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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 103247/2008

CUMBICOS, EDILMA C.

VS.

TRACTEL

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	
Answering Affidavits – Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross motions are decided in accordance with the annexed Memorandum Decision + Order.

FILED

OCT 21 2010

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 15, 2010

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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EDILMA CUMBICOS, individually and as the Administratrix of the Estate of EDGAR MORENO, VIVIANA LOPEZ MORENO and THE ESTATE OF EDGAR MORENO,

Plaintiffs, Index No. 103247/08

-against-

TRACTEL, INC., individually and d/b/a SWING STAGE EAST; TRACTEL, LTD., individually and d/b/a SWING STAGE; SAFEWORKS, LLC, individually and d/b/a SPIDER STAGING; TOWNHOUSE COMPANY, LLC and SOLOW MANAGEMENT CORP.,

Defendants.

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SAFEWORKS, LLC,

Third-Party Plaintiff, Third-Party Index No. 590420/08

-against-

CITY WIDE WINDOW CLEANING, LLC,

Third-Party Defendant.

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Joan A. Madden, J.:

This matter, and its companion case, *Moreno v Tractel, Inc.* (Index No. 100211/08 before this court), arise from a tragic accident that occurred when the cables on a suspension scaffold failed, and two brothers, who were window washers, fell 47 stories to the ground. Edgar Moreno died from the fall; his brother, Alcides Moreno, survived, but suffered catastrophic

injuries.

In this motion sequence number 003, defendant/third-party plaintiff Safeworks, LLC (Safeworks) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross and counterclaims asserted as against it. By Order dated August 18, 2009,this court dismissed plaintiffs' Labor Law §§ 200, 202, 240 (1), and 241 (6) causes of action against Safeworks. Plaintiffs' remaining claims against Safeworks are for common law negligence and violations of Labor Law § 241-a ("Protection of workmen in or at elevator shaftways, hatchways and stairwells"). As the claim asserted under Labor Law 241-a is clearly inapplicable, this cause of action is dismissed, and only the claim for common-law negligence remains to be adjudicated as against Safeworks.

Defendants Tractel, Inc., individually and d/b/a Swing Stage East, and Tractel, Ltd., individually and d/b/a Swing Stage (together, Tractel) cross-move, pursuant to CPLR 3212, for summary judgment in their favor on their cross claims against third-party defendant City Wide Window Cleaning, LLC (City Wide).

Defendants Townhouse Company, LLC (Townhouse) and Solow Management Corp. (Solow) (together, Townhouse/Solow) cross-move, pursuant to CPLR 3212, for summary judgment in their favor on their cross claims against Tractel, and for summary judgment dismissing plaintiffs' Labor Law §§ 200, 241 (6), 241-a, 202, and

common-law negligence claims as against them.

Plaintiffs cross-move, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants Townhouse/Solow and Tractel's liability under Labor Law § 240 (1).

BACKGROUND

Edgar and Alcides Moreno were experienced window washers for high-rise buildings employed by City Wide. On December 7, 2007, they were directed by City Wide to go to the 47-story building at 265 East 66th Street in Manhattan. Townhouse was the owner of the building, and Solow the managing agent. Edgar and Alcides Moreno signed in when they arrived (Ex. 2 of Wischerth 4/17/09 Aff., Solow's 12/07/07 Daily Time Sheet), and went to the roof, where they prepared to enter the suspension scaffold that would take them down the side of the building to where they would wash the exterior windows. Plaintiffs allege as Edgar and Alcides Moreno entered the scaffold, and before they loaded their window-washing equipment onto the platform, the cables connecting the scaffold to the roof failed, and the brothers and the scaffold fell 47 stories to the ground. Plaintiffs' theory is that the cables, which had been replaced shortly before the accident, failed as a Nicopress sleeve used to secure the cables was improperly crimped when the cables were replaced.

By contract dated October 4, 2006 (Ex. 1 to Timmins, [Tractel's area supervisor and branch manager)12/11/09 Aff.],

Tractel and Solow agreed that Tractel would provide maintenance on the window-washing equipment 12 times per year, and at such other times as Solow would request. The Maintenance Service Contract provided that "[i]t is specifically understood that TRACTEL will act as [Solow]'s agent solely for the purposes described above, and that [Solow] retains responsibility for any other aspects of the maintenance, use or condition of the Equipment or ancillary equipment." As part of their agreement, Tractel would submit service and installation reports after service calls, and preventative maintenance reports to document that something had been taken care of (*see e.g.* Exs. O[1] and P[2] to Hitchcock 12/14/09 Affirm.). If parts needed to be ordered, Tractel would so indicate to Solow, which would issue a purchase order for the parts (Tumminia Depo., at 105-106).

By letter dated September 12, 2007, Tractel advised Solow that the cables on the roof car rig needed to be replaced in October 2007, because the New York State Department of Labor

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[1]For example, the Service and Installation Report for May 18, 2007 reads: "Arrived at site to install (2) black bumper rollers, as per building request, due to rig rubbing against glass. Installed (2) bumper rollers where rubbing marks were on rig. Installed & tested OK. Rubbing problem resolved."

[2]The Preventative Maintenance Report for November 28, 2007 reads: "full service; checked all functions - OK; need wire rope tags - 2; need to finish installation; installed 3 O Rings; window washer's right side."

requires all suspension cables to be changed every 18 months (Ex. 5 to Wischerth 2/27/09 Aff.; Timmins Depo., at 166). Solow issued a purchase order on the following day (Wischerth 2/27/09 Aff., Ex. 6), but when the cables arrived, they had broken individual strands ("bird cages"[3]) and were sent back (*id.*, Ex. 7, Tractel's 11/8/07 Continual Improvement Form; Timmins Depo., at 170, 355 ["Multiple strands were broken"]). One cable of the next set that came was also defective, having a "bird cage near the suspension point" (Timmins Depo., at 170; Pizzulli Depo., at 15 ["we got to the end of the cable, approximately five feet from the top, and we found the bird cage"]). Tractel's technicians who were installing the cable, Anthony Pizzulli and Ivan Cerkez, notified Tractel's service manager, John Meinke, who came, inspected the cables, and determined that the bird caging was close enough to the end that they could cut the cables back and redo the ends (Timmins Depo., at 358; Pizzulli Depo., at 52).

The end of the cable that had to be removed had a loop. According to Brian Timmins, Tractel's area supervisor and branch manager, the proper procedure for recreating a loop once the end of the cable had been removed was:

> The end of the cable, now that it is cut away and clean and the remainder of the cable, the active part of the cable is good and serviceable, the cable is taken and put

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[3]"A bird cage is when the wire unwinds and it opens and resembles a bird cage" (Timmins Depo., at 132).

> through the Nico sleeve.
>
> ***
>
> [T]he cable goes through the sleeve, it is formed around the thimble, it comes back through the sleeve again and then it gets compressed with the [crimping] tool.
>
> ***
>
> They take the plier [crimping tool], which is basically what it is, it is an easy description of it, open it up enough to get the Nico ... sleeve ... in the jaws ... squarely, and compress it using the tool, move it, do it again, four times

(Timmins Depo., at 406-408; Pizzulli Depo., at 228). Timmins described Tractel's method of testing the security of the repair as follows:

> Once the cable is connected, you connect it up to a suspension point, you load it up to a working live load and put it under tension, fly it off the ground, pick it off the ground, and sort of torture test it, you jump up and down, and then you check the Nico

(Timmins Depo., at 411-412, 152-153 ["Our standard practice at the time was ... to suspend the load from (the suspension point) ... the stage with two operators in it and their tools raised off the deck, and they actually jump in the stage to bounce it and give it a little extra pull"]).

According to plaintiffs' expert, Thomas O'Shea, "each [crimping] tool is supplied with a gauge that fits around the Nicopress sleeve to verify that it was compressed properly. ... If the installation was proper, then the Nicopress sleeve would pass into the correct part of the gauge without being forced" (O'Shea 12/11/09 Aff., ¶ 10). After the accident, Timmins

learned about this tool, called a pass/fail gauge or a go-no-go gauge or a compression test gauge, and use of the gauge is now standard operating procedure at Tractel (Timmins Depo., at 153-154; *but see* Pizzulli Depo., at 59 ["After the accident, we don't use (Nicos) at all"]; at 124 ["we don't do cutbacks anymore"]; at 125 ["We don't do presses"]; at 124 ["Q. And instead of cutbacks, you'll just order the wires again and until the wires are done -- received without any problems, is that it, is that what you would do now? A. Correct"]).

Tractel's technicians who performed the cutback and replacement of the loops on the cables were Anthony Pizzulli and Ivan Cerkez. Pizzulli had worked for Tractel for about two years (Pizzulli Depo., at 7 ["It's going to be about four years now" on November 12, 2009]); Cerkez had worked with them for approximately one month, and was a trainee (Timmins Depo., at 241, 60). Timmins thought that, prior to his working for Tractel, Cerkez "did some sort of mechanical work" for the Air Force, but he did not think that Cerkez "had any experience whatsoever with suspended access equipment" (*id.* at 119). In terms of training him "in the installation, service and/or repair or replacement of [suspended access] equipment," "[e]verybody he worked with would have been part of his training" because it was "on-the-job training" (*id.* at 119-120).

Prior to his coming to Tractel, Pizzulli had worked

approximately nine years for Swing Staging, "another suspended scaffolding rental type outfit" (*id.* at 122; Pizzulli Depo., at 8), where he checked, tested, and rebuilt scaffolds (Pizzulli Depo., at 8; Timmins Depo., at 122 ["(h)oist repair, field work"]). Cutting away a bird cage "and using a Nico to make a new loop on the end is not something that [Pizzulli] would regularly have done" (Pizzulli Depo., at 133).

During the two years before the accident that Tractel serviced the window washing rig at the premises, the only time it used Nico presses was in November 2007, when Pizzulli and Cerkez performed the operation on the roof of the premises, shortly before the accident (*id.* at 327-328). According to Pizzulli, the process of recreating the loop was a two-person job (*id.* at 60). When he and Cerkez installed the new cables, Cerkez made the crimps while Pizzulli held the Nico (*id.* at 60, 62).

Installing the new cables took three days. The Service and Installation Report for November 27, 2007 indicates that Pizzulli and Cerkez "delivered 2 rolls of 580 ft of cable; installed 1 cable on window washer's left side." Under "Incomplete Work," Pizzulli noted the "need to install on window washer's right side" (Hitchcock 12/14/09 Affirm., Ex. S). The content of the Preventative Maintenance Report of November 28, 2007 was set forth above in footnote 2 (*id.*, Ex. T). The Service and Installation Report for November 29, 2007 states: "finished

installing cable 580 ft; checked and tested OK" (*id.*, Ex. U).

According to Phillip Wischerth, Solow's Director of Engineers, Solow requires that contractors who come to work on the premises fill out a daily time sheet, indicating the date, contractor's name, location and description of work, and names of contractor's employees. When the work is completed, the employees are also required to sign out (Wischerth 4/17/09 Aff., ¶ 2).[4] Solow maintains these time sheets on the premises in its regular course of business (*id.*, ¶ 3). Wischerth attests that there are no time sheets for workers going to the roof of the premises between November 29, 2007, when Pizzulli and Cerkez finished the installation of the cables, and December 7, 2007, when Edgar and Alcides Moreno went to the roof, and fell 47 stories to the ground. According to Wischerth, if any contractors were on the roof between those dates, Solow would have a daily time sheet reflecting that work. However, "[o]ur records indicate that no one was on the roof between November 29, 2007, when Tractel completed replacing the cables, and December 7, 2007, the date of the accident" (*id.*, ¶¶ 4, 5).

Approximately four hours after the accident, inspectors from the New York State Department of Labor (DOL) arrived at the scene and conducted an investigation which included examining the

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[4]The daily time sheet for December 7, 2007, the date of the accident, indicates that Edgar and Alcides Morales signed in, but "No Out" (Ex. 2 to Wischerth 4/17/09 Aff.)

carriage on the roof, the debris of the fallen scaffold on the ground and the wire rope (cable), as well as interviews of Cerkez and Pizzulli. In its report, the DOL concludes that the primary cause of the accident "was the failure of the nicopress oval sleeves and or its application. The Nicopress fitting (oval sleeve) are installed with a thimble for cable terminations. The wire rope is wrapped around the thimble and the Nicopress sleeve is attached using a nicopress hand tool. Crimps must be verified with the appropriate nicopress go gauge...Cerkez, employed one month with Tractel Inc., applied the crimps to the nicopress sleeves on the wire ropes at the building. He stated he did not use a go gauge after the installation to verify the crimp was properly installed." In their report (Antin 11/17/09 Affirm., Ex. H), after enumerating their findings, the investigators concluded that

> this accident was caused by the maintenance company's, Tractel Inc., failure to use a "go gauge" or other means supplied by the manufacture[r] to ensu[r]e that the nicopress oval sleeves after applied were in conformance with the application. The building's owner, Townhouse Company, LLC, management agent, Solow Management Corp., and the cleaning company, City Wide Cleaning LLC, failure to provide adequate training to the window cleaners contributed to this accident. In addition, the window cleaners' failure to use fall protection equipment that was provided to them on the day of this accident would not have prevented the accident but could have prevented the fatality

(Certified New York State Department of Labor report of its investigation, Ex. I to Antin 11/17/09 Affirm., at 3).[5]

In his deposition, Pizzulli, when shown a photograph of the Nicopress sleeve recovered from the accident location[6] testified that he would not crimp as shown in the photograph and that the nicopress sleeve in the photograph had to be redone (Pizzulli Depo., at 112-113).

DISCUSSION

The Summary Judgment Standard

> It is well settled that "the 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"

(*Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing,

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[5]This is consistent with the conclusion of the U.S. Department of Labor, Occupational Safety and Health Administration(OSHA) in its report which states that "the scaffold crimps were not properly installed and they failed and the scaffold collapsed." Moreover, the reference to Cerkez's statement in the DOL report that he did not use a go gauge to verify the crimping, is consistent with his written statement to OSHA, (Hitchcock 12/14/09 Affirm., Ex. X).

[6]Tuminia testified in connection with photographs he took of the nicopress sleeve at the scene, including the one shown to Puzzulli (Tuminia Depo., at 24-27).

the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.*, 64 AD3d 477, 478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Safeworks's Motion for Summary Judgment Dismissing the Complaint and All Cross and Counterclaims Asserted as Against It

As set forth above, the only claim remaining against Safeworks in the complaint is one for common-law negligence. No party other than Tractel has opposed this part of the motion, and Tractel's opposition appears based on its contention that the motion is premature, as depositions are needed to ascertain if some evidence exists that Safeworks had a presence on the roof at a time which may indicate its possible negligent causation of the

accident.

No further discovery is needed as the evidence before the court demonstrates that Safeworks was not involved in the accident. (*see Quilliams v Half Hollow Hills School District [Candlewood School]*, 67 AD3d 763, 765 [2d Dept 2009] ["'mere hope' that discovery would yield material and relevant evidence was not a ground to deny summary judgment"]; *Greater New York Mutual Insurance Co. v White Knight Restoration, Ltd.*, 7 AD3d 292, 293 [1st Dept 2004] ["Further discovery would not have assisted plaintiff in opposing (defendant's) motion for summary judgment"]).

Safeworks installed the permanent window washing rig on the rooftop of the premises (Levi 11/2/09 Affirm., ¶ 9; Dombrowski Depo., at 13), and maintained it until approximately two years before the accident, when Tractel contracted with Solow to service and maintain the scaffolding (Levi 11/2/09 Affirm., ¶ 10; Dombrowski Depo., at 13 [Safeworks's maintenance contract with Solow ended "somewhere mid-2005"]). However, when a part of the permanent rig required replacement, Solow would buy replacement parts from Safeworks (*see e.g.*, Levi 11/2/09 Affirm., Exs. Y and Z; *see also* Ex. 2 to Timmins 12/11/09 Aff., Solow Daily Time Sheet for 8/13/07: Safeworks "Checked out which wheel and what size shaft needed to be replaced," and 8/8/07 Spider Equipment Quote: "Provide one mechanic on Friday morning 8/10 to evaluate

wheel on carriage"). Gregory Tumminia, who was Solow's residential property manager for the premises at that time, testified that no complaints were made "about the operation of the equipment, the maintenance of the equipment, anything like that" from March 2007, when he began his employment with Solow, through December 7, 2007, the date of the accident, "Just a request for parts" (Tumminia Depo., at 126-127). According to Tumminia, any parts which were purchased from Safeworks in 2007 for the window washing rig on the roof of the premises were installed by Tractel (Tumminia Depo. at 116-117).

"The elements of a cause of action in negligence are '(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof' [citation omitted]" (*Rodriguez v Budget Rent-A-Car Systems*, 44 AD3d 216, 221 [1st Dept 2007]). "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. ... The question of duty ... is best expressed as 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct' [citation omitted]" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

Safeworks's motion is granted as the record is devoid of evidence that any actions of Safeworks contributed to causing the accident and no basis exists for a claim of common law negligence

against Safeworks. Moreover, Safeworks had no contractual duty in 2007 to maintain the window-washing rig on the roof in a safe and secure manner.

Townhouse/Solow and Tractel assert cross claims against Safeworks sounding in contribution and common-law indemnification, and City Wide asserts a counterclaim for common-law indemnification or contribution.

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; *see also Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

"'The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer' [citation omitted]" (*Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 691 [2006]).

As stated above, the evidence makes it clear that Safeworks did not contribute to causing Edgar Moreno's death, nor was it "the actual wrongdoer" in any manner. Therefore, summary judgment dismissing the cross claims and counterclaim against

Safeworks is granted.

Plaintiffs' Cross Motion for Partial Summary Judgment on the Issue of Defendants Townhouse/Solow and Tractel's Liability Under Labor Law §240(1)

Labor Law § 240 (1) provides, in pertinent part:

> All contractors and owners and their agents ... in the ... cleaning ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, ... ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices" (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]), and "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003], quoting *Gordon v Eastern Railway Supply*, 82 NY2d 555, 559 [1993]; *see also Kosavick v Tishman Construction Corp. of New York*, 50 AD3d 287, 288 [1st Dept 2008] ["public policy protecting workers requires that the statutes in question be construed liberally to afford the appropriate protections to the worker"]). The Legislature designed it "to prevent those types of accident 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-Electric Co.*, 81 NY2d 494, 501 [1993]). "The duties articulated in Labor Law § 240 (1) are nondelegable, and liability is absolute as to the ... owner when its breach of the statute proximately causes injuries" (*Ortega*, 57 AD3d at 58). Since the duty is nondelegable, "[i]t does not require that the owner exercise supervision or control over the worksite before liability attaches" (*Gordon v Eastern Railway Supply*, 82 NY2d at 560). Rather, in order to prevail on a section 240 (1) claim, a plaintiff must establish both that the statute was violated, and that the violation was a proximate cause of his accident (*see Forschner v Jucca Co.*, 63 AD3d 996, 997 [2d Dept 2009]).

As an initial matter, the court notes that Edgar and Alcides Moreno's work as window washers falls within the ambit of Labor Law § 240 (1). As noted by the Court of Appeals,

> "'[C]leaning' is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity.
>
> ***
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> The crucial consideration under section 240 (1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240 (1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the

> kind that the safety devices listed in section 240 (1) protect against

(*Broggy v Rockefeller Group*, 8 NY3d 675, 680, 681 [2007], cited by *Swiderska v New York University*, 10 NY3d 792, 793 [2008]). Clearly, the work of the Moreno brothers, while hanging on a scaffold 47 stories above the ground, created an elevation-related risk which required the provision of a safe and secure scaffold.

For the reasons discussed below, the court concludes that the evidence in the record is sufficient to establish that the cables suspending the scaffold were improperly crimped, deficient and incapable of supporting the scaffold. According to the deposition testimony of Pizzulli, the cable was frayed and he was instructed by Meinke, Tractel's service manager, to cut the cables back and redo the loops. Pizzulli further testified that he was performing this work with Cerkez, who, according to Timmins, had worked for Tractel for one month, was receiving on the job training, and had no prior experience crimping a Nicopress sleeve. Nonetheless, it was Cerkez who crimped the sleeve. Notably, upon being shown a photograph of the Nicopress sleeve recovered from the accident location, Pizzulli testified, that the crimps depicted in the photograph had to be redone. The clear inference to be drawn from Pizzulli's testimony is that the crimps were improperly installed. Although Pizzulli testified

they tested the scaffold by jumping on it,[7] he also testified that they did not use a pass fail gauge to test whether the crimps were properly installed. This gauge, according to plaintiffs' expert Thomas O'Shea is supplied with the crimping tool to verify proper installation.

Moreover, the building records reflect that there are no time sheets for workers going to the rooftop where the window washing equipment is located between November 29, 2009, the date Pizzulli and Cerkez completed replacing the cables, and December 7, 2009, the date of the accident.

Based on the foregoing, the evidence in the record demonstrates that the crimping was performed by an inexperienced and untrained worker, that the work was not verified by a gauge and resulted in an improperly crimped sleeve which caused the cables to fail and the scaffold to fall. This court concludes, the failure to provide a scaffold constructed so as to give proper protection to the Moreno brothers constituted a violation of section 240 (1) as a matter of law, and that violation was a proximate cause of the accident.

As owner and managing agent for the property, Townhouse and Solow had a duty to provide window washers with equipment that

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[7]An issue exists as to whether both Puzzulli and Cerzek tested the scaffold by jointly jumping on it in accordance with Tractel's policy, or whether only Pizzulli jumped on it as he indicated in his statement to OSHA.

would "give [them] proper protection" (Labor Law § 240 [1]) and "provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site ... is itself elevated" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 500-501, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Townhouse, as owner, and Solow, as managing agent, are statutorily liable under section 240 (1).

Tractel argues it is not liable under the statute because (1) the complaint merely asserts a claim for negligence and fails to allege a Labor Law claim as against it, and; (2) it is not a proper defendant under the Labor Law, as it is not a statutory agent of Townhouse/Solow, as it was simply a provider of monthly maintenance under contract with Solow. Both arguments are unpersuasive.

Paragraph 56 of the complaint alleges that "the liability of the defendants arises from Article 10 of the Labor Law ... ." The allegation extends to all defendants, and not just to Townhouse and Solow. The paragraph gives notice to all defendants that Labor Law §§ 240, 241, and 241-a are being alleged against them as these sections fall within Article 10 of the Labor Law. Moreover, the parties, including Tractel, have litigated and conducted discovery within a contextual framework that these sections of the Labor Law have been asserted as to Tractel. In addition, as to the cause of action under Labor Law

200, Tractel's argument is unpersuasive as this section is a codification of the common-law duty to maintain a safe work place and Tractel concedes that a negligence cause of action has been asserted against it. (*See e.g. Bradley v Morgan Stanley & Co.*, 21 AD3d at 868).

Tractel's assertion that it was not an agent of either Townhouse or Solow as responsibility for the window-washing rig remained with Solow, is rejected. In *Russin v Louis N. Picciano & Son*, 54 NY2d 311 at 317-318 (1981), the court stated that "[a]lthough sections 240 and 241 now make nondelegable the duty of an owner ... to conform to the requirement of those sections, the duties themselves may in fact be delegated." The court, went on to say that its "interpretation of the statutory 'agent' language appropriately limits the liability of a contractor as agent for [an] ... owner for job site injuries to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created".

In *Drzewinski v Atlantic Scaffold & Ladder Co.* (70 NY2d 774, 776-777 [1987]), the Court of Appeals held that "[t]he scaffolding contractor ... contracted to provide, erect and maintain the scaffolding and other equipment for the safety of those working on the job. Consequently, there can be no question that [the scaffolding contractor] was properly found liable to plaintiff for his injuries [citing *Russin*, 54 NY2d at 318]." The

First Department reached a similar conclusion in *Medina v MSDW 140 Broadway Property, L.L.C.*, (13 AD3d 67, 67 [1st Dept 2004]), a case with facts similar to those in the case at bar. In *Medina*, where the plaintiff, a window washer sued the building owner and the company that installed and maintained the window washing rig, the court found that "[d]efendant rigging company, which contracted with defendant owner to provide and regularly inspect and maintain the rig, is the owner's 'agent' within the meaning of [section 240 (1)] [citing *Drzewinski*, 70 NY2d at 776-777]"). The court also found that steps on the rig leading up to the platform are a "device" within the meaning of Labor Law 240 (1). Id.

Based on *Drzewinski* and *Medina*, the court concludes, for the reasons below, that Tractel is liable under Labor Law § 240 (1) as an agent of Solow, as Solow delegated the tasks involved in providing safe cables on the scaffolding to it, and Tractel failed to perform these tasks so as to give proper protection to window washers using the scaffold.

The Maintenance Service Contracts, dated October 31, 2005 and October 4, 2006, entered into by Solow and Tractel, to the extent pertinent provide:

> **Services.** Customer (Solow) desires TRACTEL to furnish, and TRACTEL, is willing to furnish, maintenance service on the window washing equipment owned and operated by customer...twelve (12)times per year and at such additional times as customer shall, in its discretion, request. Under this agreement Tractel shall:

> :
> :
> inspect suspension cables for wear, damage and corrosion
> check suspension fittings and suspension members
> :
> In performance of theses services Tractel will furnish; all lubricants, solvents, cleaning materials, consumable supplies and incidentals. Should the service inspection reveal the need for replacement parts and/or repairs not described above, the additional service work required shall be indicated on the service maintenance report which will be presented to Customer representative. It is specifically understood that TRACTEL will act as Customer's agent solely for the purposes described above, and that customer retains responsibility for any other aspects of the maintenance, use, condition of the Equipment or ancillary equipment.[8]

The contract provides that Tractel will provide certain inspection and maintenance services, including inspections of the cables. The contract also provided that Tractel would provide additional services upon request. It is undisputed that during

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[8]Under Terms And Conditions, paragraph eight of the contract provides

> "[n]othing in this Agreement shall be construed to mean That TRACTEL assumes any liability on account of injuries to person or property except those directly due to the negligent or intentional acts of TRACTEL or its employees. Customer's own responsibility for injuries to persons or property while riding on or being on or about the equipment is in no way affected by this Agreement. It is agreed that, when not working in, or about or on the Equipment, Tractel does not assume the management or control thereof. At any time TRACTEL service personnel are servicing the Equipment, TRACTEL is asserting posse and control only over the specific component being serviced at any given moment, and posse and control of the remainder of the Equipment shall remain with the Customer."

[*25]

the two years prior to the accident, Tractel serviced the window washing rig, and, in addition to the specifically described duties, installed replacement parts and provided additional services not detailed in the contract, including installing black bumper rubbers and three O rings. It is also undisputed, in accordance with the contract provisions, that Tractel informed Solow the cables needed replacing, Solow ordered the cables, and Tractel agreed to, and did I fact, install them. Tractel rejected the first set of cables as defective since they were "bird caged," and although a second set was also "bird caged," Tractel's service manager, Meinke, determined that, since the fraying was at the end, this set could be used by cutting back the cables and recreating the loop. The crimping was done by an inexperienced and recently hired employee who was receiving on the job training. It was precisely the manner in which the Nicopress sleeve was crimped when the loop was recreated which caused the cables to fail. It was Tractel employees' decision to use the second set of cables and the manner in which Tractel's employee installed the crimps on the Nicopress sleeve that caused the cables to fail and the scaffold to fall.

Although Tractel did not provide or erect the scaffold, as did the contractors in *Drzewinski* and *Medina*, based on the maintenance contract and installation of the cables, the same agency principles apply, limited to the work Tractel performed.

The cables were inherent to the safe operation of the scaffold, and are devices within the meaning of Labor Law 240 (1). *Medina*, 13 AD3d at 67, [stairs on a window washing rig leading to the platform are "devices" within Labor Law 240 (1)]. By delegating the responsibility to install the cables to Tractel, as to the cables, Tractel was Solow's agent in connection with Solow's duty to provide a safe scaffold and other devices to give proper protection to window washers.

Tractel's argument that *Walls v Turner Construction Corp.*, 4 NY3d 861 (2005) and *Borbeck v Hercules Construction Corp.* (48 AD3d 498 at 498 (2nd Dept. 2008) control the determination of this issue is rejected. The issue in *Walls* and *Borbeck* was whether a construction manager was a statutory agent for purposes of Labor Law § 240 (1). In *Walls* the court found that the construction manager was an agent, as it had, inter alia, the authority to control activities at the work site and stop unsafe work practices. In *Borbeck* the court reached the opposite conclusion on the grounds that the construction manager had no authority to enforce the provisions of the contract between the owner and the prime contractors, no authority to stop the work in the event of an unsafe condition or work practice and thus, no authority to control and supervise the work. However, the principles underlying the *Walls* and *Borbeck* decisions, and other cases Tractel cites for the same proposition, are not

controlling, as here, as in *Drzewinski and Medina*, Tractel's liability as Solow's agent is predicated on the delegation of an owner's duty to provide a safe scaffold and devices, and does not implicate issues relating to control and supervision of the work. Moreover, Tractel's liability is limited to the particular agency created, which is a function of the specific work delegated to it by Solow, and the work it performed in connection with its maintenance and repair contract. See *Russin v Louis N. Picciano & Son*, supra at 318.

Nor does *Velez v Tishman Foley Partners* (245 AD2d 155 [1st Dept 1997]), relied upon by Tractel, require a contrary result. In *Velez*, the plaintiff was injured when cross bracing on a hoist tower gave way. The court held that the contractor who constructed the tower was not an agent of the owner on the grounds that the contractor did not have authority to supervise and control plaintiff's work. While it is unclear whether the contractor in *Velez* had a maintenance and repair contract, as Tractel does here, to the extent the holding in *Velez* can be read to conflict with the holding in *Medina*, the court concludes Medina controls. The facts in *Medina* closely resemble the facts herein, as both involve window washing rigs, maintenance and repair contracts and injuries resulting from a failure to provide safe scaffolding.

The language in the contract is not inconsistent with the

conclusion that Tractel is Solow's agent. While the contract states Tractel's agency is limited to the services described "above", this sentence immediately follows the one which provides for additional services, such as the cable replacement at issue here. The court concludes that it cannot be said that such additional services are excluded from the agency relationship. Moreover, even if it is assumed that this provision is ambiguous, such ambiguity must be decided against Tractel as the drafter of the contract. *Jacobson v Sassower*, 66NY2d 991 (1985). Nor does paragraph eight, referenced in footnote 8, which has language presuming to limit Tractel's liability to persons injured when Tractel is not working on the rig, for the reasons stated above, bar Tractel's liability.

Defendants next argue that Edgar Moreno was a recalcitrant worker and the sole proximate cause of his injuries because he was not wearing the proper safety gear, i.e., a harness, at the time of the accident. For the reasons below the court rejects this argument.

The concepts of "sole proximate cause" and "recalcitrant worker" are closely related. A recalcitrant worker is one who "had adequate safety devices available; ... [who] knew both that they were available and that he was expected to use them; ... [and] he chose for no good reason not to do so; and ... had he not made that choice he would not have been injured" (*Cahill v*

Triborough Bridge and Tunnel Authority, 4 NY3d 35, 40 [2004]; *Kosavick v Tishman Construction Corp. of New York*, 50 AD3d at 288, quoting *Cahill*; *Salazar v United Rentals*, 41 AD3d 684, 685 [2d Dept 2007] [recalcitrant worker is one "who refused to use an available safety device at the work site after being given specific instruction to do so"]; *Koumianos v State of New York*, 141 AD2d 189, 192 [3d Dept 1988] ["Labor Law § 240 (1) does not protect the recalcitrant worker who refuses to utilize available safety equipment"]).

The evidence shows that Edgar Moreno was an experienced window washer who had safety training (*see* Tractel's Certificate that Edgar Moreno was trained in the operation of the window washing unit, Ex. 3 to Wischerth 2/27/09 Aff.). While the evidence does show that a safety harness was provided to Edgar Moreno and that Edgar Moreno stepped onto the scaffold while the harness was on the roof, this does not establish proof that he refused to use the harness, as it may also be inferred that he was going to put it on when he retrieved his window washing equipment from the roof. Nevertheless, even if Edgar Moreno was at fault for failing to don his safety harness before stepping onto the scaffold, the failure of the cables was the "more proximate cause of the accident" (*Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997]; *Aragon v 233 West 21st Street, Inc.*, 201 AD2d 353, 354 [1st Dept 1994] ["the proximate cause of the

scaffold's collapse was the breaking of one of the supporting ropes, not the plaintiff's decedent's failure to wear a safety harness"]; *Trepel v City of New York*, 2000 WL 1364362, *4, 2000 US Dist LEXIS 13071, *13 [ED NY 2000] ["The recalcitrant worker defense is of no moment where the failure to provide an adequate safety device is the more proximate cause of a worker's injuries," citing *Aragon* and *Milewski*]).

The concept of "sole proximate cause" is based on the Court of Appeals' determination that "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d at 39, citing *Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, *supra*; *see also Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]).

> Even when a worker is not "recalcitrant," we have held that there can be no liability under section 240 (1) when there is no violation and the worker's actions ... are the "sole proximate cause" of the accident.
>
> ***
>
> [A] defendant is not liable under Labor Law § 240 (1) where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident. Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it

> necessarily means that there has been no statutory violation

(*Blake*, 1 NY3d at 290).

Here, the court has already found that Townhouse/Solow and Tractel's failure to provide adequate cables and scaffolding on which the Edgar and Alcides Moreno could work constituted a violation of section 240 (1) as a matter of law, and that the violation was a proximate cause of the accident.

Accordingly, plaintiffs' cross motion for partial summary judgment on the issue of Townhouse/Solow and Tractel's liability under Labor Law § 240 (1) is granted, with the amount of damages to be determined at trial.

Townhouse and Solow's Cross Motion for Summary Judgment Dismissing Plaintiffs' Labor Law §§ 200, 241 (6), 241-a, 202, and Common-Law Negligence Claims as Against Them, and for Summary Judgment in Their Favor on Their Cross Claims Against Tractel

Plaintiffs' Claims

Plaintiffs do not oppose Townhouse/Solow's cross motion, and the motion is granted as indicated below.

Labor Law § 200 (1) provides, in relevant part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Labor Law § 200 is a codification of the common-law duty to maintain a safe work place (*see e.g. Bradley v Morgan Stanley & Co.*, 21 AD3d at 868). Where, as here, an accident is a result of a dangerous condition, a plaintiff must show that a defendant "caused or created the dangerous condition, or had actual or constructive notice of the unsafe condition of which plaintiff complains" (*Arrasti v HRH Construction LLC*, 60 AD3d 582, 583 [1st Dept 2009]).

The evidence is clear that the only entity that caused or created the dangerous condition of the improperly serviced window-washing apparatus was Tractel. The decision to cut away the bird cage on the cable was made by Tractel's John Meinke (Timmins Depo., at 289, 358-359). Tractel's area supervisor and branch manager, Brian Timmins, attested that he did not tell "anyone at the building" about the bird caging on the second set of cables (*id.* at 359-360), and the Preventative Maintenance Report for November 28, 2007, and the Service and Installation Reports for November 27 and 29, 2007, fail to indicate any problem with the cables or their installation (Hitchcock 12/14/09 Affirm., Exs. S, T, U). On the contrary, the November 29, 2007 Service and Installation Report affirmatively states that the cable installed "checked and tested OK" (*id.*, Ex. U).

Thus, the court concludes that Townhouse/Solow neither caused nor created the dangerous condition, and had no actual or

constructive notice of it. The part of Townhouse/Solow's cross motion which seeks summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims is granted.

Labor Law §§ 241-a and 241 (6)

As set forth above, section 241-a, which provides for the "Protection of workmen in or at elevator shaftways, hatchways and stairwells," is inapplicable to this matter. Section 241 (6) pertains only to "areas in which construction, excavation or demolition work is being performed," and thus, is also inapplicable. Summary judgment dismissing these claims is granted.

Labor Law § 202

Labor Law § 202 ("Protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings") provides, in relevant part:

> The owner, lessee, agent and manager of every public building and every contractor involved shall provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the [Industrial Board of Appeals]. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved shall not require, permit, suffer or allow any window or exterior surface of such building to be cleaned unless such means are provided to enable such work to be done in a safe manner for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the [Industrial Board of Appeals].

"[I]n order to properly plead a Labor Law § 202 claim, a plaintiff must point to the violation of a specific provision of the Industrial Code" (*Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 426 [1st Dept 2008], *revd on other grounds* 12 NY3d 316 [2009]). Here, in the absence of plaintiffs' opposition to this part of the cross motion, theses claims are deemed abandoned.

Townhouse/Solow's Cross Claims Against Tractel

In their answer, Townhouse and Solow allege cross claims against Tractel sounding in contribution and common-law indemnification. Although all three parties have been found liable to plaintiffs pursuant to Labor Law § 240 (1), such liability

> is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence [citations omitted]. A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence

(*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990]).

This court has granted summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against Townhouse/Solow, and has determined that "[t]he evidence is clear that the only entity that caused or created the dangerous condition of the improperly serviced window washing apparatus was Tractel" (*see* discussion under Labor Law § 200 and Common-Law Negligence). Townhouse/Solow's failure to demonstrate

that it is not liable under Labor Law § 202, however, precludes a determination that Townhouse/Solow is entitled to summary judgment on its claims for common-law indemnification and contribution against Tractel. As such, this part of Townhouse/Solow's cross motion must be denied.

Tractel's Cross Motion for Summary Judgment in Their Favor on Their Cross Claims Against City Wide

Tractel asserts cross claims against City Wide sounding in common-law indemnification and contribution. Since obtaining summary judgment in its favor on the cross claim for common-law indemnification requires a finding that Tractel was free from negligence, and this court has found that Tractel's negligence was a substantial factor in the causation of the accident, Tractel's cross motion with respect to its common-law indemnification cross claim must be denied.

It must also be denied with respect to Tractel's cross claim against City Wide sounding in contribution. It has been alleged that City Wide failed to adequately train its window washers, and that this alleged failure contributed to the occurrence of the accident. However, no finding has yet been made with respect to City Wide's possible negligence. Thus, summary judgment in Tractel's favor with respect to its cross claim for contribution against City Wide must be denied.

CONCLUSION

Accordingly, it is

ORDERED that Safeworks, LLC's motion for summary judgment is granted and the complaint is severed and dismissed as against Safeworks, LLC, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment on the issue of Townhouse Company, LLC and Solow Management Corp. and Tractel, Inc., individually and d/b/a Swing Stage East and Tractel, Ltd., individually and d/b/a Swing Stage's liability under Labor Law § 240 (1) is granted, with the amount of damages to be determined at trial; and it is further

ORDERED that the part of Townhouse Company, LLC and Solow Management Corp.'s cross motion which seeks summary judgment dismissing plaintiffs' Labor Law §§ 200, 241-a, 241 (6)and 202, and common-law negligence claims is granted; and it is further

ORDERED that the part of Townhouse Company, LLC and Solow Management Corp.'s cross motion which seeks summary judgment in their favor on their cross claims against Tractel, Inc., individually and d/b/a Swing Stage East and Tractel, Ltd., individually and d/b/a Swing Stage for contribution and common-law indemnification is denied; and it is further

ORDERED that Tractel, Inc., individually and d/b/a Swing Stage East and Tractel, Ltd., individually and d/b/a Swing

Stage's cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October ~~13~~ 15, 2010

ENTER:

J.S.C.