At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 1st day of April 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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GUSTAVO NUNEZ,

Plaintiff,

-against-

672 PARKSIDE, LLC and TOWNHOUSE BUILDERS, INC.,

Defendants.

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672 PARKSIDE, LLC and TOWNHOUSE BUILDERS, INC,

Third-Party Plaintiffs,

-against-

CML TAPING AND PAINTING CORP. d/b/a CML CONSTRUCTION,

Third-Party Defendant.

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Index No.: 524820/2018

ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	75-90
Opposing Affidavits (Affirmations)	93-94, 98-102
Reply Affidavits (Affirmations)	104-105

Upon the foregoing papers, defendants/third-party plaintiffs 672 Parkside LLC (Parkside) and Townhouse Builders, Inc. (Townhouse) (collectively, Defendants) move (Motion Seq. 4) for an order, pursuant to CPLR § 3212, granting them summary judgment and dismissing all claims and cross claims against them.

Gustavo Nunez (Plaintiff) brings this action to recover for personal injuries sustained on March 16, 2018, as a result of falling on construction debris while he was employed as a laborer at a project located inside a building at 672 Parkside Avenue in Brooklyn (the "Property"). At the time of the accident, Parkside owned the property. By contract dated May 20, 2016, Parkside retained Townhouse, doing business as Promont, as the general contractor for construction work at the property. By contract dated September 7, 2017 (Subcontract), Townhouse subcontracted with third-party defendant CML Taping and Painting Corp. d/b/a CML Construction (CML) to perform demolition, framing and other work at the property. The Subcontract further noted that

all additional work on other floors were to be considered "change orders" and part of the scope of the work.

At his deposition, Plaintiff testified that at the time of the accident, he worked for "Promont" and that he only took his orders from the manager, "Caesar." According to Plaintiff, "Mario" was the boss. Plaintiff testified that all the workers were wearing hats and shirts that said "Promont." Plaintiff never heard of a company called CML Taping and Painting, CML Construction, Townhouse or Parkside. Plaintiff's duties on-site were mainly cleaning, but he would also do whatever Caesar told him to do, which included carrying furniture, debris and construction materials. Plaintiff testified that only Caesar told him what to do or how to do his job at the Property, and that no one who was not from Promont ever told him how to do his work or where to work.

Plaintiff testified that on the day of the accident, he was on the first floor of the Property clearing garbage from his workspace and moving cabinets around so that the laborers could clean the area. Plaintiff used a shovel and broom and was wearing boots. He testified that the first floor was made of cement and that while he was working, he did not see any holes or cracks in the floor. Plaintiff further testified that prior to the accident, he was in the process of carrying a cabinet across the room. As he did so, he slipped and fell on a sheet of metal on the floor, measuring approximately 72 inches by 36 inches, which plaintiff claimed had been completely covered by garbage. Plaintiff further claimed that he did not see the sheet of metal, as the area where he fell had not yet been cleaned, because he had to look forward while carrying the cabinet. Although Plaintiff had observed the garbage, he testified that it was not time to remove it because of the order of priority of the cleaning.

On May 10, 2019, a Workers Compensation Board hearing was held in Plaintiff's case. After the hearing, the Administrative Law Judge (ALJ) made a finding that the claimant [plaintiff] was employed by CML (NYSCEF Doc No. 81 at 2, Workers' Compensation Board Notice of Decision, dated May 15, 2019).

Caesar Moreno Lopez (Caesar), CML's sole owner, testified that he signed the Subcontract, which was for framing on the fourth floor of the Property. Caesar also invoiced a work change order for cleaning work done on the first floor. Caesar did not recall a person named "Mario" ever working for him. Caesar testified that in 2018, CML employed four to five

people. He testified that Promont (also known as Townhouse) did not provide any laborers to perform work at the site. Caesar further testified that he was the only person supervising the work at the location where Plaintiff was working at the time of his accident. Caesar further testified that he did not recall Plaintiff; nor did he recall if there were other workers not from CML cleaning construction debris at the Property. Contrary to Plaintiff's testimony, Caesar did not recall seeing any Promont laborers or construction workers at the Property for the entire time that he was there. Caesar also testified that no one from Townhouse ever directed him or his employees how to do their job.

During his EBT, Mordchai Waisbrod (Waisbrod), Townhouse's President, testified that Parkside retained Townhouse for construction at the Property. According to Waisbrod, while Townhouse did not employ laborers, its foreman/site superintendent on the project, Yossi Kopfstein, was regularly on site to monitor construction progress. Waisbrod testified that pursuant to Townhouse's contract with Parkside, Townhouse had to keep the area clean, but that Townhouse subcontracted that work out. Waisbrod further testified that Townhouse, as the general contractor, was responsible for overall job safety.

Plaintiff commenced this action against Defendants on December 11, 2018, by filing a summons and verified complaint, asserting causes of action for common law negligence, and violations of Labor Law §§ 200, 241(6) and the Industrial Code of the City of New York. On or about July 19, 2019, Townhouse interposed an answer with a cross claim against Parkside, and on or about October 1, 2019, Parkside filed an answer. On October 22, 2019, Parkside and Townhouse filed a third-party summons and complaint against CML, and on March 2, 2020, CML filed an answer to the third-party complaint. Subsequently, on March 5, 2020, Plaintiff filed an amended complaint to include CML as a defendant. Thereafter, by letter dated May 7, 2020, CML informed Plaintiff's counsel of the Workers' Compensation Board's decision which determined that CML was Plaintiff's employer, and demanded that Plaintiff withdraw its claims against CML. By stipulation filed on May 14, 2020, Plaintiff discontinued the action as against CML. Discovery ensued, and Plaintiff filed a note of issue on June 14, 2022. Defendants timely filed the instant motion on July 5, 2022. Subsequently, by order dated August 10, 2022, the court vacated the note of issue and directed further medical discovery. Plaintiff then filed a note of issue on September 23, 2022.

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 (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 § 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]).

In his bill of particulars, plaintiff alleged violations of Industrial Code Sections 23-1.7 (b), (d), (e) (1) and (2), 23-1.30, 23-1.31 and 23-1.32. In support of their motion, Defendants argue that the Labor Law § 241(6) claim should be dismissed because the Industrial Code sections cited by Plaintiff in the Bill of Particulars are either inapplicable or not sufficiently specific to form a predicate for a Section § 241(6) violation. In opposition, plaintiff failed to address Defendants' arguments as they pertain to these sections 23-1.30, 23-1.31 and 23-1.32. As

such, these sections of the Industrial Code in support of Plaintiff's Labor Law § 241(6) claim are deemed abandoned, and are dismissed (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529 [1st Dept 2013]; *Kronick v LP. Thebault Co., Inc.*, 70 AD3d 648 [2d Dept 2010]). As to 12 NYCRR §§ 23-1.7 (d) and (e), Plaintiff contends that the evidence demonstrates that Defendants violated those provisions and are therefore liable under Labor Law § 241 (6).

12 NYCRR § 23-1.7(d) states:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

12 NYCRR §§ 23-1.7(e)(1) and (2) states:

> "(e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work, or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Defendants contend that 12 NYCRR § 23-1.7 is inapplicable because Plaintiff's assignment on the day of his accident was to specifically remove construction debris from the first floor of the Property.

Initially, the court notes that Section 23-1.7(d) is inapplicable because there is no evidence that Plaintiff tripped over a "slippery condition" such as ice, snow, water, grease or other foreign substance within the meaning of that section (*see Zukowski v Powell Cove Estates Home Owners Assn., Inc.*, 187 AD3d 1099, 1103 [2d Dept 2020]; *Cooper v State*, 72 AD3d 633, 634 [2d Dept 2010]). Section 23-1.7 (e) (1) is also not applicable because Plaintiff was working in a large room and not in a "passageway" (*see Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001]; *see also Quigley v State*, 168 AD3d 65, 67 [1st Dept 2018]).

With respect to Section 23-1.7(e)(2), that Section does not apply where "the object on

which plaintiff tripped . . . was an integral part of the work he was performing" (*Lech v Castle Vil. Owners Corp.*, 79 AD3d 819, 820-821 [2d Dept 2010]; *see Alvia*, 287 AD2d at 423; *see also Smith v New York City Housing Authority*, 71 AD3d 985, 987 [2d Dept 2010]; *Goodfellow v Long Island Railroad*, 2022 NY Slip Op 32629[U] [Sup Ct, NY County, 2022], Tisch, J.). Plaintiff testified that (1) his assignment for the day was to remove garbage from the first floor, (2) that the entire room, including the floor, was covered in garbage that he had to remove, and (3) that the metal sheet on which he slipped was covered by the debris on the floor. Since Plaintiff's task was to remove construction debris from the floor, the garbage covered metal sheet upon which he fell was an integral part of the work that he was performing for that day, and thus section 23-1.7 (e) (2) does not apply (*see Cody v State,* 82 AD3d 925, 928 [2d Dept 2011]; *Marinaccio v Arlington Cent. School Dist.,* 40 AD3d 714, 715 [2d Dept 2007]; *Alvia v Teman Elec. Contr.,* 287 AD2d 421 [2d Dept 2001]). Plaintiff's counsel's contention that Plaintiff was not in the process of removing construction debris at the time of the accident but rather transporting cabinets from one part of the job site to another is unavailing, as Plaintiff testified that he needed to move the cabinets in order to clear the space of garbage. Accordingly, Defendants have met their burden of demonstrating entitlement to summary judgment as a matter of law with respect to Plaintiff's Labor Law § 241 (6) cause of action. In opposition, Plaintiff has failed to raise a question of material fact requiring a trial. As a result, that branch of Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 241 (6) cause of action is granted.

Defendants contend that the Labor Law § 200 and common law negligence claims against them must be dismissed because Townhouse did not have any workers in the area where Plaintiff's accident occurred, and all the work was directed and controlled by Caesar of CML. Defendants also argue that having construction debris on the floor of an area where workers are tasked with cleaning construction debris is not a breach of any duty; nor is it a dangerous condition, but rather, a standard hazard associated with the work of cleaning construction debris. In opposition, Plaintiff contends that Defendants have not met their burden of establishing that they did not create or have actual constructive notice of the dangerous condition. Plaintiff also argues that, at the very least, a question of fact exists as to whether Townhouse supervised and controlled the work.

"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]). 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]).

As noted above, Plaintiff was tasked with removing garbage and construction debris from a room full of such debris, and the metal sheet that he fell on was covered by the garbage. Defendants did not have a duty to protect Plaintiff from a hazard – the construction debris – that was part of or inherent in the work which Plaintiff was hired to perform. Accordingly, Defendants have met their burden on summary judgment, and Plaintiff has failed to raise a question of fact. Therefore, that portion of Defendants' motion seeking dismissal of Plaintiff's Labor Law § 200 and common law negligence claims is also granted.

Defendants further seek to dismiss Plaintiff's Labor Law § 240(1) claim as Plaintiff's accident was not attributed to any elevation-related risks. The court notes that neither the complaint nor the amended complaint explicitly states a Labor Law § 240 (1) cause of action, and in opposition, Plaintiff's counsel does not argue that such claim has been asserted. Thus, to the extent that the complaint may be construed to assert a Labor Law § 240(1) case of action, any such cause of action is dismissed.

In light of the dismissal of the complaint against Defendants, their third-party claims for common-law indemnification against CML are academic (*see Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]). Defendants' contractual indemnification claim, however, to the extent that it seeks to recover attorneys' fees and costs in defending the action is not academic and will be addressed herein (*see id.; Bashant v Mid-Westchester Realty Assocs.*, LLC., 31 AD3d 680 [2d Dept 2006]).

In support of their claim for contractual indemnification, Defendants rely upon the following indemnification clause set forth in the Subcontract:

> "1.1 To the fullest extent permitted by law, [CML] shall defend, indemnify and hold harmless the Owner [Parkside] and/or Contractor [Townhouse] and employee of either of them from and against damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [CML's] Work provided that such claim, damage, loss or expense is attributable to bodily injury . . . caused in whole or in part by negligent acts or omissions of [CML], [CML's subcontractors[, anyone directly or indirectly employed by them or anyone for whose acts they may be liable of [CML] . . . or anyone employed by them or anyone whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in party by a party indemnified hereunder . . . " (NYSCEF Doc No. 88, at 1.1).

The Subcontract also required CML to name Townhouse and Parkside as additional insureds on their insurance policies (*id.* at 2.1).

Defendants argue that there can be no dispute that Plaintiff's accident triggered the above-referenced indemnification provision. Defendants point to a letter sent by CML's counsel to Plaintiff's counsel dated May 7, 2020, which enclosed a copy of the Workers' Compensation Board's decision and asserted the position that the Board's finding that CML employed Plaintiff at the time of the accident is binding on the parties. Thus, Defendants contend that plaintiff's accident arose out of CML's work. Defendants also note that they were named as additional insureds under the Contract. In opposition, CML now takes the contrary position that issues of fact exist as to whether the Plaintiff was working for it at the time of the accident, and therefore Defendants are not entitled to contractual indemnification.

"A party's right to contractual indemnification depends upon the specific language of the relevant contract" (*McNamara v Gusmar Enterprises, 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 above-referenced provision contained in the Subcontract contains language conditioning indemnification upon a finding that Plaintiff's injuries arose out of CML's work, *and* were "caused in whole or in part by negligent acts or omissions" of CML. The court rejects CML's contention that the accident did not arise out of CML's work. In this regard, Defendants

have submitted as an exhibit to their motion papers a copy of the Workers' Compensation Board's determination finding that CML was plaintiff's employer, which CML did not dispute before the Board (NYSCEF Doc No. 81). As such, CML is bound by that determination (*see Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63, 71-72 [2d Dept 2023]; Workers' Compensation Law § 11 [2]). Furthermore, during his deposition, although Plaintiff testified that he worked for "Promont," (Townhouse), he claimed that Caesar of CML was his boss. In addition, Caesar testified that Townhouse did not have any laborers on site performing cleanup of the first floor at the time of Plaintiff's accident. Thus, the court finds that plaintiff's injuries clearly arose out of CML's work at the site. However, since Defendants have failed to establish as a matter of law that Plaintiff's injuries were caused by negligence on the part of CML or any of its workers, the contractual indemnity clause at issue has not been triggered (*see Tolpa v One Astoria Sq., LLC,* 125 AD3d 755, 756 [2d Dept 2015]; *Sellitti v TJX Cos., Inc.,* 127 AD3d 724, 726 [2d Dept 2015]; *Mikelatos v Theofilaktidis,* 105 AD3d 822, 824 [2d Dept 2013]). Accordingly, that branch of Defendants' motion seeking contractual indemnification as against CML is denied.

The court has considered the parties' remaining contentions and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment (Motion Seq. 4) is **GRANTED** to the extent that plaintiff's amended complaint is dismissed in its entirety, and the remainder of Defendants' motion is denied.

All relief not expressly granted herein has been considered and is **DENIED**.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice