finally, even if the indemnification provision is a valid one, EEC argues that it would only be responsible to provide indemnification related to an accident arising out of the "performance of this contract by the contractor", and there has been no evidence that EEC was in any way responsible for the underlying accident.

Skylights likewise opposes the motion. It also argues that the provisions of the indemnification clause in its contract runs afoul of GOL §5-322.1. Like EEC, it contends that there is no connection between Kraus and the entities to which indemnification is to be provided, and there is no claim that the underlying accident arose out of any act or omission by Skylights, so it would not be responsible for indemnification in any event.

CANY likewise opposes the motion. It argues that the underlying accident did not arise out of its contractual obligations, so it does not owe indemnification. Its role at the jobsite, CANY contends, was to provide consulting, architectural, and engineering services, and it had no responsibility to enforce work safety standards. General site safety had been contracted to a different entity. CANY's obligation with reference to safety, according to the terms of its contract, would have been to bring to the general contractor's attention any dangerous conditions observed when it was actually at the premises, but not otherwise. Since there is no dispute that CANY did not have any representatives at the jobsite on the day of the accident, it could not have observed, or given notice, of any dangerous conditions which would have led to plaintiff's accident. Finally, CANY states it only entered into a contractual relationship with Kraus, not Franklin, and since no assignment between NYCHA and Franklin has been produced, it would not owe that entity any contractual indemnification.

In reply, Kraus argues that the language in the contract with Skylights is not in violation of the GOL, in that it would not provide indemnification for its own negligence. As to the claim by Skylights that it was not actively negligent, Kraus argues that is yet to be determined and a conditional order of indemnification is permissible.

The argument that Kraus is not entitled to indemnification because its relationship with NYCHA has not been established is not persuasive. Sufficient evidence has been shown that the owner of the property had been NYCHA, that Franklin Kite purchased the property from that entity, and that Kraus is Franklin Kite's contractor. Additionally, the argument that indemnification is barred because of the doctrine of "laches" fails; the equitable defense of laches is unavailable in an action at law, such as one for indemnification (*Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 [1st Dept 1990]).

General Obligations Law § 5-322.1 states:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

Kraus argues that it is entitled to contractual indemnification from Skylights and EEC based upon the following language in the contract between EEC and Skylights:

> To the fullest extent permitted by law, [Skylights] shall indemnify and hold harmless [EEC] together with their agents and employees from and against all claims or causes of action, damages, losses, expenses, attorneys fees, and legal costs and expenses relating to bodily injury, sickness, disease or death, arising out of or resulting from the performance of the work, or the condition of the site or from failure to guard the same, whether such operations be by himself or by a subcontractor or anyone directly employed by either of them.

Here, this court has determined under motion sequence number 10 that summary judgment on liability has been assessed against Kraus for a violation of Labor Law §240 (1). Because this finding is based upon a statutory violation, and not upon a finding of negligence, the section of the contract cited above does not run afoul of the GOL (Cavanaugh v 4518 Assoc., 9 AD3d 14, 18 [1st Dept 2004][citing *Brown v. Two Exchange Plaza Partners*, 76 NY2d 172 [1990][the Court held that inasmuch as the general contractor's liability was solely statutory, based on the absolute liability provisions of Labor Law § 240 (1) and not upon any negligence on its part, the General Obligations Law prohibition against indemnifying a party for its own negligence was not implicated]).

EEC's liability for the statutory violation of Labor Law §240 (1) has been determined by this court previously in this motion. Accordingly, Kraus is entitled to contractual indemnification from EEC. However, since the responsibility, if any, attributable to Skylights is yet to be determined, Kraus is entitled to a conditional order of indemnification against it (see, *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 300 [1st Dept 2007]; *Ortiz v. Fifth Ave. Bldg. Assoc.*, 251 AD2d 200[1st Dept.1998]).

As to the motion for contractual indemnification against CANY, that motion is denied based upon this court's decision in motion sequence #12, below.

Accordingly, the motion for contractual indemnification by Kraus as against EEC is granted. The motion for contractual indemnification by Kraus as against Skylights is granted conditionally. The motion seeking contractual indemnification from CANY is denied.

