At an IAS Term, Part 8 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 29th day of September, 2008.

P R E S E N T:

HON. BERT A. BUNYAN,
Justice.

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JAN POMICHOWSKI AND JANINA POMICHOWSKA,

Plaintiffs,

- against -

GREENWICH STREET PROJECT, LLC.,
BREEZE CONTRACTING CORP., AND
BREEZE NATIONAL INC.,

Defendants.

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GREENWICH STREET PROJECT, LLC,

Third-Party Plaintiff,

- against -

HAZARDOUS ELIMINATION CORP.,

Third-Party Defendant.

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Index No. 12356/06

Index No. 75757/06

The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	5-6
Reply Affidavits (Affirmations)	7-8
_____Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant/third-party plaintiff Greenwich Street Project, LLC, (GSP) moves for an order, pursuant to CPLR 3211 and/or CPLR 3212, for summary judgment dismissing plaintiff Jan Pomichowski's (plaintiff)[1] complaint and all claims asserted against it, and for summary judgment on its claims for contractual indemnification against third-party defendant Hazardous Elimination Corp. (HEC).[2] Plaintiff moves for an order, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under his Labor Law § 240(1) cause of action against GSP.

Factual and Procedural Background

This personal injury action arises out of a workplace accident wherein plaintiff, a construction worker employed by HEC, was injured on March 3, 2006 when a staircase collapsed at a construction site located at 21-23 Thames Street a/k/a 133-135 Greenwich Street (the site or subject premises) in Manhattan. Plaintiff testified at his deposition that he was involved in cleaning and removing garbage from the subject premises as part of a larger demolition project that included World Trade Center dust and asbestos abatement. Plaintiff's accident occurred in his first week of work.

At the time of plaintiff's accident, HEC employee Piotr Kaciuba (Kaciuba) was

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[1] Janina Pomichowska was also joined as a plaintiff in this action by an amended summons and complaint dated January 18, 2008.

[2] HEC's cross- motion seeking dismissal of GSP's complaint was voluntarily withdrawn by a short form order dated July 23, 2008. In the same order, GSP discontinued without prejudice its causes of action in the third-party complaint against HEC that sound in apportionment and/or common-law indemnity.

plaintiff's supervisor. Kaciuba, in turn, reported to Daniel Zelek (Zelek), an employee of HEC and Manager of Hazardous Supervisors at the subject premises. Zelek testified that his duties included staffing the workers and materials, and overseeing the progress of the job. Plaintiff testified that only Kaciuba and an HEC foreman inspected his work. In addition, Channan Rozenbaum (Rozenbaum) was the project developer employed by the Copper Group, a subsidiary of Greenwich Street, LLC, who was responsible for meeting with designers and architects in connection with the development of the 133 Greenwich Street properties. Said properties consisted of two buildings collectively referred to as 133 Greenwich Street. The owner of these properties was GSP. Of the two buildings at 133 Greenwich Street, plaintiff was allegedly injured in the five-story structure. According to Rozenbaum, this structure was to be demolished after asbestos abatement work was completed.

Pursuant to a contract between GSP and HEC, HEC was to perform abatement at the subject premises, which involved the removal of anything "porous." According to Rozenbaum, the removal of porous structures involved some demolition. However, according to Zelek, HEC did not remove anything structural from the premises in its demolition work. As a result of the asbestos abatement work being done at the site, a decontamination unit was set up at the front entrance of the building so that only licensed handlers were allowed to enter the building. Rozenbaum testified that no one from GSP or the Copper Group approved or inspected plaintiff's work or entered the site after HEC

began abatement. Rozenbaum also testified that his only communication with HEC was verbal progress reports and updates given by Zelek several times a week. At the time of plaintiff's accident, there were no elevators or escalators at the work site. Plaintiff testified that there was one staircase made of metal, with metal handrails leading to each of the three floors in the center of the building; that it was not enclosed with walls when he began working at the site; that it was "old and rusty;" that it was supported by 2 x 4 vertical beams on each side; and that he did not see any "bracing" to protect it prior to his accident. Rozenbaum testified that the staircase was a "permanent" structure; that "bracing" on the stairwell pre-existed GSP's purchase of the building; that before HEC began abatement work, there was a wall on one side of the staircase; and that the staircase was braced by being tied to the handrails and the wall. According to Rozenbaum, the stairs were "stable" and "sturdy" prior to HEC's work. Zelek testified that, at the time of plaintiff's accident, HEC had removed the sheetrock and the plaster from the walls of the staircase on every level with the use of crowbars and hammers. Zelek also testified that once the sheetrock was removed, the only things remaining were wooden structure beams which were connected to the stairs.

According to plaintiff, on the day of his accident, he was instructed by Kaciuba to remove the garbage from each floor of the building. Plaintiff was on the second floor loading garbage into bags when he realized that he needed more bags from the first floor. He proceeded down the staircase to the first floor, holding the handrail as he walked down.

After descending the first few steps, the entire staircase collapsed "right away," falling directly down with the plaintiff approximately 5-6 meters (or 19 feet) to the first floor below. Plaintiff testified that he did not hear any sounds, cracking wood, cracking metal or any other kind of sound that would indicate to him the imminent collapse of the staircase.

After the accident, Rozenbaum walked through the site with a structural engineer. He testified that much of the abatement work had been completed, that there were no longer any walls holding up the stairs, and that a new, "temporary," staircase was constructed by HEC and paid for by GSP. According to Rozenbaum, pursuant to the contract between HEC and GSP, as well as a Health and Safety Plan prepared for the Copper Group by Airtek Environmental Corp., a GSP consultant, HEC was responsible for safety at the work site. Rozenbaum testified that the Health and Safety Plan required HEC to inspect and make the stairwell safe, and that HEC was told about the "compromised structural integrity of the building" prior to commencing work. He also stated that HEC performed several walk-throughs of the site as part of the bidding process before it began its work . In this regard, during one site visit, Zelek testified that he was present and that he initially inquired as to whether the staircase was safe to use. However, after using the staircase and noticing that the stairs did not move, the staircase was no longer a concern for him. Zelek also testified that he was aware that as a result of the World Trade Center collapse, hazardous conditions existed relating to the "deteriorated, rundown condition of the site." He stated that HEC did not perform any activities to determine if the staircase needed shoring or further support

after the sheetrock was removed from the stairwell. According to Zelek, any safety complaints at the site would be appropriately directed to him, but he had never received any complaints about the stairs prior to plaintiff's accident. Zelek denied that HEC was responsible for checking the structure of the building as part of its duties. Zelek also denied being advised that the work HEC was required to do would create weakened sections as supporting elements were removed; however, upon further review of the Health and Safety Plan, Zelek conceded that HEC was aware of this fact. Zelek also testified that if he had noticed a structural problem at the site, he would have stopped work immediately and notified GSP, and that it was the owner's responsibility to notify a structural engineer. According to Zelek, when he walked through the building with the owner during the bidding process, he was told that the building and the stairs were safe.

By summons and complaint dated April 17, 2006, plaintiffs commenced the instant action against defendants alleging violations of Labor Law § § 240(1), 241(6), 200 and common-law negligence. GSP commenced a third-party action against HEC on or about August 8, 2006. All claims against defendants Breeze Contracting Corp. and Breeze National Inc. were voluntarily discontinued on or about August 1, 2006.

Plaintiff's Labor Law § 240(1) Claim

In moving to dismiss plaintiff's Labor Law § 240(1) claim, GSP contends that Labor Law § 240(1) "is clearly not applicable to the facts of this case." In this regard, GSP asserts that "the Supreme Court of New York, Appellate Division Third and Fourth Departments

have consistently deemed the collapse of a permanent structure as being outside the scope of Labor Law § 240(1)." To this effect, GSP notes that the interior staircase that collapsed was a pre-existing, permanent staircase in the building where plaintiff fell. Therefore, GSP argues that, "this matter does not involve any issues with braces or the proper support of an elevated work site."

In opposition, plaintiff argues that "where, as in the instant case, a gravity related accident occurs, whereby, a worker is injured in a fall from a collapsing staircase, a *prima facie* case for summary judgment has been established under Labor Law § 240(1)." Further, plaintiff alleges that the only access between floors at the subject premises was an "unbraced/un-secure" staircase and that "the demolition of the subject premises prior to plaintiff's accident had weakened the existing staircase to such a level that it was no longer safe to use the staircase." Plaintiff also contends that the staircase existed only as a means of access to different levels of the building. In this regard, plaintiff argues that a temporary staircase should have been installed and that GSP failed to eliminate risks posed by the height differential by failing to provide him with safety devices. In addition, plaintiff avers that the "permanent" nature of the staircase does not preclude its consideration as the functional equivalent of 'other devices' for purposes of Labor Law § 240(1). Specifically, plaintiff asserts that the "real issue is whether the object was being used as an elevated work platform" and not whether the staircase was permanent or temporary.[3]

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[3] The court notes that plaintiff also moved for partial summary judgment on the basis of liability pursuant to Labor Law § 240(1).

In reply, GSP argues that "although [p]laintiff's [o]pposition to GSP's application for summary judgment tried to deny the legal implications of a staircase that is temporary as opposed to one that is permanent for purposes of § 240, [p]laintiff's own cited case law is indicative of the legal significance New York courts place on this distinction." Further, GSP notes that the staircase "at all times served its originally intended purpose of providing access between two levels of the structure." Therefore, GSP asserts that the permanent nature of the subject staircase precludes its consideration as the functional equivalent of a ladder/scaffold.[4]

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

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the

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[4] The court notes that GSP's affirmation in opposition to plaintiff's motion for partial summary judgment raises legal arguments already discussed here. In its opposition, GSP maintains that "there is no evidence in this matter to warrant deeming the permanent staircase the functional equivalent of a 'safety device' or 'other devices' for the purposes of § 240(1)." In his reply to GSP's affirmation in opposition, plaintiff incorporates by reference the legal arguments and exhibits set forth in his affirmation in opposition to GSP's motion for summary judgment.

scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" *(Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*Ross*, 81 NY2d at 500; *see also Zimmer v Chemung County Perf Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross* at 500). Furthermore, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). "The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do not 'encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (*Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999], *quoting Ross* at 501). "Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci*, 96 NY2d 259). Only those accidents proximately caused by a Labor Law § 240 (1) violation

will result in the imposition of liability under the statute (*see Blake v Neighborhood Hous. Services of New York City*, 1 NY3d 280, 287 [2003]).

Moreover, a fall from a fixed permanent staircase is not covered under Labor Law § 240(1) because such a staircase is a "normal appurtenance to the building and [is] not designed as a safety device to protect [against] an elevation-related risk" (*Norton v Park Plaza Owners Corp.*, 263 AD2d 531,532 [1999]). In addition, in *Ryan v Morse Diesel, Inc.* (98 AD2d 615, 615-616 [1983]) where the plaintiff fell while carrying a bucket of bolts down a permanently installed but unfinished interior stairway of a hotel under construction, the First Department noted that an accident arising from such a normal appurtenance to a building not designed as a safety device to protect against elevation-related risks simply does not lie within the purview of Labor Law § 240(1) *(see also Sponholz v Benderson Property Dev., Inc.*, 266 AD2d 815, 815-816 [1999] [where the stairway which collapsed and caused plaintiff to fall 15 feet below did not constitute a temporary safety device within the meaning of that section]).[5] Further, in *Ryan*, the evidence was clear that "[t]he stairway in question was not a tool used in the performance of the plaintiff's work" and was merely a "passageway from one work place to another" (*Ryan*, 98 AD2d at 616; *see also Sponholz*, 266 AD2d at 433 [no Labor Law § 240(1) cause of action where stairway was a permanent passageway between two parts of the building, and was not a tool or device employed solely

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[5] The First Department in *Brennan v RCP Associates* (257 AD2d 389, 391 [1999]), also "emphasize[d] that the determinative criterion in *Ryan* is not the permanence of the structure but its character as a normal appurtenance of the building rather than as a device to protect the worker from elevation-related hazards" (*id.*).

to provide access to an elevated worksite]; *Clinquennoi v Michaels Group*, 178 AD2d 839 [1991]).[6] Furthermore, the fact that the staircase in question was slated for eventual demolition does not convert it into a safety device under the statute (*see Williams v City of Albany*, 245 AD2d 916 [1997] [that the stairway which collapsed had been altered from its original condition, and was near demolition, did not warrant it being treated as a "temporary structure" used only to afford workers access to a worksite]).

Here, the staircase could not be considered the functional equivalent of a ladder or other device as contemplated by Labor Law § 240(1) *(see also Sponholz,* 266 AD2d at 433).[7] Thus, plaintiff has failed to establish the applicability of Labor Law § 240(1) since the subject staircase was a permanent and normal appurtenance to the building, and was not being used as an "other device" under the statute because the staircase did not pose a special

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[6] In *Clinquennoi*, the Appellate Division, Third Department ruled that the permanent nature of the staircase precluded its consideration as the functional equivalent of a ladder or as a tool of plaintiff's work. The court distinguished its ruling in *Westcott v Shear* (161 AD2d 925 [1990]), where a temporary staircase was found to be the functional equivalent of a ladder and, therefore, fell within the designation of "other devices" as used in Labor Law § 240(1). In *Westcott,* the court distinguished a temporary staircase from a permanent passageway; noting that the latter is something which cannot be considered a tool of plaintiff's work and, therefore, does not fall within the provisions of Labor Law § 240(1).

[7] In both *Williams* and *Sponholz*, the Third and Fourth Departments, respectively, distinguish the case of *Foufana v City of New York* (211 AD2d 550 [1995]), where an old concrete stairway was unearthed during excavation of the site and thereafter left in place to be used by the workers to gain access from the bottom of the excavation to the street level of the site. *Foufana* (211 AD2d at 550) held that: "[t]hat stairway was thus a temporary device used for access to the excavation, not a permanent passageway within a structure." The court noted that the staircase was used "only for purposes of the excavation" and, therefore, was "effectively furnished and operated by defendants," making its use much the same as a ladder that would be provided at the workstation and covered by Labor Law § 240(1) (*Foufana* at 550).

hazard related to an elevation differential. Inasmuch as the staircase on which plaintiff was injured was merely a passageway from one place of work to another, not a tool used in the performance of his work, the court finds that plaintiff was not subjected to an elevation-related risk (*see Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989 [2005]; *Ryan*, 98 AD2d at 616).

Accordingly, the branch of defendant's motion which seeks summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action is granted and plaintiff's motion for partial summary judgment on the issue of GSP's liability under his Labor Law § 240(1) cause of action is denied.

Labor Law 241(6)

In moving for summary judgment to dismiss plaintiff's Labor Law § 241(6) cause of action, GSP argues that the New York State Industrial Code regulations cited in plaintiff's bill of particulars are either too general to support a Labor Law § 241(6) claim, or are inapplicable under the facts of this case. In his bill of particulars, plaintiff alleges that defendants violated various Industrial Code sections. However, in his opposition papers, plaintiff relies solely upon 12 NYCRR 23-1.7(f), 23-1.8(c)(1), 23-2.7(e), 23.3.2 (b) and 23-3.3(b)(3)(4)(5)(6), (c) and (f), and thus has abandoned his claims with respect to the remaining violations.

Labor Law § 241 (6) provides, in pertinent part, that:

> All contractors and owners and their agents . . . when constructing or demolishing buildings . . . shall comply with

> the following requirements: * * *
> 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 or lawfully frequenting such places.

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*see Ross*, 81 NY2d at 501-502). 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]). 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 (*see Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 352 [1998]). Further, the liability of contractors and owners under this section is not dependent on whether the owner or contractor exercised control or supervision of the work site (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300).

12 NYCRR 23-1.7(f)

12 NYCRR 23-1.7(f) provides that:

> "(f) Vertical passage. Stairways, ramps, or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the

> work prevents their installation in which case ladders or other safe means of access shall be provided."

Plaintiff argues that this regulation is specific enough to support a Labor Law § 241(6) claim and that there is a triable issue of fact as to whether GSP provided a "safe stairway" for him to use. GSP replies that this regulation is inapplicable because plaintiff was using a permanent staircase as access to different working levels at the time of the accident.

This regulation is a concrete specification of the Industrial Code *(see Gielow v Rosa Coplon Home*, 251 AD2d 970 [1998]). In addition, this section is applicable because there is clear evidence that the staircase collapsed. Thus, the alleged violation of 23-1.7(f) may form the basis of a cause of action under Labor Law § 241 (6), and there is a triable issue of fact as to whether GSP provided a safe stairway for plaintiff to use (*see Sponholz v Benderson Property Development, Inc.*, 273 AD2d 791 [2000]).

12 NYCRR 23-1.8 (c)(1)

23-1.8(c)(1), entitled "Head protection," requires the owner and contractor to provide an approved safety hat to "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists." Plaintiff argues that GSP violated this regulation because he was not provided with a hard hat for his work at the subject premises. GSP asserts that this regulation is inapplicable because plaintiff's injuries were not caused by a falling object or material or other head-bumping hazard.

The provisions of 23-1.8(c)(1) contain concrete specifications *(see Bornschein v*

Shuman, 7 AD3d 476 [2004]). However, this regulation is not applicable since plaintiff's injuries were not caused by a falling object or other head-bumping hazard (*see Modeste v Mega Contracting Inc.*, 40 AD3d 255, 255-256 [2007]), but rather a fall through a collapsed staircase.

12 NYCRR 23-2.7(e)

GSP asserts that 12 NYCRR 23-2.7, which deals with stair requirements in the construction of buildings, is inapplicable because it concerns the construction of "temporary" rather than "permanent" stairs. In addition, GSP avers that 2.7(e), which requires protective railings on stairways, is inapplicable because the lack of a safety railing was not the proximate cause of plaintiff's fall. In that regard, GSP points out that plaintiff himself testified that the stairwell had metal handrails on both sides. Plaintiff claims that GSP violated 23-2.7(e) because there is no evidence that a "safety railing" was provided for the subject stairway.

Plaintiff's reliance on 23-2.7(e) is misplaced since the lack of safety railings was not a proximate cause of plaintiff's fall; it is undisputed that plaintiff was injured because the stairway collapsed, not because he slipped or tripped on the stairway (*see Sponholz*, 273 AD2d at 750; *compare Frank v Meadowlakes Development Corp.*, 256 AD2d 1141 [1998]).

12 NYCRR 23-3.2(b) and 12 NYCRR 23-3.3(c)

23-3.2(b) pertains to the protection of adjacent structures during demolition operations and 23-3.3(c) deals with required inspections during hand demolition operations. GSP

argues that 12 NYCRR 23-3.2(b) is inapplicable because the regulation "pertains solely to the protection of the stability of 'adjacent structures' during the demolition of a building or structure, not to walls within the building or structure being demolished." In this regard, GSP notes that because the "stairs that collapsed were *a part of* the very structure being abated" they were not *adjacent to* the structure. With respect to 23-3.3 (c), GSP asserts that because this provision applies to hazards resulting from weakened or deteriorated "floors or walls or from loosened materials" only, and because plaintiff was not performing hand demolition at the time of his accident, the regulation is not applicable. GSP also notes that there is no evidence that any failure to perform inspections pursuant to 23-3.3(c) was the proximate cause of plaintiff's injuries. Plaintiff asserts that 12 NYCRR 23-3.2(b) and 12 NYCRR 23-3.3(b)(3)(4)(5)(6), (c), (f) were violated because a structural engineer was not hired until after the accident, inspections were not performed after the wall coverings were removed, and HEC did not perform any bracing or support of the subject staircase during the course of its work.

There are triable issues of fact concerning the applicability of 23-3.2(b) and 23-3.3 (c), including whether there was a partial dismantling of the building (*see* 23-1.4[b][16] defining "demolition work";[8] *see also Sponholz*, 273 AD2d at 750; *Gonzalez v Marine*

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[8] 12 NYCRR 23-1.4(b)(16) defines "demolition work" as "[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." Thus, the term "demolition" in subdivision 23-3.3(c) includes within its protective sphere the definition of "demolition work" contained in subdivision 23-1.4(b)(16) (*see Zuniga v Stam Realty*, 169 Misc.2d 1004, 1008-1009 [1998]).

Midland Bank, 259 AD2d 999, 1000 [1999]) and whether the stairway was a "structure" (23-3.2[b];[9] *see also Sponholz*, 273 AD2d at 750) or made hazardous by a "weakened or deteriorated floor [ ] or wall[ ]" (23-3.3[c];[10] *see also Sponholz*, 273 AD2d at 750) that required stabilization. To that effect, plaintiff raises an issue of fact as to whether the removal of porous sheetrock constitutes demolition as contemplated by 23-1.4(b)(16), and whether the staircase, which was adjacent to the wall that was allegedly partially demolished, was properly inspected or braced to prevent collapse. Further, 23-3.3(c) is sufficiently specific to support a Labor Law § 241 (6) claim *(see Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 1138 [2005]). "The thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work itself" (*Monroe v City of New York*, 67 AD2d 89, 100 [1979], *quoting* 23-3.3[c]). There exists an additional issue of fact as to whether the

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[9] 12 NYCRR 23-3.2(b), entitled "General requirements" provides that "[d]uring the demolition of any building or other structure, the employer performing such demolition shall examine the walls of all buildings or other structures adjacent to the one which is to be demolished. Such examination shall include a determination of the thickness and method of support of any wall of such adjacent buildings or other structures. Where there is any reason to believe that an adjacent building or other structure or any part thereof is unsafe or may become unsafe because of demolition operations, such operations shall not be performed until means have been provided to insure the stability and to prevent the collapse of such adjacent buildings or other structures. Such means shall consist of sheet piling, shoring, bracing, or the equivalent."

[10] 12 NYCRR 23-3.3(c) provides that: "Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other affective means."

demolition of the walls performed by HEC weakened the staircase in a way that caused the collapse of the staircase and whether the staircase was sufficiently inspected to prevent collapse under said conditions.

12 NYCRR 23-3.3(b)(3)

23-3.3(b)(3), addressing demolition by hand, provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse, or be weakened by wind pressure or vibration."

GSP asserts that 23-3.3(b)(3) is not relevant since there was no evidence that the staircase collapsed due to wind pressure or vibration. Plaintiff's arguments with respect to this regulation are noted above.

23-3.3(b)(3) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Perillo*, 17 AD3d at 1138). However, while this section refers to "other parts of any building," thus not limiting it to walls and partitions, it states that such structures "shall not be left unguarded in such condition that such parts may fall, collapse, or be weakened by wind pressure or vibration" (*see German v City of New York*, 14 Misc.3d 1204(A), *5 [2004][emphasis added]). Since there is no evidence that the staircase fell due to wind pressure or vibration, 23-3.3(b)(3) is not applicable to this case (*id.*). Moreover, the staircase was not undergoing demolition by hand at the time of the accident, rather, it was the surrounding walls which were allegedly demolished. Inasmuch as a wall collapse was not the cause of plaintiff's accident, the regulation is not applicable *(compare Bald v Westfield*

Academy, 298 AD2d 881 [2002]).

12 NYCRR 23-3.3(b)(4) and (5)

23-3.3(b)(4) and (5) require certain safety precautions during operations involving "demolition by hand." GSP argues that 23-3.3(b)(4), which prohibits employers from permitting employees to work while standing on top of a wall or any similar elevated structure of a small area, is inapplicable because the plaintiff was not standing on top of a wall or any similar elevated structure of a small area when the accident occurred. GSP maintains that 23-3.3(b)(5) is inapplicable because it deals with the demolition of exterior walls, and no such work was being performed at the site. Plaintiff's arguments with respect to these regulations are noted above.

Here, plaintiff was not performing demolition work at the time of the accident. In fact, plaintiff testified that he never performed demolition work at the site; his duties were limited to the removal of garbage from the premises. Consequently, these regulations are not applicable.

12 NYCRR 23-3.3(b)(6)

23-3.3(b)(6) provides that "[w]alls or partitions which are being demolished by hand shall not be left standing more than one story or 15 feet, whichever is less, above the uppermost floor on which persons are working." GSP argues that this regulation is inapplicable because plaintiff's injuries did not involve the manner in which walls or partitions were left standing. Plaintiff's arguments with respect to this section are noted

above.

This section is inapplicable since there is no evidence in the record that the collapse of the subject staircase was caused by any wall "left standing" or that this regulation is in any way applicable to the instant case.

12 NYCRR 23-3.3(f)

23-3.3(f), entitled "Access to floors," requires that "at all times safe access to and egress from every building or other structure in the course of demolition" shall be provided. In addition, that "safe means of access and egress shall consist of . . .stairways . . .so protected as to safeguard the persons using such means from the hazards of falling debris or materials." GSP argues that this regulation is inapplicable since plaintiff's injuries resulted from a collapsed staircase and not from falling debris or materials. Plaintiff's arguments with respect to this regulation are noted above.

The protections contemplated under this regulation are to safeguard workers against the "hazards of falling debris or materials" by providing safe means of access. Here, plaintiff was injured when the stairwell collapsed, not as a result of falling debris.

In summary, that branch of GSP's motion to dismiss plaintiff's Labor Law § 241(6) cause of action is granted to the extent it is predicated on 23-1.8(c)(1), 23-2.7(e), 23-3.3(b)(3), 23-3.3(b)(4)(5)(6), and 23-3.3(f), and is otherwise denied.

Labor Law § 200

In its motion for summary judgment, GSP argues that, based on the testimony of

plaintiff and Rozenbaum, it is uncontroverted that plaintiff only received supervision from Kacuiba and an HEC foreman. Because it did not have the necessary level of control, GSP contends that it cannot be held liable under Labor Law § 200 or the common law. GSP further contends that the condition of the staircase pre-existed GSP's ownership; that any bracing on the stairs was not added by it; and that it had no presence at the site because only licensed asbestos handlers were allowed to enter after abatement began. Therefore, GSP argues that it did not create the allegedly defective condition of the staircase. GSP also maintains that it did not have notice of the allegedly defective condition of the staircase because no complaints were made about the integrity of the stairs prior to the accident, and because plaintiff, Zelek and Rozenbaum had all used the stairs without incident or indication that the structure of the stairs might be compromised. Finally, GSP asserts that it had no constructive notice of the allegedly dangerous condition of the staircase because it was used daily at the site without incident, and no one from GSP was allowed to access the staircase once HEC commenced abatement. GSP contends that there is no evidence as to how long the allegedly defective condition existed or that any defect was visible and apparent.

In opposition, plaintiff alleges that GSP "oversaw the work of [HEC] at the subject premises by the receipt of updates." Plaintiff also notes that Rozenbaum stated in his affidavit that "it is obvious that the properly [sic] structural integrity of the staircase was compromised in the course of HEC's work at the site." In addition, plaintiff cites Zelek's

testimony that he was aware that HEC's work at the subject premises would create weakened sections of the stairs as supporting elements were removed. As a result, plaintiff alleges that "it is clear . . .that the defective condition of the stairs was visible and apparent to Greenwich Street and must have continued for such a long . . .and unreasonable period of time that it should have been discovered and remedied." Further, plaintiff asserts that GSP "was aware that the supporting wall adjacent to the stairway was removed in the course of demolition, there was no inspection of the stairway until after it collapsed and Greenwich Street presented no evidence that the defect in the stairs could not have been discovered through a reasonable inspection before it collapsed." However, in his motion, plaintiff also contends that, "while there is no evidence to support the contention that [GSP] supervised [his work], [his] theory of liability is based on the defective condition of the premises rather than on the manner in which the work was performed." To that effect, plaintiff argues that GSP "failed to show that they [sic] lacked control over the subject premises and the work taking place there."

In reply, GSP argues that plaintiff's opposition makes blanket assertions regarding notice and that plaintiff's counsel has failed to introduce evidence in admissible form to support his conclusory allegations. GSP also notes that plaintiff concedes that there is no basis for liability on the theory that GSP supervised plaintiff's work. GSP avers that "even liability predicated on a hazardous condition at the work site requires proof that the owner had actual or constructive notice of the condition as a requisite to recovery under Labor Law

§ 200 or common-law negligence."

Labor Law § 200 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 (*see 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 plaintiffs 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 (*see Sobelman v Norstar Bank*, 226 AD2d 444 [1996]).

Although the parties discuss the issue of supervision and control, or lack thereof, on GSP's part, "that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work" *(Keane v Chelsea Piers, L.P.*, 16 Misc 3d 1116(A), *8 [2007]; *see also McLeod v Corp. Of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 [2007] [where negligence arose from the manner in which work was performed at a site, a general contractor must have actually exercised supervision and control over the work performed to be held liable under Labor Law § 200]). Here, however, plaintiff's injuries arose from a purported unsafe condition present at the work site. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that

the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Kerins v Vassar College*, 15 AD3d 623, 626 [2005]).

To give rise to constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see also Andrini v Navarra*, 49 AD3d 575, 575 [2008]). Further, "[t]he notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York University*, 12 AD3d 200 [2004]). "[A] 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition" (*Piacquadio v Recine Realty Corp.*, 84 N.Y.2d 967, 969 [1994], *citing Gordon*, 67 NY2d at 838; *see also Kleinberg v City of New York*, 17 Misc 3d 1116(A) [2007]).

Here, upon review of the deposition testimony of plaintiff, Zelek and Rozenbaum, as well as the contract and Health and Safety Plan submitted by GSP, GSP has established that it did not create the dangerous condition since the staircase and bracing pre-existed GSP's purchase of the subject premises and were not installed by GSP, the Copper Group, or any agents of GSP. GSP has also established that it did not have actual notice of the alleged dangerous condition of the staircase since Rozenbaum's examination before trial and affidavit indicate that GSP never received any complaints prior to the accident about the stairs being unstable or in a weakened condition due to demolition. Moreover, GSP has

established that it cannot be charged with constructive notice since Rozenbaum's examination before trial and affidavit indicate that GSP did not have control over the staircase. Specifically, Rozenbaum testified that HEC was hired by GSP to perform abatement work at the premises and that, pursuant to a contract between the parties and the Health and Safety Plan submitted by GSP, HEC was the party responsible for safety at the site and for daily inspection of the staircase. It is also undisputed that no one from GSP was licensed to access the site in order to examine the structural integrity of the staircase as HEC performed its work. However, in response to GSP's *prima facie* showing, plaintiff raises triable issues of fact as to whether GSP had actual notice of the alleged defective condition of the staircase which caused its collapse. Rozenbaum's testimony indicates that GSP knew that the staircase was in a hazardous condition even before the demolition began as indicated in the Health and Safety Plan created for the Copper Group by Airtek. Testimony from Rozenbaum and Zelek also indicates that both HEC and GSP were aware that demolition of the structure might further weaken the integrity of the staircase. Therefore, issues of fact exist as to GSP's notice of the deteriorated condition of the staircase that preclude the granting of summary judgment.

Accordingly, this branch of GSP's motion is denied.

GSP's Motion for Summary Judgment on Third Party Claims Against HEC

In its motion, GSP argues that if the court declines to dismiss plaintiff's complaint in its entirety, it moves, in the alternative, for summary judgment on the third-party action

against HEC. GSP alleges that its contract with HEC makes clear the fact that it shifted the burden for the safe performance of the work to HEC, which expressly agreed to assume its defense and indemnification. Specifically, GSP contends that "since GSP is free of negligence on this case, it is owed defense and indemnification from HEC. To that effect, GSP notes that the contract was fairly negotiated between the parties, in effect at the time of plaintiff's accident, and that the language of the indemnification clause is clear and unambiguous. According to GSP, because HEC cannot raise factual issues pertaining to its alleged negligence, it is entitled to a conditional judgment on its cause of action for indemnification. GSP notes that "attempts to obtain defense, indemnification and insurance coverage from HEC have been unsuccessful."

Regarding HEC's obligation to provide Project Management Protective Liability Insurance under the contract, GSP argues that "unless HEC can provide evidence that it actually procured insurance covering GSP . . . GSP is entitled to a granting of summary judgment on its claim against HEC." GSP asserts that "if HEC can provide evidence that it actually procured insurance covering [it] as required by contract, movants would still be entitled to summary judgment against HEC on the third-party claim based on the indemnity provisions contained in the contract, including the costs of defending this matter." HEC offers no papers in opposition to GSP's motion for summary judgement as to GSP's third-party claims against HEC.

Contractual indemnification is generally decided as a matter of law pursuant to the

terms of the contract, after the trier of fact determines culpability. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" *(Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987]). Moreover, it is well established that prior to a finding of liability against a defendant, the court is permitted to grant a conditional order of summary judgment for indemnification where a party's potential liability is purely vicarious or statutory (*see Lofaso v J.P. Murphy Assocs.*, 37 AD3d 769, 771 [2007]; *Tranchina v Sisters of Charity Health Care Sys. Nursing Home, Inc.*, 294 AD2d 491, 493 [2002]).

GSP met its initial burden of demonstrating its entitlement to contractual indemnification by introducing the contract, which includes an express indemnification clause in its favor. However, since GSP has failed to make a *prima facie* showing that it was not negligent, that branch of GSP's motion which seeks conditional contractual indemnification against HEC is denied.

HEC has failed to offer any opposition to GSP's motion for summary judgment under its breach of contract to procure liability insurance claim. Accordingly, this portion of GSP's motion is granted on default (*see Fragiacomo v VRH Const. Corp.*, 241 AD2d 477 [1997] [where subcontractor failed to proffer any competent proof showing the existence of a factual question as to whether it had complied with the provisions of the insurance contract submitted by the contractor, the court properly granted summary judgment on claim for

breach of contract]).

In summary, that branch of GSP's motion for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action is granted and plaintiff's cross-motion for summary judgment on his Labor Law § 240(1) cause of action is denied. That branch of GSP's motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is granted to the extent it is predicated on 23-1.8(c)(1), 23-2.7(e), 23-3.3(b)(3), 23.3-3(b)(4)(5)(6), and 23-3.3(f), and is otherwise denied. That branch of GSP's motion for summary judgment on plaintiff's Labor Law § 200 – common-law negligence cause of action is denied. That branch of GSP's motion seeking contractual indemnification against HEC is denied, and that branch of GSP's motion for summary judgment under its claim for breach of contract to procure liability insurance is granted.

The foregoing constitutes the decision and order of this court.

ENTER,

J. S. C.

HON. BERT BUNYAN