At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of February, 2008.

P R E S E N T:

HON. HERBERT KRAMER,
Justice.

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PAUL DEFILLIPO,

Index No. 46294/03

Plaintiff,

- against -

270 BROADWAY ASSOCIATES, LLC, 270 BROADWAY COMMERCIAL ASSOCIATES, LLC, 270 BROADWAY RENTAL ASSOCIATES, LLC, 270 BROADWAY CONDOMINIUM ASSOCIATES, LLC, NEWMARK CONSTRUCTION SERVICES, LLC, N.A.I. CONSTRUCTION, LLC, AND ON PAR CONTRACTING,

Defendants.

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NEWMARK CONSTRUCTION SERVICES, LLC AND N.A.I. CONSTRUCTION, LLC,

Third-Party
Index No. 76261/04

Third-Party Plaintiffs,

- against -

AURASH CONSTRUCTION CORP.,

Third-Party Defendant.

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NEWMARK CONSTRUCTION SERVICES, LLC AND N.A.I. CONSTRUCTION, LLC,

Second Third-Party
Index No. 75953/05

Second Third-Party Plaintiffs,

- against -

GESSIN ELECTRICAL CONTRACTORS, INC.,

Second Third-Party Defendant.

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NEWMARK CONSTRUCTION SERVICES, LLC AND N.A.I. CONSTRUCTION, LLC,

Third Third-Party
Index No. 75756/06

Third Third-Party Plaintiffs,

- against -

MEDCO PLUMBING, INC.,

Third Third-Party Defendant.

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The following papers numbered 1 to 14 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6, 7-8
Opposing Affidavits (Affirmations)	9-10, 11
Reply Affidavits (Affirmations)	12, 13-14, 15-16, 17
Affidavit (Affirmation) Supplemental Affidavit in Support	18
Other Papers	

Upon the foregoing papers, (1) defendants 270 Broadway Associates, LLC, 270 Broadway Commercial Associates, LLC, 270 Broadway Rental Associates, LLC, and 270 Broadway Condominium Associates, LLC (collectively, the Broadway entities), Newmark Construction Services, LLC (Newmark), N.A.I. Construction, LLC (NAI), and On Par Contracting (On Par) move

for orders, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint and any and all cross and counter claims as asserted against them, (2) second third-party defendant Gessin Electrical Contractors, Inc. (Gessin) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the second third-party complaint and any and all cross and counter claims as asserted against Gessin, and (3) third third-party defendant Medco Plumbing, Inc. (Medco) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third third-party complaint and any and all cross and counter claims as asserted against Medco.

Background Facts and Procedural History

On October 25, 2001, plaintiff Paul DeFillipo (DeFillipo) was injured when he slipped and fell during a project involving the renovation and conversion of an office building into a combination retail/office/rental/condominium facility located at 270 Broadway in New York City (the building). Prior to the accident, defendant 270 Broadway Associates, LLC (270 Broadway Associates) was the general property manager of the building, defendant 270 Broadway Commercial Associates, LLC (270 Broadway Commercial Associates) was the managing agent responsible for the construction of the retail space on the ground level and the office space on floors two through seven, defendant 270 Broadway Rental Associates, LLC was the managing agent responsible for the residential rental construction on floors eight through fifteen, and defendant 270 Broadway Condominium Associates, LLC was the managing agent responsible for the condominium construction on floors sixteen through twenty-eight. At all relevant times, defendant Newmark acted as the construction manager and defendant NAI as the general contractor on the project. At the time of plaintiff's accident, NAI had several subcontractors working in the building including (1) first third-party defendant Aurash

Construction Corp. (Aurash), which was responsible for masonry, concrete, general labor, and cleaning, (2) second third-party defendant Gessin, which was responsible for electrical work, (3) third third-party defendant Medco, which was responsible for plumbing work, and (4) defendant On Par, which was responsible for carpentry.