Motion Sequence #12

Motion sequence #12 is a motion for summary judgment brought by CANY to dismiss the fourth party action against it by Kraus. In that action, Kraus seeks: (1) contribution, (2) indemnification, and (3) damages for the failure of CANY to have obtained insurance in favor of Kraus, as called for in their contract. CANY argues that it was contractually obligated to check completed work for quality assurance purposes, and was not involved in site safety. It would only be required to bring a dangerous condition to the attention of the general contractor if it observed one when one of its representatives was actually at the site. Customarily, it was only at the jobsite 1 to 2 days per week, and its logs showed it was not present on the day of the instant accident. It owes no contribution to Kraus since CANY owed no duty to the plaintiff, which would be necessary for a finding that it was liable for contribution pursuant to CPLR §1401. It owes no contractual indemnity to Kraus since the plaintiff's accident did not arise out of the performance of the contract into which CANY had entered. No common-law indemnification is owed by it, CANY contends, since it did not oversee or direct the work in which plaintiff was engaged at the time of his injury. Finally, it indicates that it had obtained a greater amount of insurance coverage than called for in the contract.

Kraus opposes the motion, arguing that the language of the contract requires that CANY oversee the safety of persons on the jobsite and whether or not it did so would be a question of fact which would conditionally trigger its duty to provide indemnification. The extent of CANY's involvement with safety was demonstrated by several field reports, showing that it could direct work. As to the claim that Kraus was not a party to the contract, it argues that it purchased the premises from NYCHA and, as such, is its "successor" and is covered by the contractual language. Finally Kraus states that the insurance carrier for which CANY supposedly obtained coverage for it had disclaimed.

In reply, CANY argues that the opposition submitted by Kraus is insufficient because it contains only an attorney's affirmation and not any affidavit or other evidence by someone with actual knowledge. As to its contractual obligations, CANY states that the contract refers to a separate "scope of services" agreement which provided that it was only to do "periodic inspections", which Kraus' witness in a deposition agreed meant that CANY would only be expected to be at the jobsite 1 to 2 times per week. In reference to the field reports, CANY argues that the ones cited were for several months before the accident, and merely was in keeping with its responsibility to decide whether it would "sign off" on payment requests once it determined if the work had been satisfactorily completed.

With reference to the causes of action for both contribution and indemnification, CANY argues that the scope of its responsibility at the jobsite did not encompass site safety, other than reporting issues that one of its representatives may have observed during the limited periods of time they were present on the jobsite. As such, they argue that they owed no duty to the plaintiff at the time of his accident so that contribution from them cannot be obtained, nor are they responsible to contractually indemnify Kraus because the underlying accident did not arise from any actions of CANY or its agents. CANY has demonstrated its prima facie entitlement to summary judgment on these two causes of action by referring to the terms of the "scope of services" agreement which support its position, is not disputed by Kraus, and whose terms were recognized by Kraus' witness at a deposition. In response, Kraus has failed to raise a triable issue of fact, merely referring to the language of the contract and not disputing the efficacy or effect of the "scope of services" agreement.

Finally, CANY is entitled to summary judgment on the cause of action which alleges it failed to obtain sufficient insurance under the terms of its contract. CANY apparently purchased insurance coverage for the benefit of Kraus in the event of CANY's responsibility for an underlying incident; the disclaimer letter upon which Kraus relies does not state the coverage did not exist, just that Kraus had failed to demonstrate that the accident arose out of CANY's operations.

Accordingly, the motion by CANY for summary judgment and dismissal of the fourth third-party claims against it by Kraus, is granted, and those claims dismissed.

Motion Sequence #13

Motion sequence # 13 is a motion for summary judgment by Skylights to: (1) dismiss the contractual and common law indemnification claims by EEC, and (2) dismiss the contractual and common law indemnification claims by Kraus. Separately, EEC brings a cross-motion to (1) oppose Skylights motion, and (2) for partial summary judgment against Skylights on EEC's claim for indemnification.

Skylights argues that since it was plaintiff's employer, it is only responsible for contribution or common law indemnification if the plaintiff suffered a "grave injury" as that is defined in Workers' Compensation Law § 11. Plaintiff here contends that he sustained a hearing loss, vision loss, disfigurement, and brain injury which, the medical evidence obtained so far demonstrates, does not rise to the level of grave injury as defined in the statute.

Kraus opposes the motion, arguing there is conflicting evidence among medical experts as to the extent and permanency of plaintiff's injuries; as such a question of fact exists so the motion must be denied.

In its cross-motion, EEC argues that it is entitled to contractual indemnity from Skylights based upon the language of the contract. As to the claim for common law indemnification, it likewise argues that a question of fact exists as to the extent of plaintiff's injuries, and that if the allegations which plaintiff makes are proven, he would have sustained a "grave injury", which would entitle it to indemnification from Skylights.

In its opposition to the cross-motion, and in further reply, Skylights argues that the language of the contract violates the GOL and that, in any event, for contractual indemnification to be owed it must be demonstrated that the accident was due to acts or omissions on Skylight's part, which has not been demonstrated. As to the claim for common-law indemnification it argues that plaintiff's injury claims, while serious, do not rise to the level of "grave injury" since plaintiff's brain injury has not rendered him

unemployable, and his facial scarring likewise does not rise to the level required by the statute.

Kraus sought permission to file a supplemental affirmation in opposition based upon new material. Specifically, it cited a medical exchange dated November 21, 2019 which contained the results of an MRI and the findings of Dr. Hausknect. In interpreting the test, this doctor opined that plaintiff could no longer engage in his previous vocation. Therefore, Kraus again argues that a question of fact exists as to whether plaintiff sustained a "grave injury" and that the motion by Skylights should be denied.

Workers' Compensation Law § 11 states, in pertinent part:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a "grave injury" the employer also may be liable to third parties for indemnification or contribution (*Rubeis v. Aqua Club, Inc.,* 3 NY3d 408, 412–413 [2004] . That portion of the definition of "grave injury" which includes "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," means the injured worker is no longer employable "in any capacity" (*Rubeis* at 417; *Alulema v ZEV Elec. Corp.,* 168 AD3d 469, 470 [1st Dept 2019]). Here, Skylights has met its burden to show its prima facie entitlement to summary judgment since it has submitted affirmations from physicians and a vocational rehabilitation expert which state that the plaintiff can function cognitively well and, while he may not be able to engage in the type of strenuous work which he was doing prior to his accident, was employable for jobs which were fairly routine and repetitive. The most recent submission from Kraus, incorporating the test results and reports from Dr. Hausknecht do not raise a triable issue of fact. While the doctor states that the plaintiff has sustained a "significant limitation of function of his neurocognitive and neuropsychological system" he does not affirmatively state that the plaintiff is unemployable in any capacity.

Plaintiff also claims to have sustained a significant hearing loss, loss of vision in one eye, and facial lacerations which resulted in scarring. None of these, however, meet the "grave injury" standard, and therefore do not raise triable issues of fact. Plaintiff alleges to have sustained an 81% hearing loss in one ear and a "moderate to severe" loss in both ears. While significant, this would not meet the definition of "total and permanent deafness" as enunciated in the statute. Likewise, loss of vision in one eye, while apparently not contested by any of the defendants here, does not rise to the level of "total and permanent blindness", as stated under that section of the Worker's Compensation Law. Finally, the court has reviewed the photographs of plaintiff submitted with these motions and conclude as a matter of law that plaintiff did not sustain a "permanent and severe facial disfigurement". A disfigurement is severe if a reasonable person viewing the plaintiff's face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly. In finding that a disfigurement is severe, plaintiff's injury must greatly alter the appearance of the face from its appearance before the accident (*Fleming v. Graham,* 10 NY3d 296, 301 [2008]).

As to the claim that Skylights owes contractual indemnification to Kraus and EEC, the court refers back to its decision in motion sequence # 11 in which it determined that the contractual language at issue does not

violate GOL §5-322.1, but that only conditional indemnification is ordered since the negligence, if any, of Skylights has not yet been determined.

Accordingly, the motion by Skylights for summary judgment and dismissal of the common law claims for contribution and indemnification against it is granted; that portion of its motion which seeks summary judgment and dismissal of the claims for contractual indemnification is denied to the extent that it is entitled to an order of conditional indemnification; the cross-motion by EEC for common law indemnification is denied and its claim for contractual indemnification is granted conditionally.

It is hereby

ORDERED that plaintiff's motion for summary judgment on his claim brought pursuant to Labor Law §240 (1) is granted. It is further

ORDERED that Kraus' motion for contractual indemnification from Skylights is granted conditionally. It is further

ORDERED that Kraus' motion for contractual indemnification from EEC is granted. It is further

ORDERED that Kraus' motion for contractual indemnification from CANY is denied. It is further

ORDERED that the motion for summary judgment by CANY is granted. It is further

ORDERED that the motion by Skylights to dismiss the claims against it for contribution and common-law indemnification is granted. It is further

ORDERED that the motion by Skylights to dismiss the claims against it for contractual indemnification is granted conditionally. It is further

ORDERED that the cross-motion by EEC for contractual indemnification from Skylights is granted conditionally.

This constitutes the decision and orders of the Court.

Dated: 10/1/20

Hon. _____
HOWARD H. SHERMAN, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT