At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of April, 2024.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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THOMAS PITTELKO,

Plaintiff,

-against-

Index No.: 505354/2018

ALL-SAFE, LLC, VORNADO REALTY TRUST, TISHMAN INTERIORS CORPORATION, NINETY PARK PROPERTY LLC, and FOREST ELECTRICAL CORP.,

DECISION AND ORDER

Defendants.

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VORNADO REALTY TRUST, TISHMAN INTERIORS CORPORATION, and NINETY PARK PROPERTY LLC,

Third-Party Plaintiffs,

-against-

DONALDSON INTERIORS, INC.,

Third-Party Defendants.

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| The following e-filed papers read herein: | NYSCEF Doc Nos.: |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 136-137, 139, 181-182, 201, 203-204, 221, 223-224, 244, 245-246, 263, 265-266, 283 |
| Opposing Affidavits/Answer (Affirmations) | 293, 305, 307, 314, 332, 334, 340, 343, 346, 367-368, 369, 377, 381, 382, 390 |
| Affidavits/ Affirmations in Reply | 408, 410, 412 414, 416, 417, 418, 419, 420 |
| Other Papers: | |

Upon the foregoing papers, plaintiff Thomas Pittelko (plaintiff) moves for an order, pursuant to CPLR § 3212, granting partial summary judgment in his favor: (1) with respect to liability on his Labor Law § 240 (1) cause of action as against defendants/third-party plaintiffs Vornado Realty Trust (Vornado), Tishman Interiors Corporation (Tishman) and Ninety Park Property LLC (Ninety Park) and defendant All-Safe, LLC (All-Safe); (2) with respect to liability on his Labor Law § 241 (6) cause of action as against all defendants; (3) with respect to liability on his Labor Law § 200 cause of action as against Tishman; and (4) with respect to liability on his common law negligence cause of action as against all defendants (Seq. 03).

Vornado, Tishman and Ninety Park (collectively referred to as the Ninety Park Defendants) move for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims asserted against them (Seq. 04). By way of separate motions, the Ninety Park Defendants move for summary judgment in their favor with respect to their claims for contractual indemnification, common law indemnification or contribution against third-party defendant Donaldson Interiors, Inc. (Donaldson) (Seq. 05), defendant Forest Electric Corp. (Forest) (Seq. 07), and All-Safe (Seq. 08). They also move for summary judgment with respect to their breach of contract claim for failure to procure insurance against Donaldson (Seq. 05) and All-Safe (Seq. 08). Defendant All-Safe moves for an order, pursuant to CPLR § 3212, granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against it (Seq. 06).

## BACKGROUND

In this action premised on common law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff alleges that on June 1, 2015 he fell and suffered injuries as he was climbing down an interior scaffold stairway installed as part of a construction project involving the renovation of the lobby of a building owned by Ninety Park and Vornado.[1] Ninety Park and Vornado hired Tishman as the construction manager for the project. Tishman thereafter hired All-Safe to erect the scaffolding used during the project, Forest to do the electrical work for the project and to provide and maintain temporary lighting for the scaffold platform and staircase, and Donaldson as the drywall and carpentry subcontractor. Donaldson, in turn, hired non-party Cooper Plastering Corp. (Cooper) to perform plaster work on its behalf. Plaintiff was employed by Donaldson as a carpenter foreperson.

The scaffold at issue consisted of a platform (also referred to as the "dance floor") that spanned the entirety of the lobby and allowed the workers to access the ceiling and walls of the upper portion of the lobby. Since the lower part of the lobby remained open to the public, the temporary staircase constructed to access the platform was enclosed within plywood walls with a door to allow the workers to access the stairway. This door was generally kept closed during construction activities in order to prevent dust from entering the lobby.

[1] Ninety Park admitted it was an owner in its answer to the complaint and counsel for the Ninety Park Defendants stated in his affirmation in support of its motion to dismiss the complaint that the building at issue is owned by both Ninety Park and Vornado (NYSCEF Doc. No. 182, Manarel Aff. at ¶ 10).

As shown by the photographs of the scaffold stairway and the deposition testimony in the record, the main portion of the stairway consisted of metal pipe scaffolding, pipe railings and metal steps that went from the platform to approximately 20 to 21 inches above the floor, where there was, in effect, a small metal landing between the end of the staircase and the plywood wall. Apparently to allow easier access to the metal landing, a wooden platform that was 18 inches above the floor and a single 10-inch-high step had been installed. Although the main metal portion of the staircase had handrails, there were no handrails on the wooden platform and the step down to the floor. At least as of the date of the accident, there was a 10-inch gap between the plywood wall and the side of the wooden platform and step that was furthest from the metal landing.

According to plaintiff's deposition testimony, at approximately 11:30 a.m. on the date of the accident, he went to the scaffolding in order to check on the progress of Cooper's plasterers. When he entered the stairway area, he noticed that the lights in that area were out. However, with the door open, there was enough light coming in from the lobby for him to climb up the steps to the platform. The lights were also out on the platform, but the plasterers were able to see using hand-held lights. While plaintiff was standing on the platform, he saw Dennis Valeri (Valeri), a field superintendent for Tishman, and one of his assistants, on the platform. Valeri and his assistant went down the stairs before plaintiff left the platform. After checking on the plasterers, plaintiff started down the steps, but by that time, someone had apparently closed the door to the staircase, and, as a result, it was very dark on the stairway – so dark that plaintiff couldn't see his hand in front of his face.

The accident occurred as plaintiff started turning towards his left to step from the metal scaffold stairs to the wood platform.[2] Plaintiff started losing his balance when he stepped down with his left foot onto the transition from the metal scaffold landing and the wooden platform. At that time, the back half of his left foot was on the metal landing, which was at least two inches above the wood platform, and the front half of his foot was on the wood platform. Plaintiff continued turning to his left to descend onto the wooden platform and his right foot missed the platform and went into the gap between the wooden platform and the wall.[3] Plaintiff then fell face forward towards the floor. As he was falling, plaintiff alleges he reached out to grab something, but there was nothing for him to grab onto, and his hands pushed open the door into the lobby as he fell to the floor. Ultimately, plaintiff asserted that the lack of lighting was the primary cause of his accident.

In his deposition testimony, Valeri states that on the day of plaintiff's accident, he received a call from someone who informed him that the lighting was out on the scaffold platform and in the staircase. Valeri asserts that he immediately called Forest to request that it investigate the issue, and, receiving no answer, he went to the scaffold to check-out the issue himself. When he reached the area, Valeri observed that the lights were out on both the stairs and the platform, but, with the staircase door open, the lighting from the lobby illuminated the stairs, as well as the area where the plasterers were working on the platform. After observing the conditions at the scaffold, Valeri went to look for the Forest representative onsite to address the issue. Valeri asserts that he left the scaffold door open

[2] According to plaintiff, the wooden platform was already present when he started working on the project.
[3] The gap was to plaintiff's right as he was turning to come down the steps and is visible on the left side of the photographs of the steps.

when he went to look for the Forest representative and asserts that, with the lighting out, it would have been unacceptable to close the door. Valeri, however, concedes that he didn't take any steps to block access to the scaffold until the lighting issue was addressed or ensure that the door remained open at that time.

Approximately twenty to thirty minutes after first receiving notice that the lights were out on the scaffold, Valeri received a call that plaintiff had fallen. When he arrived at the accident location, Valeri observed that plaintiff was lying on the ground, was in pain, and appeared to have injured his arm. When Valeri asked plaintiff the cause of the accident, plaintiff told him that it was clumsiness and poor lighting. When asked about the wooden steps during his deposition, Valeri asserted that they were installed by All-Safe.[4] He also opined that the gap between the wall and the steps shown in the photographs of the area could present a safety issue, and, if he had observed the gap during the project, he would have had the issue addressed and corrected.

In contrast to the assertions of Valeri, Brendan McCarroll (McCarroll), an All-Safe supervisor, testified at his deposition that All-Safe did not install the wooden steps, that it was not responsible for building such steps, and that the wooden steps shown in the photographs were not made of materials that All-Safe would have used in constructing such steps in any event. McCarroll also stated that the gap between the step and the wall presented a safety issue and, unless built flush with the wall, should have had a handrail. Damian Tomkins (Tomkins), another witness from All-Safe, testified at his deposition that

[4] Ernesto Martinez, a Tishman project manager, similarly testified that All-Safe was responsible for installing the stair tower, but he did not know if All-Safe built the wooden steps.

he did not believe All-Safe built the wooden steps. Tomkins added that, once the platform and staircase access were constructed, they were handed over to Tishman, and All-Safe's work with respect to the scaffold and stairway access was finished.[5] Clifford Westrick (Westrick), All-Safe's senior engineer, testified that the wooden steps were not part of All-Safe's design for the project and that he did not know who would have installed or built them. He testified that such steps would only be required under OSHA regulations if the bottom of the metal scaffold step was over a certain distance from the floor. Westrick did not know if such steps would have been required for the staircase here, but he did state that, in contrast to McCarroll's testimony, the steps shown in the photographs were made of material that All-Safe would have used.

Wayne Lang (Lang), Forest's general foreman, testified that there was no lighting on the platform and in the stairwell at the time of the accident because someone from Tishman had instructed him to take down the lighting since the project was finished and the platform was going to be removed the next day. Lang further asserted that it was only after the accident that Valeri contacted him and asked him to reinstall some temporary lighting at the bottom of the stairs. Lang asserted that with the door open, lighting in the area was more than adequate in the absence of any lighting on the stairs themselves but it was a little dark with the door closed. Aside from this assertion that Forest was directed to remove the lighting at some point prior to the accident, it is undisputed that Forest's scope

[5] After the completion of the scaffold, All-Safe was only present in the building with respect to work unrelated to the scaffold.

of work under its contract with Tishman included maintaining the temporary lighting on the scaffold and in the stairway.

## DISCUSSION

***Labor Law Defendants***

In moving for summary judgment, All-Safe asserts that it is not a proper defendant within the meaning of Labor Law §§ 240 (1) and 241 (6). In this respect, All-Safe was not an owner or general contractor, the entities primarily subject to liability under sections 240 (1) and 241 (6) of the Labor Law. As a subcontractor, however, it may be held liable as an agent of the owner or general contractor upon a "showing that it had the authority to supervise and control the work that brought about the injury" (*Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571 [2d Dep't 2020]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292 [2003]; *Guevara-Ayala v Trump Palace/Parc LLC*, 205 AD3d 450, 451 [1st Dep't 2022]). "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" (*Navarra v Hannon*, 197 AD3d 474, 476 [2d Dep't 2021] [internal quotation marks omitted]; *Woodruff v Islandwide Carpentry Contrs., Inc.*, 222 AD3d 920, 921 [2d Dep't 2023]).

As relevant here, All-Safe's involvement with the project was limited to the construction of the scaffold, stairway, and possibly the wooden platform and step to access the scaffold stairway. All-Safe has also presented evidence showing that its responsibility for the scaffold and staircase ended when those structures were turned over to Tishman's control, that it did not supervise or control the work of any of the other contractors on the

site, and that it had no involvement with plaintiff's work. As such, All-Safe has demonstrated, prima facie, that it may not be held liable as a statutory agent within the meaning of Labor Law §§ 240 (1) and 241 (6) *(Guevara-Ayala*, 205 AD3d at 451; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 521-522 [2d Dep't 2008]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dep't 2005]). In opposition, plaintiff has failed to identify any evidentiary facts, such as pointing to a contract provision showing that All-Safe had an obligation to maintain the scaffold, creating an issue of fact with respect to All-Safe's possible status as a statutory agent of the owner and/or contractor. All-State is thus entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) causes of action as against it. For the same reasons, the portion of plaintiff's motion for partial summary judgment on his Labor Law §§ 240 (1) and 241 (6) causes of action as against All-Safe must be denied.

In opposing plaintiff's motion for partial summary judgment on plaintiff's Labor Law § 241 (6) cause of action, Forest similarly contends that it, as a subcontractor, is not a proper defendant under that section. It is undisputed that Forest's responsibilities included maintaining the temporary lighting at issue and this control over lighting could render it liable as a statutory agent under section 241 (6) to the extent that such cause of action is premised on a violation of 12 NYCRR 23-1.30 (*McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 576 [1st Dep't 2023]; *Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 444 [1st Dep't 2022]). However, Lang, Forest's deposition witness, testified that Tishman had instructed Forest to remove the temporary lighting at some point in time prior to the accident. This testimony, while it is contradicted by other evidence in the record, is not incredible as a matter of law (*Joseph-Felix v Hersh*, 208 AD3d 571, 573 [2d Dep't 2022];

*Merino v Tessel*, 166 AD3d 760, 761 [2d Dep't 2018]), and is sufficient to demonstrate factual issues as to whether Forest may be held liable as a statutory agent under section 241 (6) to the extent that such cause of action is premised on a violation of 12 NYCRR 23-1.30. Forest, however, may not be deemed a statutory agent with respect to the other alleged Industrial Code violations relied upon in support of the section 241 (6) cause of action since it did not have authority to supervise or control plaintiff's work or the work of any of the other entities responsible for the scaffolding or other conditions at the worksite (*see Vitucci*, 205 AD3d at 444; *see also Woodruff*, 222 AD3d at 921; *Fiore*, 186 AD3d at 571-572).

There is no dispute, however, that the Ninety Park Defendants may be held liable under Labor Law §§ 240 (1) and 241 (6). In this regard, Ninety Park and Vornado may be held liable as owners (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *Jara v Costco Wholesale Corp.*, 178 AD3d 687, 690 [2d Dep't 2019]) in view of their concession they owned the subject premises. Further, while Tishman is identified as a "construction manager," it hired the subcontractors and was responsible for site safety and overall supervision of the project, and thus, it may be held liable here because it effectively acted as the general contractor within the meaning of sections 240 (1) and 241 (6) (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Pipia v Turner Constr. Co.*, 114 AD3d 424, 427 [1st Dep't 2014], *lv dismissed* 24 NY3d 1216 [2015]; *Gallagher v Resnick*, 107 AD3d 942, 943-944 [2d Dep't 2013]).

***Labor Law § 240 (1)***

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries

proximately caused by risks associated with falling from a height or those associated with falling objects (*Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "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]; *see Wilinski*, 18 NY3d at 10).

Generally, in the context of a falling worker case, an 18-inch elevation at a work site does not trigger the need for a Labor Law § 240 (1) protective device and thus does not present a significant elevation differential for purposes of section 240 (1) liability (*Balfe v Graham*, 214 AD3d 693, 694 [2d Dep't 2023];[6] *Fischer v VNO 225 W. 58th St. LLC*, 215 AD3d 486, 487 [1st Dep't 2023]; *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 543-544 [2d Dep't 2010]). When, however, the safety device intended to protect a worker working at an elevation fails to do so, courts do not focus on the distance of the fall (*McGarry v CVP 1, LLC*, 55 AD3d 441, 441 [1st Dep't 2008]; *Barber v Kennedy Gen. Contrs.*, 302 AD2d 718, 720 [3d Dep't 2003]; *Siago v Garbade Constr. Co.*, 262 AD2d 945, 945 [4th Dep't 1999]). As such, where the worker is working on or is traversing a section 240 (1) device at an elevation differential of around 18 inches, and such a device breaks, is defective, or otherwise fails to perform its proper function, courts have generally

[6] Although the Appellate Division, Second Department does not mention the depth of the hole at issue in *Balfe*, plaintiff, in his reply brief on appeal, states that the hole was two feet deep (*see Reply Brief*, 2021 WL 10365302, *4).

found the existence of a significant elevation differential within the meaning of section 240 (1) (*Morris v City of New York*, 87 AD3d 918, 919 [1st Dep't 2011]; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 880 [2d Dep't 2009]; *Latino v Nolan & Taylor-Howe Funeral Home*, 300 AD2d 631, 632-633 [2d Dep't 2002]; *Siago*, 262 AD2d at 945).

Here, the scaffold stairs, wood platform and step, which together served as the only means to access the scaffold platform being used in the performance of the work, constitute a safety device within the meaning of Labor Law § 240 (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33-34 [2017]; *Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 980 [2d Dep't 2021]; *Esquivel v 2707 Creston Realty, LLC*, 149 AD3d 1040, 1041 [2d Dep't 2017]). Further, under these circumstances, the 18-inch elevation differential constitutes a significant elevation differential for purposes of a section 240 (1) cause of action (*Abreo*, 60 AD3d at 880; *McGarry*, 55 AD3d at 441; *Latino*, 300 AD2d at 632-633).

Plaintiff, nevertheless, is not entitled to summary judgment in his favor on his Section 240 (1) cause of action as the wooden steps did not collapse or fall, and the record does not support a determination, as a matter of law, that the gap between the wall and the wooden steps and/or the absence of a railing rendered the steps an inadequate safety device (*O'Brien*, 29 NY3d at 33-34; *Esquivel*, 149 AD3d at 1041). Moreover, plaintiff's testimony that he thought that the primary cause of the accident was the lack of lighting is sufficient to demonstrate the existence of a factual issue as to whether any defect with the stairs was a proximate cause of the injury and/or whether plaintiff's injuries resulted from a hazard unrelated to the need for a safety device in the first instance (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008]; *Nieves v Five Boro A.C. & Refrig.*

*Corp.*, 93 NY2d 914, 916 [1999]; *Krarunzhiy v 91 Cent. Park W. Owners Corp.*, 212 AD3d 722, 723-724 [2d Dep't 2023]). On the other hand, the Ninety Park Defendants have not demonstrated, as a matter of law, that the gap and or the absence of the railing did not render the stairway an inadequate safety device, or that such defects were not a proximate cause of plaintiff's fall.

This Court also rejects defendants' assertion that plaintiff's decision to go down the stairs in the dark was the sole proximate cause of the accident. Plaintiff went up the stairs at a time when the access door was open, and the lighting on the staircase was adequate. It was only when plaintiff was descending the stairs that he found that it was very dark because the door had been closed. Moreover, there is nothing in the record to suggest that plaintiff was on notice that Tishman was attempting to reach out to Forest to correct the lighting problem or that the issue would have been corrected within a reasonable amount of time. Thus, the record does not support a finding that plaintiff's decision to descend the stairs in the dark was the sole proximate cause of plaintiff's injuries or that it was otherwise an unforeseeable superseding cause of his injuries (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dep't 2016]; *Sawyers v Troisi*, 95 AD3d 1293, 1294 [2d Dep't 2012]). While plaintiff's decision to proceed in darkness may demonstrate comparative fault on plaintiff's part, comparative fault is not a defense to a Labor Law § 240 (1) cause of action (*Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 614-615 [2d Dep't 2023]).

***Labor Law § 241 (6)***

Under Labor Law § 241 (6), an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dep't 2017]). Here, plaintiff, in his bill of particulars, premises his section 241 (6) cause of action on violations of Industrial Code (12 NYCRR) §§ 23-1.7 (b) (1), (d), (e ) (1), (e) (2), and (f); 23-1.30; 23-2.7 (a), (b), (c), (d) and (e); 23-5.1 (b), (f), (g), (h) and (j); 23-5.3 (e), (f), (g) and (h).

Plaintiff, in moving, has demonstrated, prima facie, that he is entitled to summary judgment in his favor on his Labor Law § 241 (6) cause of action as against the Ninety Park Defendants to the extent that it is premised on a violation of Industrial Code (12 NYCRR) § 23-1.30, which addresses illumination at construction sites.[7] Plaintiff's testimony that he couldn't see his hand in front of his face while he was descending the stairs is sufficient to demonstrate a violation of section 23-1.30 even though this testimony does not specifically mention that there was less than "five foot candles" of illumination on the stairway (*Favaloro v Port Auth. of N.Y. & N.J.*, 191 AD3d 524, 525 [1st Dep't 2021]; *Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850-851 [1st Dep't 2012];

[7] Industrial Code (12 NYCRR) §§ 23-1.30 provides that, "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

*Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dep't 2004]; *cf. Murphy v 80 Pine, LLC*, 208 AD3d 492, 497-498 [2d Dep't 2022]). The Ninety Park Defendants, who point to no testimony suggesting that illumination in the staircase was adequate with the stairway door closed, and who, as discussed above, have not shown that plaintiff's proceeding down the stairs may be deemed the sole proximate cause of the accident, have failed to demonstrate an issue of fact as to whether section 23-1.30 was violated (*Favaloro*, 191 AD3d at 525; *Capuano*, 98 AD3d at 850-851; *cf. Murphy*, 208 AD3d at 497-498; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157 [4th Dep't 2007]).

As discussed above, while the fact that Forest was generally charged with maintaining the temporary lighting on the platform and stairway may be grounds for holding it liable as a statutory agent to the extent that plaintiff's Labor Law § 241 (6) claim is premised on Industrial Code (12 NYCRR) § 23-1.30, it has demonstrated an issue of fact as to whether it may be held liable for the lighting conditions based on Lang's testimony that Tishman had instructed Forest to remove the lighting at issue at some point prior to the accident.

Aside from the issue relating to lighting, plaintiff alleges that the gap between the wooden platform/step and the wall and the absence of a handrail violated other provisions of the Industrial Code. As noted above, McCarroll, an All-Safe supervisor, testified that the gap and the absence of a handrail presented safety issues, and plaintiff himself stated that his right foot went into the gap before he fell towards the floor and that he did not have anything to grab onto to prevent him from falling. Plaintiff, however, also testified that the absence of lighting was the cause of his fall. In view of this evidence, issues of fact as to

whether the gap at the edge of the platform presented a tripping hazard, whether a handrail was required, and whether the gap and the absence of a handrail were a proximate cause of plaintiff's injuries require denial of both plaintiff's motion and the Ninety Park Defendants' motion with respect to Industrial Code (12 NYCRR) § 23-1.7 (f), dealing with vertical passageways (*Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 765 [2d Dep't 2009]; *McGarry*, 55 AD3d at 441-442; *Smith v Woods Constr. Co.*, 309 AD2d 1155, 1156 [4th Dep't 2003]), with respect to Industrial Code (12 NYCRR) § 23-2.7 (d) and (e), setting requirements for temporary stairways (*Waldron v City of New York*, 203 AD3d 565, 566 [1st Dep't 2022]; *Morris v City of New York*, 87 AD3d 918, 919 [1st Dep't 2011]; *Kanarvogel v Tops Appliance City*, 271 AD2d 409, 411 [2d Dep't 2000], *lv dismissed* 95 NY2d 902 [2000]), and with respect to Industrial Code (12 NYCRR) §§ 23-5.1 (j) (1) and 23-5.3 (e) and (f), setting requirements for scaffold railings and scaffold access (*Debennedetto v Chetrit*, 190 AD3d 933, 936-937 [2d Dep't 2021]; *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dep't 2012]).

Plaintiff, in moving for summary judgment, did not rely upon Industrial Code (12 NYCRR) § 23-1.7 (e) (1), which addresses tripping hazards in passageways. The Ninety Park Defendants, however, have failed to demonstrate, prima facie, that section 23-1.7 (e) (1) is inapplicable, that the gap did not constitute a tripping hazard or that the gap was not a proximate cause of plaintiff's fall (*Castro v Wythe Gardens, LLC*, 217 AD3d 822, 826 [2d Dep't 2023]; *Thomas v Goldman Sachs Headquarters*, 109 AD3d 421, 421 [1st Dep't 2013]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 765 [2d Dep't 2009]).

On the other hand, the Ninety Park Defendants have demonstrated, prima facie: that Industrial Code (12 NYCRR) § 23-1.7 (b) (1), addressing hazardous openings, is inapplicable to the facts here because the gap between the wall and the wooden portion of the staircase was too small for plaintiff to completely fall through (*Castro*, 217 AD3d at 826; *Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dep't 2018]); that Industrial Code (12 NYCRR) § 23-1.7 (d), addressing slipping hazards, is inapplicable because plaintiff did not fall because of a slipping hazard (*Fonck v City of New York*, 198 AD3d 874, 875-876 [2d Dep't 2021]; *Nankervis v Long Is. Univ.*, 78 AD3d 799, 801 [2d Dep't 2010]); that Industrial Code (12 NYCRR) § 23-1.7 (e) (2), addressing tripping hazards caused by accumulated debris or scattered tools, is inapplicable because the gap by the wall is not such a condition (*Thomas*, 109 AD3d at 422); that Industrial Code (12 NYCRR) § 23-2.7 (a), (b), and (c), addressing temporary stairs, are either inapplicable or violations thereof were not a proximate cause of plaintiff's injuries; that Industrial Code (12 NYCRR) § 23-5.1 (b), (g), and (h) were either inapplicable, or that violations thereof were not a proximate cause of plaintiff's injuries; that Industrial Code (12 NYCRR) § 23-5.1 (f) may not be relied upon because it does not state a specific safety standard (*see Debennedetto*, 190 AD3d at 937); and that Industrial Code (12 NYCRR) 23-5.3 (g) and (h) were either inapplicable or violations thereof were not a proximate cause of plaintiff's injuries. As plaintiff has failed to demonstrate a factual issue with respect to the applicability of those sections, the Ninety Park Defendants' are entitled to dismissal of plaintiff's Labor Law § 241 (6) cause of action to the extent that it is predicated on

Industrial Code (12 NYCRR) §§ 23-1.7 (b) (1), (d), and (e) (2); 23-2.7 (a), (b), and (c); 23-5.1 (b), (f), (g) and (h); and 23-5.3 (g) and (h).

***Labor Law § 200 and Common Law Negligence***

With respect to plaintiff's common law negligence and Labor Law § 200 causes of action, when such claims arise out of alleged defects or dangers in the methods or materials of the work, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dep't 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dep't 2005]; *see also Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dep't 2023]). Where a premises condition is at issue, property owners and general contractors may be held liable under common law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dep't 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dep't 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dep't 2008]). Similarly, liability under Labor Law § 200 and common law negligence may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it (*Vita v New York Law Sch.*, 163 AD3d 605, 607 [2d Dep't 2018]; *Wolf v KLR Mech., Inc.*, 35 AD3d 916, 918 [3d Dep't 2006]). Even in the absence of control of the worksite required for section 200 liability, a subcontractor may be held liable for common law negligence "where the work it performed

created the condition that caused plaintiff's injury" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dep't 2011] [internal quotation marks omitted]; *see also Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dep't 2017]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dep't 2015]).

Here, the court finds that the Ninety Park Defendants have failed to demonstrate their prima facie entitlement to dismissal of the Labor Law § 200 and common law negligence causes of action. Tishman's responsibilities as construction manager included scheduling or coordinating the work of the various trades involved in the project. In view of Lang's testimony that Tishman directed Forest to remove the temporary lighting on the platform and in the staircase while Donaldson's subcontractors were still performing work using the scaffold, there are factual issues as to whether the lack of lighting arose out of Tishman's negligence in its coordination of the work (*Rizzuto*, 91 NY2d at 352-353; *Matter of New York City Asbestos Litig.*, 142 AD3d 408, 409 [1st Dep't 2016], *lv denied* 28 NY3d 915 [2017] and 31 NY3d 903 [2018]; *Gardner v Tishman Constr. Corp.*, 138 AD3d 415, 416-417 [1st Dep't 2016]; *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dep't 2013]).

As Tishman had control of the work site (*Simon v Granite Building 2, LLC*, 170 AD3d 1227, 1232-1233 [2d Dep't 2019], *lv denied* 34 NY3d 904 [2019]) and, in view of Valeri's testimony regarding his observations of the lighting on the platform and scaffold stairs, Tishman had actual notice that the temporary lighting was not working. Given this notice, there are factual issues as to whether Tishman was negligent in failing to block access to the stairway or in some way ensuring that the stairway door did not close until

the lighting was restored, particularly given that Valeri, in his testimony, recognized that the door should not have been allowed to close.

The Ninety Park Defendants have also failed to demonstrate, prima facie, that they did not have constructive notice of the gap between the wall and the wooden platform or the absence of a handrail on the platform (*Agosto v Museum of Modern Art*, 219 AD3d 674, 676 [2d Dep't 2023]; *Karel v Pizzorusso*, 215 AD3d 738, 739 [2d Dep't 2023]; *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938, 939 [2d Dep't 2017]). Nor have the Ninety Park Defendants demonstrated as a matter of law that the gap and the absence of a handrail did not constitute a dangerous or defective condition (*Stancarone v Sullivan*, 167 AD3d 676, 678 [2d Dep't 2018]; *Cram v Keller*, 166 AD3d 846, 848-849 [2d Dep't 2018]). The court notes that, in moving, Ninety Park and Vornado have made no argument that their liability should be considered differently from that of Tishman and thus provided no independent ground for dismissing plaintiff's Labor Law § 200 and common law negligence causes of action as against them. This portion of the Ninety Park Defendants' motion must be denied regardless of the sufficiency of plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff has likewise failed to demonstrate the absence of factual issues with respect to the Ninety Park Defendants' liability under Labor Law § 200 and common law negligence and his motion must be denied with respect to those causes of action. Notably, plaintiff's accident occurred not long after Tishman received notice of the lighting issue. This court is not of the opinion that the failure of Valeri, Tishman's field supervisor, to barricade the stairway or ensure that the door remained open demonstrates negligence as a

matter of law, or that it was unreasonable for him to continue to look for the Forest representative instead. Similarly, plaintiff has failed to demonstrate, as a matter of law, that Tishman had actual or constructive notice of the gap between the wooden steps and the wall, that the gap and the absence of a handrail constituted dangerous conditions, or that such conditions were a proximate cause of plaintiff's injury in view of his testimony that the absence of lighting was the cause of his fall.

The portion of plaintiff's motion seeking summary judgment on his common law negligence claim as against Forest must be denied because of factual issues as to whether Forest removed the lighting based on a direction from Tishman. In addition, assuming, as suggested by other testimony in the record, that Forest did not remove the lighting and the lighting simply went out, plaintiff has failed to demonstrate, prima facie, that Forest had actual or constructive notice of an issue with the lighting.

Turning to the portion of All-Safe's motion for summary judgment dismissing the Labor Law § 200 and common law negligence causes of action as against it, for the reasons discussed above relating to plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action, All-Safe is entitled to dismissal of the section 200 cause of action because it had no control over the scaffold stairway or the worksite after it constructed the scaffold (*Navarra*, 197 AD3d at 476-477; *Fiore*, 186 AD3d at 572; *Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1433 [4th Dep't 2015]). On the other hand, All-Safe has failed to demonstrate the absence of factual issues as to whether it constructed the wooden step and platform, as to whether the steps needed a handrail, and as to whether the gap between the wall and step was present if and when All-Safe installed it. Accordingly, it has failed to demonstrate,

prima facie, that it did not create a dangerous condition and thus failed to demonstrate its entitlement to dismissal of plaintiff's common law negligence cause of action against it (*Burns*, 130 AD3d at 1433; *Lombardo*, 126 AD3d at 950). These same factual issues require denial of the portion of plaintiff's motion for summary judgment in plaintiff's favor on his common law negligence cause of action as against All-Safe.

***Indemnification and Insurance Issues***

Each of Tishman's contracts with Donaldson, All-Safe and Forest contain identical indemnification language providing, as is relevant here, that:

> "To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager, such other Indemnitees as may be defined by the applicable Task Order . . . from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), *arising out of or resulting from the acts or omissions of Contractor or anyone for whose acts Contractor may be liable in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations*, including the performance of the obligations set forth in this Clause. To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether or not caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee . . . As used in this paragraph, "Contractor" shall mean Contractor and its representatives, employees, servants, agents, subcontractors, delegates, or suppliers" (Trade Contracts, at § 7).

With respect to Donaldson, this broadly worded indemnification provision which requires indemnification for, among other things, claims "arising out of resulting from . . .

the performance of, or failure to perform, the Work," is applicable with respect to the injuries sustained by plaintiff, one of Donaldson's employees, even though Donaldson had nothing to do with the lighting or the condition of the scaffold (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Castro*, 217 AD3d at 826; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dep't 2021]; *Tkach v City of New York*, 278 AD2d 227, 229 [2d Dep't 2000]). Nevertheless, in light of the factual issues with respect to the Ninety Park Defendants' own negligence under plaintiff's Labor Law § 200 and common law negligence claims discussed above, the Ninety Park Defendants have failed to demonstrate their prima facie entitlement to contractual indemnification as they have failed to establish that they are themselves free from any negligence with respect to this accident (*Crutch*, 192 AD3d at 982; *Tarpey v Kolanu Partners, LLC*, 68 AD3d 1099, 1100-1101 [2d Dep't 2009]; General Obligations Law § 5-322.1).[8]

The Ninety Park Defendants' have also failed to demonstrate their prima facie entitlement to summary judgment on their claim as against All-Safe. In view of the testimony from McCarroll and Tomkins, who asserted that the All-Safe did not build the wooden steps and platform, and in view of the evidence that it had no continuing responsibility for the scaffold, there are factual issues as to whether plaintiff's claim arose

[8] Although the language of the provision appears to allow for partial indemnification of the indemnitees in the event they are less than 100 percent negligent (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 208-211 [2008]), as Tishman may be found 100 percent at fault, this court sees no reason to conditionally grant indemnification pending a jury determination on apportionment of fault (*Crutch*, 192 AD3d at 982; *cf. Dejesus v Downtown Re Holdings LLC*, 217 AD3d 524, 527 [1st Dep't 2023]; *Higgins v TST 375 Hudson, LLC*, 179 AD3d 508, 511 [1st Dep't 2020]).

out of All-Safe's "acts or omissions" or "work" within the meaning of the indemnification provision (*Nicholson v Sabey Data Ctr. Props., LLC*, 205 AD3d 620, 622 [1st Dep't 2022]; *Pereira v Hunt/Bovis Lend lease Alliance II*, 193 AD3d 1085, 1090-1091 [2d Dep't 2021]; *see also Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415-416 [2008]; *cf. Zong Wang Yang v City of New York*, 207 AD3d 791, 796 [2d Dep't 2022]: *McDonnell v Sandaro Reatlty, Inc.*, 165 AD3d 1090, 1097 [2d Dep't 2018]). As noted, the factual issues with respect to Tishman's own negligence also preclude it from obtaining summary judgment on its indemnification claim as against All-Safe. These same factual issues with respect to whether the plaintiff's claims arose out of All-Safe's work require denial of the portion of All-Safe's motion seeking dismissal of the Ninety Park Defendants' contractual indemnification claims against it.

Aside from the factual issues with respect to the Ninety Park Defendants' own negligence, the Ninety Park Defendants' motion relating to its contractual indemnification claim against Forest must be denied because Lang's testimony that Forest removed the temporary lighting at issue at the direction of Tishman is sufficient to demonstrate a factual issue as to whether plaintiff's claim arose out of Forest's "acts or omissions" or "work" within the meaning of the indemnification provision.

The portion of the Ninety Park Defendants' motion seeking summary judgment on its common law indemnification claims as against Donaldson, All-Safe and Forest must be denied in view of the factual issues relating to the Ninety Park Defendants' own negligence (*Rodriguez v Waterfront Plaza*, LLC, 207 AD3d 489, 491 [2d Dep't 2022]; *Crutch*, 192 AD3d at 982) and relating to whether Donaldson, All-Safe and Forest were negligent or

supervised or controlled the injury producing work (*Chapa v Bayles Props., Inc.*, 221 AD3d 855, 856-857 [2d Dep't 2023]; *Quiroz v New York Presbyt./Columbia Univ. Med. Ctr.*, 202 AD3d 555, 557 [1st Dep't 2022]; *Debennedetto*, 190 AD3d at 938; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

The portion of Ninety Park Defendants' motions seeking summary judgment on their contribution claims against Donaldson, All-Safe, and Forest are denied as a party is only entitled to recover on a contribution claim upon a jury determination of apportionment of damages and the payment of damages in excess of that party's proportionate share of the judgment (*Klinger v Dudley*, 41 NY2d 362, 369 [1977]; CPLR 1401, 1402).

As All-Safe has failed to demonstrate, prima facie, that it was free from negligence or that the Ninety Park Defendants were negligent as a matter of law, the portion of All-Safe's motion seeking dismissal of its co-defendants' common law indemnification claim as against it is denied (*Meadowbrook Pointe Dev. Corp. v F&G Concrete & Brick Indus., Inc.*, 214 AD3d 965, 969-970 [2d Dep't 2023]). All-Safe's failure to demonstrate, as a matter of law, that it was not negligent, also requires denial of the portion of its motion seeking dismissal of the Ninety Park Defendants' contribution claim (*Randazzo v Consolidated Edison Co. of N.Y., Inc.*, 177 AD3d 796, 798 [2d Dep't 2019]). The Court additionally notes that, as correctly asserted by All-Safe, the Ninety Park Defendants did not plead a cross claim for breach of contract for failure to procure insurance as against All-Safe. As such, there is no breach of contract claim as against All-Safe for the Court to dismiss.

Finally, the portion of the Ninety Park Defendants' motion for summary judgment as against Donaldson on their breach of contract claim based on Donaldson's failure to obtain insurance naming them as additional insureds must be denied, as the conclusory assertions of counsel for the Ninety Park Defendants are insufficient to demonstrate their prima facie burden that Donaldson failed to obtain the requisite coverage (*Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 629 [2d Dep't 2022]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dep't 2014]; *Karnikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2d Dep't 2014]; *cf. Dibuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dep't 2011]). In any event, Donaldson has demonstrated the existence of factual issues requiring denial of the Ninety Park Defendants' motion in this respect by submitting a copy of policies that contain blanket additional insured endorsements. Such additional insured endorsements are generally sufficient to satisfy contractual additional insured requirements (*Langer v MTA Capital Constr. Co.*, 184 AD3d 401, 402-403 [1st Dep't 2020]; *Perez v Morse Diesel Intl., Intl., Inc.*, 10 AD3d 497, 498 [1st Dep't 2004]; *see also Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]; *cf. Gilbane v Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 31 NY3d 131, 135 [2018]). The fact that Donaldson's insurers may not have provided coverage for the Ninety Park Defendants under these policies does not, in and of itself, demonstrate that the policies obtained by Donaldson failed to comply with the terms of the contract (*Perez*, 10 AD3d at 498; *Rodriguez v Savoy Boro Pork Assoc. Ltd. Partnership*, 304 AD2d 738, 738-739 [2d Dep't 2003]; *KMO-361 Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dep't 1998]; *Garcia v Great Atl. & Pac. Tea Co.*, 231

AD2d 401, 402 [1st Dep't 1996]; *see also Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 404 [1st Dep't 2023]).

**CONCLUSION**

Accordingly, it is hereby

**ORDERED**, that plaintiff's motion (Seq. 03) is granted only to the extent that he is entitled to summary judgment in his favor on his Labor Law § 241 (6) cause of action under Industrial Code (12 NYCRR) §§ 23-1.30 as against the Ninety Park Defendants. Plaintiff's motion is otherwise denied, and it is further

**ORDERED**, that the Ninety Park Defendants' motion (Seq. 04) is granted only to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code (12 NYCRR) §§ 23-1.7 (b) (1), (d), and (e) (2); 23-2.7 (a), (b), and (c); 23-5.1 (b), (f), (g) and (h); and 23-5.3 (g) and (h), and it is further

**ORDERED**, that the Ninety Park Defendants' motions as against Donaldson, Forest and All-Safe (Seqs. 05, 07 and 08) are all denied, and it is further

**ORDERED**, that All-Safe's motion (Seq. 06) is granted to the extent that plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) causes of action are dismissed as against All-Safe. The motion is otherwise denied.

This constitutes the decision and order of the court.

ENTER

J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.