Plaintiff had been hired by Aurash to work in the building as a laborer. Plaintiff had worked in the building for approximately ten days prior to his accident and was responsible for cleaning, sweeping, and performing whatever tasks were assigned to him by his foreman. During that time, plaintiff received work instructions solely from his foreman. On the day prior to his accident, a Gessin electrician verbally requested that plaintiff clean out the debris in the men's bathroom on the seventh floor of the building (the bathroom). Plaintiff relayed the electrician's request to his foreman at Aurash. According to plaintiff's deposition testimony, the next day, in the early afternoon, he was directed by his foreman to clean the bathroom and, specifically, to "[c]lean out all the stalls, all the broken block and bricks all over and all that. Clean up the floor, the cardboard and all that...."

At the time of the accident, the seventh floor of the building was fully gutted and had no walls, except for the walls surrounding the bathroom at issue, one other bathroom, and the elevator banks. The bathroom had an outside door with latches on both sides. The bathroom was approximately 15 feet by 20 feet and consisted of a hallway, a regular bathroom, with urinals and toilet stalls without doors, and a janitor's closet (also referred to in the record as the "slop room"). The janitor's closet was variously described as measuring approximately 11 feet by 9 feet according to plaintiff or 3 feet by 6 feet according to Mark Groblewski, Director of Construction at Design Construction Consultants which acted as the owner's representative in the building. The janitor's

closet had one wash sink, and on the wall behind the sink, there were two or three pipes or "risers." The janitor's closet was part of the bathroom and had no door, window, or lighting of its own. The bathroom itself was rigged with temporary lighting consisting of a single incandescent bulb hanging down from the ceiling on a wire. The bathroom also had outside light coming from its window, which was covered with glass that was glazed and had a wire mesh. In addition, there was demolition debris scattered around the bathroom including pieces of concrete and brick. Finally, the floor of the bathroom was covered with cardboard which had been placed in order to soak up the water which had accumulated on said floor. Upon arriving at the bathroom prior to the accident, plaintiff used a shovel to lift the debris and to dump it into a four-wheel one-yard container, which he had wheeled and positioned about three feet away from him. Plaintiff had been cleaning the debris for 15-20 minutes when, while twisting his body to dump another shovel load into the container, he lost his footing, slipped, and fell down on the wet floor tiles. When he fell, plaintiff alleged that he was working about three feet inside the janitor's closet. He testified that he was wearing work boots with rubber soles and that he did not feel that there was water in the janitor's closet until he fell down. Plaintiff got up unassisted and walked to a nearby elevator where he met his foreman. Plaintiff told him about the accident and the foreman took him downstairs in an elevator. It is unclear whether an accident report concerning the incident was ever prepared, and, in any event, no such report has been submitted in the record of the summary judgments before the court. There were no witnesses to plaintiff's accident, and no one else was working on the seventh floor at the time of the accident.

By supplemental summons and amended verified complaint, dated July 19, 2004, plaintiff brought the instant action against the Broadway entities, Newmark, NAI, and On Par alleging violations of Labor Law §§ 200, 240, 241 (a), and 241 (1-6). In his supplemental bill of particulars, dated January 17, 2007, plaintiff alleged violations of the following:

(I) New York Labor Law Sections 200, 240(1) and 241(6);

(ii) OSHA Section 29 1910 and 1926;

(iii) 12 NYCRR 23-1.1(a); 1.5(a); 1.7(d); 1.7(e)(1) and (2); and 1.30.[1]

In their answer, dated December 15, 2004, the Broadway entities asserted cross-claims against Newmark, NAI, and On Par seeking common-law indemnification. In their joint answer, dated October 25, 2004, Newmark and NAI asserted cross-claims against the Broadway entities and On Par seeking common-law indemnification. Thereafter, Newmark and NAI filed separate third-party actions against Aurash, Gessin, and Medco for common-law indemnification and contractual indemnification. Aurash failed to answer, and Gessin and Medco answered, in their respective actions.

By order, dated February 23, 2006, the court directed that motions for summary judgment be filed within 90 days after plaintiff filed a note of issue. On July 30, 2007, plaintiff filed a note of issue. On September 20, 2007, the Broadway entities, Newmark, NIA, and Gessin filed their respective motions for summary judgment. On October 11, 2007, Medco filed its motion for summary judgment. On October 22, 2007, On Par filed a motion for summary judgment which was

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[1] There is no subsection (a) in 12 NYCRR 23-1.1, and the court will treat this citation as referring to the entire section 23-1.1.

supported by an attorney's affirmation only and relied on depositions and document submissions made by the Broadway entities, Newmark, NAI, and Gessin.

Plaintiff's Labor Law § 241 (6) Claim

In moving for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, the Broadway entities, Newark, NAI, and Gessin argue that the New York State Industrial Code provisions (12 NYCRR 23 *et seq.*) alleged by plaintiff to have been violated are either too general to support a claim under the statute, or are inapplicable given the circumstances of the accident. In particular, the Broadway entities, Newmark, NAI, and On Par point out that 12 NYCRR 23-1.1 ("Title and Citation") and 1.5(a) ("General Responsibility of Employers") are general safety regulations that may not serve as a basis for a Labor Law § 241 (6) claim. These movants also argue that section 23-1.7(d) ("Protection from General Hazards – Slipping Hazards") is inapplicable because any slippery condition in the bathroom was a normal and integral part of plaintiff's cleaning job. These movants further claim that section 23-1.7(e)(1) ("Protection from General Hazards – Tripping and Other Hazards – Passageways") is inapplicable because plaintiff did not fall in a passageway and that section 23-1.7(e)(2) ("Protection from General Hazards – Tripping and Other Hazards – Working Areas") is inapplicable because the debris that allegedly caused plaintiff's fall was also an integral part of his cleaning job. Gessin maintains that section 23-1.30 ("Illumination"), which imposes minimum lighting requirements for work areas, was not violated because plaintiff's assertions in his deposition testimony that it was "too dark [for him] to see" was contradicted by his other deposition testimony that he had been able to work for 10-15 minutes in the bathroom prior

to his accident and that plaintiff had no independent proof, other than his own testimony, that the lighting in the bathroom, including in the janitor's closet, was inadequate.

In opposition to this branch of the summary judgment motions, plaintiff does not dispute that 12 NYCRR 23-1.1 and 1.5(a) are too general to support a Labor Law § 241 (6) claim. However, plaintiff argues that 12 NYCRR 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), and 23-1.30 are specific safety regulations that are applicable in this case since he slipped and fell because of water beneath construction debris on the floor in the working area that he was sent to clean. Plaintiff also maintains that he could not see the water because there was no lighting, natural or artificial, in the closet, and that he did not expect to encounter water as he was sent to remove debris from the bathroom, not to mop. In particular, plaintiff points out that the failure to provide any lighting in the work area violated section 23-1.30, that the failure to remove/rectify the accumulation of water in the work area was a slipping hazard within the meaning of section 23-1.7(d), and that the failure to remove debris strewn throughout the work area was a tripping hazard within the meaning of sections 23-1.7(e)(1) and (2).

Labor Law § 241 provides, in pertinent part, that:

> All contractors and owners and their agents ... when constructing or demolishing buildings ... shall comply with the following requirements:
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> * * *
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein .... The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work ... shall comply therewith.

"'A plaintiff asserting a cause of action alleging a violation of Labor Law § 241 (6) must allege that a specific and concrete provision of the Industrial Code was violated and that the violation proximately caused his or her injuries.'" (*Rosado v Briarwoods Farm*, 19 AD3d 396, 399 [2005] [citations omitted]). For purposes of Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction has been drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards (*see Ross v Curtis-Palmer Hydro Electric Co.*, 81 NY2d 494, 505 [1993]). Once it has been alleged that a concrete specification of the Industrial Code has been violated, a determination must be made as to whether the plaintiff's injuries were caused by the violation. If proximate cause is established, the contractor or owner is vicariously liable under the statute without regard to his or her fault and without regard as to whether or not he or she had actual or constructive notice of same (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 352 [1998]).

Section 1.7(d) – Slipping Hazards

12 NYCRR 23-1.7(d), which protects against "slipping hazards," provides:

> "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."

Courts have consistently interpreted 12 NYCRR 23-1.7(d) in a common-sense manner, holding that a slippery condition that is normal, integral, unavoidable or an inherent part of the construction job does not violate the rule and, therefore, does not support Labor Law 241(6) claim (*see Bond v York Hunter Constr.*, 270 AD2d 112, 113 [2000], ["the accumulation of debris was an

unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"] [citations omitted], *aff'd*, 95 NY2d 883 [2000]).

Plaintiff's argument that the water condition on the floor was not inherent to his work because he was given a shovel, but not a mop, is without merit. By his own admission, plaintiff's cleaning task was not limited to removing bricks and concrete blocks, but included cleaning up the entire bathroom floor, including the cardboard which had been used to soak up the water. In particular plaintiff testified at his deposition that he was sent to "[c]lean up the floor, the cardboard and all that...." Accordingly, section 1.7(d) does not support a cause of action under Labor Law § 241 (6) since the water that caused him to slip was an inherent part of the work that he was performing.

Section 1.7(e)(1) – Tripping and Other Hazards in Passageway

12 NYCRR 23-1.7(e)(1), which protects against "tripping and other hazards in passageways," provides, in relevant part:

> "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

Plaintiff stated in his sworn deposition that his accident occurred in the janitor's closet, which was not, and could not have been used by plaintiff as, a passageway. Consequently, section 23-1.7(e)(1) is not applicable in this case and may not serve as a basis for plaintiff's Labor Law § 241 (6) cause of action. (*Hageman v Home Depot USA, Inc.*, 45 AD3d 730 [2007]).

Section 1.7(e)(2) – Tripping and Other Hazards in Working Areas

12 NYCRR 23-1.7(e)(2), which protects against "tripping and other hazards in working areas," provides:

> "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*"(emphasis added).

The janitor's closet in which plaintiff fell was part of his work area (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [2004]). However, cleaning up dirt and debris was an integral part of the work plaintiff was performing (*see Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2001]). Consequently, section 1.7(d) does not support a cause of action under Labor Law § 241 (6).

Section 1.30 – Adequate Illumination

12 NYCRR 23-1.30, which requires sufficient lighting, provides:

> "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."

In his pre-trial depositions, plaintiff testified at length about the inadequacy of illumination in his work area:

> "The area I was working in the bathroom, there was no light at all and I told my shop steward and he said 'Well, do the best you can.'" (DeFillipo first deposition at 13).

> "[I]t was dark in there, so as I was shoveling away there was water on the floor, but in that particular spot there was tile that I didn't see that was still level on the floor, so that made it really slippery and that's when I fell." (*Id.* at 15).

> "Q. When did you first notice water on the floor of the bathroom?
>
> "A. Well, the bathroom, the water, the cardboard was soaking up that part. The other part of the bathroom you couldn't see nothing, that's why I got hurt, it was dark, pitch dark.
>
> "Q. What part of the bathroom was that that was pitch dark?
>
> "A. I believe it was part of the slop room [the janitor's closet], where they keep the mops, the pails, the slop sinks and all that. They had no light at all and I even said to the shop steward and foreman that there was no light over here.
>
> "Q. What, if anything, did he say?
>
> "A. He said, 'All right, do the best you can.'"

(*Id.* at 94).

In his affidavit submitted in support of plaintiff's opposition to the summary judgment motions, plaintiff also states:

> "Immediately prior to my accident, I was working inside the janitor's closet and was standing approximately three (3) feet from the door frame of the closet. I had been shoveling construction debris from inside the janitor's closet and I put the debris inside a container which was located in the hallway, immediately outside the door frame for the janitor's closet.
>
> "There was no light inside the janitor's closet. There were no windows inside the janitor's closet nor was there any light bulb or any other artificial lighting inside the janitor's closet."

On the other hand, Groblewski testified at his pre-trial deposition that the temporary lighting utilized light bulbs with the wattage of 75 or 100 (Groblewski deposition at 58), that in "[e]very closet space there was at least three or six 75 or 100 watt bulbs and in each bathroom" (*id.* at 68) and that he never saw areas with inadequate lighting when he was in the building (*id.* at 64). His testimony, however, was general in nature and did not specifically address whether or not there was

adequate lighting in the janitor's closet. No other movant offered any relevant evidence concerning the lighting conditions in the janitor's closet. The Broadway entities, Newmark, NAI, and Gessin failed to make a *prima facie* showing that the lighting in the janitor's closet was sufficiently compliant with the requirements of 23 NYCRR 23-1.30 (*see Lucas v KD Dev. Constr. Corp.*, 300 AD2d 634 [2002]).[2]

Plaintiff's Labor Law § 200 Claims

The Broadway entities, Newmark, and NAI also seek to dismiss plaintiff's Labor Law § 200 negligence claims. Gessin and Medco seek to dismiss contractual and common-law indemnity claims asserted by Newmark and NAI against them. In so moving, each movant argues that there is no evidence that it controlled or supervised plaintiff's work or that it otherwise had notice of the allegedly dangerous condition posed by the water on the floor and/or the temporary lighting. Specifically, the movants note that plaintiff's own deposition testimony indicates that he was supervised solely by his foreman and did not interact with other contractors.

In opposition to this portion of the summary judgment motions, plaintiff argues that all movants had notice of two distinct defective conditions – water and darkness – that existed in the janitor's closet in which plaintiff was working. First, plaintiff points to the presence of the cardboard on the floor as indicative that at least someone knew that the bathroom floor was wet. Second, plaintiff states that his complaint to his shop steward and foreman about the lack of light in the

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[2] Plaintiff also relies on several OSHA regulations in support of his Labor Law § 241 (6) claim. Violations of OSHA standards, however, do not provide a basis for liability under Labor Law § 241 (6) and, accordingly, plaintiff's Labor Law § 241 (6) claim is dismissed to the extent plaintiff relies on the OSHA regulations. (*See Vernieri v. Empire Realty*, 219 AD2d 593, 598 [1995]; *Ciraolo v. Melville Ct. Assocs.*, 221 AD2d 582, 583 [1995]).

bathroom created an issue of actual and/or constructive notice of the dangers in the bathroom. Third, plaintiff was told by a Gessin foreman to clean up the bathroom. Fourth, plaintiff points out that, according to the daily job report, Medco, a plumbing subcontractor, had two employees assigned to the slop sink area in the janitor's closet on the day of the accident.

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

> All places to which this chapter applies shall be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein ....

Labor Law § 200 is a codification of an owner's or general contractor's common-law duty to maintain a safe work place. (*Lombardi v Stout*, 80 NY2d 290, 294 [1992]). Liability under Labor Law § 200 will attach when the injury sustained was a result of an actual dangerous condition and then only if defendant (1) exercised supervision or control over plaintiff's work on the premises (*see Rizzuto,* 91 NY2d at 352-53), or (2) had actual or constructive notice of, or created, an unsafe condition that produced the injury (*Sobelman v Norstar* Bank, 226 AD2d 444 [1996]).

Broadway Entities

There is no evidence that the Broadway entities exercised any supervision or control over plaintiff's work or the work of plaintiff's employer (Aurash) in the building. Furthermore, there is no evidence that the Broadway entities had actual or constructive notice of any problem in the janitor's closet or any place in the bathroom. Inasmuch as neither the plaintiff nor any of the other movants have raised a triable issue of fact establishing otherwise (*see Braun v Fischbach & Moore*, 280 AD2d 506, 507 [2001]), that branch of the Broadway entities' motion seeking to dismiss

plaintiff's Labor Law § 200 claim asserted against them is granted, and said claims are dismissed against the Broadway entities.

Newmark

Plaintiff's Labor Law § 200 claim is also dismissed against Newmark. There is no evidence in the record that Newmark exercised actual control over plaintiff's work or that it had actual or constructive notice of the allegedly dangerous conditions (*see Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]). Although Newmark exercised general supervisory authority at the work site for the purpose of overseeing the timing and quality of the work in the building and inspecting its progress, that is insufficient to impose liability under Labor Law § 200. (*See Delanna v. City of New York*, 308 AD2d 400 [2003]). Evidence of a party's overall responsibility for the safety of work being performed by subcontractors and authority to have unsafe conditions corrected or to stop the work does not raise a question of fact as to that party's liability for violation of Labor Law § 200. (*See Brown v NYC Economic Dev. Corp.*, 234 AD2d 33, 34 [1996]). Accordingly, plaintiff's Labor Law § 200 claim against Newmark is dismissed.

NAI

There is evidence in the record that NAI was aware of the water on the floor of the bathroom where plaintiff fell. Alan Kaiserman, a construction superintendent at Newmark, testified at his pre-trial deposition that the cardboard would not have been placed on the bathroom floor to soak up the water unless NAI had directed subcontractors to do so because subcontractors themselves would not have done it (Kaiserman deposition at 110). This suggests that NAI had notice of the presence of the water on the bathroom floor. It is true that Mr. Kaiserman's testimony is contradicted by

Rosemarie Cutting, a clerical estimator at NAI at the time of plaintiff's accident, who testified that she had no knowledge of any unsafe conditions in the men's bathroom (*id.* at 72, 84). However, the credibility of the parties is not an appropriate consideration in the context of a summary judgment motion (*see, e.g., MJM Advertising, Inc. v Panasonic Indus. Co.*, 2 AD3d 252, 253 [2003]). Since there is a contradiction between the testimony of Mr. Kaiserman and Ms. Cutting concerning the condition of the bathroom, NAI's motion for summary judgment dismissing plaintiff's claim against it under Labor Law § 200 is denied.

Gessin

Gessin seeks summary judgment to dismiss claims of Newmark and NAI against it for contractual and common-law indemnity.

Contractual Indemnity

NAI retained Gessin as the electrical subcontractor for the project pursuant to a written agreement (Contract no. TWR-270-11), dated July 30, 2001 (the Gessin contract). Section 1 of Schedule D to the Gessin contract contains an indemnification clause which states, in pertinent part, as follows:

> The Contractor [Gessin] shall indemnify and hold harmless the First Party [NAI] and all of its agents and employees from and against all claims, damages, losses and expenses including but not limited to attorney's fees arising out of or resulting from the performance of the Contractor's Work under this Contract, *provided that any such claim, damage, loss, or expense (a) is attributable to bodily injury, sickness, disease, or death, or to injury or to destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor* or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder.
>
> * * *

> This Indemnity Agreement shall survive the termination or completion of Contractor's engagement.

The foregoing contract provision requires Gessin to indemnify NAI for any bodily injury claim that is caused, in whole or in part, by any negligent act or omission of Gessin.

By the terms of the Gessin contract, Gessin was specifically required to "provide temporary and maintain temporary lighting in all bathroom[s] for entire duration of job." (Section 56(b) of Schedule A). Christopher Graf, a Gessin foreman who worked in the building, testified that Gessin would add lighting if Gessin determined it was necessary or if someone asked Gessin to do so (*id.* at 23).

Plaintiff testified that Gessin's electricians had their shanty on the same floor as the bathroom in which plaintiff fell (DeFillipo first deposition at 16). Furthermore, a Gessin electrician spoke to plaintiff about cleaning the bathroom (*id.* at 16). When plaintiff informed his shop steward and foreman about Gessin's request, he told them, "But there is no light in there" (*id.* at 16). Plaintiff further testified: "I explained to them that there was no light in there and he said, 'Well, maybe they'll rig something up,' but they never did" (*id.* at 17). Plaintiff's testimony suggests that Gessin may have had notice of the lighting conditions in the bathroom.

Accordingly, Gessin has not established that it was altogether free of blame in causing plaintiff's injuries. Therefore, that branch of Gessin's motion which seeks to dismiss the contractual indemnity claims against it is denied.

Common Law Indemnity

It appears that Gessin may have had "'the authority to control the activity bringing about the injury'" (*see Verel v Electric Constr. Co.*, 41 AD3d 1154, 1156 [2007]) (citations omitted).

Accordingly, that portion of Gessin's motion which seeks to dismiss common law indemnity claims against it is also denied.

Medco

Medco also seeks summary judgment to dismiss claims of Newmark and NAI against it for contractual and common-law indemnity.

Contractual Indemnity

Newmark and NAI's complaint against Medco references a written agreement between Medco and NAI, pursuant to which "Medco agreed to indemnify NEWMARK CONSTRUCTION and N.A.I. CONSTRUCTION for any claims, damages, losses, and expenses, including but not limited to legal fees, arising from the work performed by MEDCO" (¶ 15). Because the agreement itself has not been submitted into the record, however, the court cannot rule on this issue, and that portion of Medco's motion for summary judgment which seeks to dismiss the contractual indemnity claims against it is denied.

Common Law Indemnity

That portion of Medco's motion for summary judgment which seeks to dismiss a common law indemnity claim against is also denied. The daily job report for the day of plaintiff's accident stated that two Medco employees were assigned to work on the slop sink in the janitor's closet. Daniele Mancini, a Medco foreman, testified at his pre-trial deposition that if there was a sink or toilet overflow at the building, a plumber would be called. (Daniel Mancini deposition at 34-35). Presumably such plumber would have been Medco.

However, Nicholas Mancini, a general super manager at Medco at the time of plaintiff's accident, testified that slop sinks in the building were outside the scope of Medco's work, that the only work performed by Medco in the bathrooms on the seventh floor was the addition of new pipes in one of the bathroom walls. (Nicholas Mancini Deposition at 16, 41-42).

In light of the daily job report specifically stating that two Medco employees were dispatched to work in the janitor's closet on the day of plaintiff's accident, and in light of the inconsistent testimony of the Medco managers, Medco may have had some control over the conditions in the janitor's closet in which plaintiff fell. Summary judgment is inappropriate in these circumstances.

Plaintiff's 240 (1) Claim

Plaintiff's Amended Verified Complaint, dated July 19, 2004, also asserts a claim under Labor Law § 240 (1) even though plaintiff slipped and fell on the same floor level at which he was working. Plaintiff has no viable claim under Labor Law § 240 (1), and has failed to defend this claim in his Affirmation in Opposition. Therefore, the court deems that plaintiff has abandoned his Labor Law § 240 (1) claim as to all defendants.

On Par's Motion for Summary Judgment

On Par's motion for summary judgment is supported solely by an attorney's affidavit which relies upon documents and depositions submitted by parties other than On Par. An attorney's affidavit is of no probative value on a summary judgment motion unless accompanied by documentary evidence which constitutes admissible proof. (*See Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1997]). The evidence submitted by third-party defendants and by the other defendants did not relate to On Par. On Par has failed to meet the initial burden on its motion for

summary judgment and the burden of proof has not shifted to plaintiff. Accordingly, On Par's motion for summary judgment is denied without regard to the sufficiency of plaintiff's opposition. (*See Hughes v Cali*, 31 AD3d 385, 386 [2006]).

Summary

In summary, the court rules as follows:

(1) that branch of summary judgment motions of the Broadway entities, Newmark, and NAI which seeks to dismiss claims under Labor Law § 241 (6) is granted to the extent plaintiff relies on 12 NYCRR 23-1.1, 1.5(a), 1.7(d), 1.7(e)(1), and 1.7(e)(2), and on the OSHA regulations, and is denied to the extent plaintiff relies on 12 NYCRR 23-1.30;

(2) that branch of summary judgment motions of the Broadway entities, Newmark, and NAI which seeks to dismiss claims under Labor Law § 200 is granted to the extent such claims are asserted against the Broadway entities and Newmark, and is denied to the extent such claims are asserted against NAI;

(3) that branch of Gessin's summary judgment motion which seeks to dismiss contractual and common law indemnity claims against it is denied;

(4) that branch of Medco's summary judgment motion which seeks to dismiss contractual and common law indemnity claims against it is denied;

(5) that branch of summary judgment motions which seeks to dismiss claims under Labor Law § 240 (1) is granted; and

(6) On Par's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. JUSTICE HERBERT KRAMER