[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 108213/2008

WOWK, YURIY

VS

BROADWAY 280 PARK FEE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion Seq #1 and #2 are consolidated for consideration

IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 5, 2011

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

---x

YURIY WOWK,

Plaintiff,

-against-

BROADWAY 280 PARK FEE, LLC and
ISTITHMAR BUILDING 280 PARK, LLC,

Defendants.

---x

ISTITHMAR BUILDING 280 PARK, LLC,

Third-Party Plaintiffs,

-against-

COMBINED BUILDING SERVICES, INC. and
PRITCHARD INDUSTRIES, INC.,

Third-Party Defendants.

DECISION AND ORDER
Index No.: 108213/08
Seq No.: 001, 002

Hon. Judith J. Gische
J.S.C.

Third-Party Index
No.: 59115/08

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion Seq No. 1	
CBS/Pritchard n/m (3212) against Istithmar w/MAC affirm, JS affid, exhs	1
Istithmar partial opp w/DSC affirm	2
Motion Seq. No. 2	
Istithmar x/m (3212) against π and Pritchard w/DSC affirm, SD affid, exhs	3
CBS/Pritchard partial opp w/MAC affirm, RS affid	4
Istithmar reply to CBS/Pritchard partial opp w/DSC affirm	5
π x/m (3212) against Istithmar w/SH affirm, exhs	6
Istithmar opp w/DSC affirm, exh	7

Upon the foregoing papers, the decision and order of the court is as follows:

Gische, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a window washer when he fell from a permanently fixed metal exterior ship ladder (the staircase) while working at the premises located at 280 Park Avenue, Manhattan, New York (the premises) on September 24, 2007.

In motion sequence number 001, third-party defendants Combined Building Services, Inc. and Pritchard Industries, Inc. (together, Pritchard) move, pursuant to CPLR 3212, for summary judgment dismissing defendant/third-party plaintiff Istithmar Building 280 Park, LLC's (Istithmar) third-party complaint against them for common-law and contractual indemnification, contribution and failure to procure insurance.

In motion sequence number 002, defendant/third-party plaintiff Istithmar moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Yuriy Wowk's complaint, as well as all third-party counterclaims, against it. In addition, Istithmar moves for summary judgment in its favor on its third-party contractual indemnification claim against third-party defendant Pritchard, including legal and other expenses incurred in defense of this action from the date of tender to the present, with a hearing to be held to determine the amount of such legal and other expenses, as well as for a declaration that Istithmar is an additionally named insured on Pritchard's general liability insurance policy.

Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against defendant/third-party plaintiff Istithmar.

Since issue has been joined and these motions were timely brought after the note of issue was filed, they are ready to be decided on their merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]. The court's decision is as follows:

BACKGROUND

At the time of the accident, defendant/third-party plaintiff Istithmar was the owner of the premises where the accident took place. On or about December 2, 2002, non-party Boston Properties Limited Partnership (Boston Properties), as agent for BP 280 Park Avenue LLC (BP), the former owner of the premises, hired third-party defendant Pritchard, pursuant to a service contract (the service contract), to regularly perform certain cleaning services at the premises, including window washing. In June of 2006, the service agreement was properly assigned to Istithmar. At the time of the accident, plaintiff had been employed by Pritchard as a window washer for five years, without incident.

The premises was comprised of two towers, the East Tower and the West Tower. These two towers were connected by a third structure (the connecting building), which housed elevator shafts. All three of these structures (the buildings) required and received, window cleaning four times a year. In order to accommodate the window cleaning, the East and West towers each possessed two scaffolds, and the connecting building possessed one scaffold. All five scaffolds were designed to drop down from the roofs of the buildings.

Plaintiff testified that, at approximately 6:10 a.m. on the day of the accident, while working alone at the East Tower, he prepared the house rig, or window washer's scaffold (the scaffold), in anticipation of the continuation of a series of enumerated drops from the upper level of the East Tower's roof down to the various floors that needed exterior window cleaning. After

preparing the scaffold, which circled the perimeter of the building on a track, plaintiff and his partner intended to place it over the side of the building so that they could pick up cleaning where they had left off the day before.

Plaintiff described the window washing procedure as "like a routine" (Plaintiff's Notice of Cross Motion, Exhibit A, Wowk Deposition, at 33). Plaintiff explained that going up and down the buildings on the scaffold constituted a "drop," and the drops were conducted in a sequential order as he and his partner proceeded around the buildings. To that effect, if drop number 10 was completed on a Monday, drop number 11 would begin on Tuesday. After all of the windows of one building were completed, plaintiff and his partner would then move on to wash the windows of the next building in line. Accordingly, plaintiff and his partner began cleaning windows on the East Tower every third month.

Plaintiff testified that the staircase provided a means of access from the lower level of the East Tower roof, where he was working on that particular day, to the upper level of that roof, where the scaffold was located. The East Tower's lower roof level and the subject staircase could be reached by taking a freight elevator from ground level.

At the time of the accident, for the first time that day, plaintiff was descending the staircase in order to retrieve a bucket of water to bring up to the scaffold. At this time, plaintiff had nothing in his hands, and he was holding on to the staircase's right handrail with only his right hand. Plaintiff testified that, as he reached the lower half of the staircase, at approximately the fourth or fifth stair tread, his right foot slipped. Plaintiff explained that, after his right foot slipped, his left foot then missed the next step, causing him to step all the way down the four or five steps to either the first step or the roof deck.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST ISTITHMAR

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents ... in the erection, demolition, repairing ... of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... 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 designed to prevent those types of accidents in which the scaffold ... 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'" (*John v*

Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1st Dept 2004]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Initially, it should be noted that issues of fact exist as to whether the subject staircase that plaintiff slipped on provided sole access to his work site, and, as such, was a "device" within the meaning of Labor Law § 240 (1), or "whether it was a permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute" (*Griffin v New York City Transit Authority*, 16 AD3d 202, 203 [1st Dept 2005]).

Although it has been held that "[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach" (*Gallagher v Andron Construction Corporation*, 21 AD3d 988, 989 [2d Dept 2005]; *see Gold v NAB Construction Corporation*, 288 AD2d 434, 435 [2d Dept 2001] [plaintiff's Labor Law § 240 (1) claim dismissed where metal steps from which he fell were considered a normal appurtenance to the subway tunnel and not a safety device]; *Norton v Park Plaza Owners Corporation*, 263 AD2d 531, 532 [2d Dept 1999] [plaintiff's Labor Law § 240 (1) claim dismissed where he fell from a permanent staircase

leading to the roof, as staircase was considered a normal appurtenance to the building]), it has recently been held that if a staircase was used by plaintiff in lieu of a scaffold, and where it was the sole means of access to the elevation level required to perform the work, it could be then deemed a "safety device" within the ambit of Labor Law § 240 (1) (*Ramirez v Shoats*, 76 AD3d 851, 854 [1st Dept 2010]).

In any event, as evidence in the record establishes that the window washing work that plaintiff was performing at the time of the accident was only routine maintenance, plaintiff's accident does not fall within the purview of the statute. To that effect, although section 240 (1) applies where an employee is engaged "in the erection, demolition, repairing ... of a building or structure," the enumerated activity "repairing" has been distinguished from work that is considered "routine maintenance" (*Esposito v New York City Industrial Development Agency*, 1 NY3d 526, 528 [2003]; *Smith v Shell Oil Company*, 85 NY2d 1000, 1002 [1995]; *Cordero v SL Green Realty Corporation*, 38 AD3d 202, 202 [1st Dept 2007] [plaintiff's work replacing worn-out slats in a roll-down motorized security gate that had been fully installed and operational for years deemed component replacement in the course of routine maintenance and not repair]; *Gleason v Gottlieb*, 35 AD3d 355, 356 [2d Dept 2006] [where plaintiff fell from a ladder as he was attempting to replace a coil that had worn out in an air-conditioning unit, court held that work performed by plaintiff did not constitute "erection, demolition, repairing, altering ..." within the meaning of Labor Law § 240 (1)]; *Arevalo v Nasdaq Stock Market, Inc.*, 28 AD3d 242, 243 [1st Dept 2006]).

As Istithmar contends, Labor Law § 240 (1) has no application to the routine cleaning of windows. As stated by the Court in the case of *Brown v Christopher Street Owners Corporation*

(211 AD2d 441, 442-443 [1st Dept 1995], *affd* 87 NY2d 938 [1996]), the protection afforded by Labor Law § 240 (1) is limited to window cleaning that is "incidental to building construction, demolition and repair work." Since *Brown*, the Court of Appeals has defined the scope of Labor Law § 240 (1) "to include activities that, while not performed at a construction site, involve 'making a *significant* physical change to the configuration or composition of the building's structure' so as to constitute an alteration within the meaning of the statute" (*Broggy v Rockefeller Group, Inc.*, 30 AD3d 204, 206 [1st Dept 2006], *affd* 8 NY3d 675 [2007], quoting *Joblon v Solow*, 91 NY2d 457, 465 [1998]). "'Altering,' for the purposes of statutory protection, however, 'does not encompass simple, routine activities such as maintenance and decorative modification'" (*id.*, quoting *Panek v County of Albany*, 99 NY2d 452, 458 [2003]).

Here, plaintiff has not identified any physical change to the premises to which the window cleaning was incidental, nor has plaintiff demonstrating that his window washing work was related to building construction, demolition or repair. As set forth in plaintiff's deposition testimony, pursuant to the service contract, plaintiff was required to wash the windows as part of a set, quarterly schedule. To that effect, the windows of the buildings were cleaned four times a year, in enumerated drops, which proceeded in a pre-set sequence around the perimeter of the building. As such, plaintiff was not exposed to an elevation-related risk protected by Labor Law § 240 (1).

In addition, Istithmar met its burden of establishing a prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff, who allegedly slipped while descending the staircase, was unable to identify the cause of his accident (*Slattery v O'Shea*, 46 AD3d 669, 669 [2d Dept 2007]; *Manning v 6638 18th Avenue Realty Corporation*, 28 AD3d 434, 435 [2d Dept

2006] [Court stated that complaint should have been dismissed where plaintiff, who tripped and fell on a staircase, was unable to identify the cause of her accident. Although she claimed that she slipped on debris, plaintiff did not see what caused her to fall either before or after the accident, and the accident could have just as well been caused by a misstep or loss of balance]).

In his opposition, plaintiff failed to raise a triable issue of fact as to the cause of the accident (*id.*; *Reed v Piran Realty Corporation*, 30 AD3d 319, 320 [1st Dept 2006] [defendants demonstrated prima facie entitlement to judgment as a matter of law through deposition testimony of plaintiff and his girlfriend in that they were unable to identify the cause of the fall, and, in opposition, plaintiff failed to introduce evidentiary proof to establish the existence of material facts warranting a trial]).

Here, when plaintiff was asked what caused him to fall, he stated, "I don't remember exactly. It might be a fifth step. My right foot slipped and my body moved forward with the left part of my body[.] I fell down on my left foot ... I don't remember exactly whether my left foot hit against the first step or the deck of the roof" (Plaintiff's Notice of Cross Motion, Exhibit A, Wowk Deposition, at 55). When asked why his right foot slipped, plaintiff replied, "I may guess. I don't know for sure" (*id.* at 57).

In addition, when asked if he might have spilled bucket water on the stairs, plaintiff replied, "It doesn't matter because the steps were moist, were wet anyway at that time" (*id.* at 101). Plaintiff also noted that, due to the presence of two air conditioning units and a water tank in the area, at "6:00 a.m. in August and in September they are always moist, wet in between and because of those vibrations and moisture in the air it is always moist" (*id.*). Later in the morning, however, when the sun shone directly on the subject area, the conditions were no longer moist.

Importantly, however, when asked whether his foot slipped on the steps because of said moisture, plaintiff replied, "It could be a reason. That's the first. Second, we were behind schedule ... we were working all the time and rushing" (*id.* at 102). In addition, plaintiff noted that "[t]he steps, the ladder is going down very sharp and I am trying to hold onto the handrails ... I don't rush myself on the stairs because they are dangerous to walk down" (*id.* at 102-103). Plaintiff also opined that it was also unsafe because "it was like at the dawn," and "[m]aybe it was dark," as there were no "artificial lights" (*id.* at 54, 105).

Where, as in the instant case, "a plaintiff is unable to give a specific reason for the cause of an alleged accident [he] may not recover based on pure speculation" (*Barland v Cryder House, Inc.*, 203 AD2d 405, 405 [2d Dept 1994]; *Curran v Esposito*, 308 AD2d 428, 429 [2d Dept 2003][a finding of proximate cause would be based upon nothing more than speculation where plaintiff testified that her foot became caught on something at the top of the staircase, but she did not know what it was]; *Walsh v Murphy*, 267 AD2d 172, 172 [1st Dept 1999]).

Thus, defendant/third-party plaintiff Istithmar is entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it. Accordingly, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against Istithmar.

PLAINTIFF'S LABOR LAW § 241(6) CLAIM AGAINST ISTITHMAR

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

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Like Labor Law § 240, Labor Law § 241 (6), distinguishes between employees engaged or employed in construction at the time of the accident and those performing routine maintenance (*Esposito v. New York City Industrial Development Agency*, 1 NY3d 526, 527 [2003]; *Agli v. Turner Construction Company,* 246 AD3d 16 [1st Dept 1998]. Therefore, having rejected plaintiff's Labor Law § 240 claims, his Labor Law § 241 (6) are dismissed for the same reasons.

In any event, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*). Plaintiff did not allege any specific Industrial Code violation in his bill of particulars but improperly raises, for the first time, said alleged violation in his cross motion and reply papers.

The failure to identify the Code provision in his complaint or bill of particulars is not fatal to his claim (*Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d 231, 232 [1st Dept 2000]) because "a plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability" (*Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001]; *Latchuk v Port Authority of New York and New Jersey*, 71 AD3d 560, 560 [1st Dept 2010]; *Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007]; *Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d at 232 [plaintiff's service, without leave of court, of a supplemental bill of particulars identifying a particular alleged Industrial Code violation was

proper, "since allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability"]).

Here, however, plaintiff did not first serve a supplemental bill of particulars identifying the alleged Industrial Code violation, before raising it for the first time in his cross motion and reply papers, which is improper and prejudicial to the defendants (see *Schiulaz v Arnell Construction Corporation*, 261 AD2d 247, 248 [1st Dept 1999] ["(p)laintiffs' attempt time violations of Industrial Code ... was improper"]). Furthermore, plaintiff, who commenced this action over two and one-half years ago, has failed to provide an explanation for his lengthy delay in identifying said violation (*see Reilly v Newireen Associates*, 303 AD2d 214, 196-197 [1st Dept 2003]). Thus, even if this plaintiff's accident had come within the protections of Labor Law § 241 (6) (which it does not), the Industrial Code violations raised in this manner cannot be considered and Istithmar is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against it. Accordingly, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 241 (6) claim against Istithmar.

It should be noted that plaintiff's failure to support his cross motion with a copy of the pleadings filed in the action provides another reason for the denial of his cross motion for summary judgment in his favor on his Labor Law §§ 240 (1) and 241(6) claims against defendant/third-party plaintiff Istithmar (*Williams v County of Genesee*, 289 AD2d 1026, 1026 [4th Dept 2001]).

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation

omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (*see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

When the accident arises from a dangerous condition on the property, as in the instant 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, and plaintiff need not demonstrate that the defendant exercised supervision and control over the work being performed (*see Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

Initially, it should be noted that plaintiff does not disagree with Istithmar's expert

testimony asserting that the staircase was not defective in any way. Instead, plaintiff contends that a dangerous condition was caused to exist as a result of the staircase's close proximity to moist conditions, as well as insufficient lighting in the area. To that effect, plaintiff maintains that he may have slipped on moisture that was commonly present in the area as a result of a nearby air conditioning unit. In addition, plaintiff speculated that his accident may have been caused because the lighting in the area was often insufficient during the early morning hours.

Plaintiff also does not argue that Istithmar created or had actual notice of these allegedly dangerous conditions that caused his accident. Instead, he argues that constructive notice on the part of Istithmar has been established by evidence of the ongoing and recurring dangerous conditions that existed for a sufficient length of time for Istithmar to have discovered and remedied them (*Solazzo v New York City Transit Authority*, 21 AD3d 735, 736 [1st Dept], *affd* 6 NY3d 734 [2005]; *Maza v University Avenue Development Corporation*, 13 AD3d 65, 65 [1st Dept 2004][general contractor correctly found liable under Labor Law § 200 where it had the authority to direct trades and its own employees to clean up the site, and it was not disputed that construction debris had been present and continued to accumulate in the area]; *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106-107 [1st Dept 1996][plaintiff may establish constructive notice by evidence that an ongoing and recurring dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord]).

However, a general awareness that a dangerous condition may be present, as put forth in the instant case, is legally insufficient to constitute notice of the particular condition that caused the injury (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *DeJesus v New York City Housing Authority*, 53 AD3d 410, 411 [1st Dept 2008] [no constructive

notice found, where, on the evidence presented, it was possible that the piece of carpet that caused the plaintiff to fall could have been deposited just prior to the time of the accident]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004] [no constructive notice where no evidence was presented on the issue of length of time the hazardous wet spot was present, as well as plaintiff's admission that two other customers used the stairs in the few minutes prior to the accident]).

Thus, even assuming that Istithmar was aware of general conditions of recurring moisture and poor lighting in the accident area, "proof that the defendants were aware of [these] general condition[s] would not be sufficient to establish constructive notice of the particular wet condition which allegedly caused the plaintiff to slip and fall" (*Pinto v Metropolitan Opera*, 61 AD3d 949, 950 [2d Dept 2009]; *Joseph v New York City Transit Authority*, 66 AD3d 842, 843-844 [2d Dept 2009] [plaintiff's contention that the steps were worn and smooth was merely conclusory and insufficient to raise a triable issue of fact as to constructive notice on the part of defendant]).

Moreover, plaintiff has failed to put forth any evidence regarding the length of time that these somewhat transient conditions existed or whether Istithmar had received any prior complaints about these conditions, so as to establish that it had constructive notice of the same (*see Piacquadio v Recine Realty Corporation*, 84 NY2d 967, 968 [1994]; *Murphy v 136 Northern Boulevard Associates*, 304 AD2d 540, 541 [2d Dept 2003] [no constructive notice where plaintiff presented no evidence regarding the length of time the unsafe condition existed, or whether the defendant had received any prior complaints about said condition]).

In addition, plaintiff has not put forth any testimony to establish that Istithmar had ever

been present in the area of the accident during the time that the subject dangerous conditions would have been present. To that effect, testimony in the record demonstrates that Istithmar did not have any repair or maintenance responsibilities at the premises. Rather, the property was maintained, managed and operated by Boston Properties, or one of its affiliates.

Thus, as there is no indication in the record to support a finding that defendant Istithmar created the unsafe condition at issue, or that this defendant had actual or constructive notice of the same, so as to be liable under common-law negligence and Labor Law § 200 theories (*see Geonie v OD & P NY Limited*, 50 AD3d 444, 445 [1st Dept 2008]), Istithmar is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

This conclusion, that Istithmar is not liable to plaintiff for his injuries, necessarily defeats any counterclaims for indemnification and contribution asserted against it (*see Stone v Williams*, 64 NY2d 639, 642 [1984]).

ISTITHMAR'S THIRD-PARTY CLAIMS FOR COMMON-LAW INDEMNIFICATION AND CONTRIBUTION AS AGAINST PRITCHARD

Pritchard moves for summary judgment dismissing Istithmar's claims for common-law indemnification and contribution as against it. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore*

Medical Center/Einstein Medical Center, 10 AD3d 493, 495 [1st Dept 2004]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61-62 [2d Dept 2003]).

As to Istithmar, "an owner without direction, control, or other supervisory authority over the work site at which plaintiff was injured," its liability was purely vicarious, and thus, it is entitled to full common-law indemnification from an actively negligent contractor (*Tapia v 126 First Avenue, LLC*, 282 AD2d 220, 220 [1st Dept 2001]; *Parris v Shared Equities, Company*, 281 AD2d 174, 175 [1st Dept 2001]).

However, pursuant to pursuant to Workers' Compensation Law § 11:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury."

To that effect, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793-794 [3d Dept 2001]).

It should be noted that no argument has been made by any party to the effect that plaintiff sustained a grave injury. Thus, Pritchard is entitled to summary judgment dismissing these

claims as against it.

ISTITHMAR'S THIRD-PARTY CLAIMS FOR CONTRACTUAL INDEMNIFICATION AS AGAINST PRITCHARD

Istithmar moves for summary judgment in its favor on its third-party claim for contractual indemnification as against Pritchard. In addition, Pritchard moves for summary judgment dismissing Istithmar's third-party claim for contractual indemnification as against it.

"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 Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

The service contract between Istithmar's predecessor, non-party Boston Properties, and Pritchard (the service contract) contains an indemnification provision, which states, in pertinent part:

> 3.4 Indemnity [Pritchard] shall indemnify, defend and hold harmless the OWNER [Istithmar] entities listed on Attachment D, their agents, employees, affiliates, successors and assigns from any claims, demands, debts, suits, losses ... liabilities, costs and expenses, including attorneys' fees, expenses, court costs, or causes of action whatsoever of every name and nature, both in law and in equity, to any person or property (i) arising from or claimed to have arisen from (a) the omission, fault, willful act, negligence or other misconduct of CONTRACTOR or CONTRACTOR'S subcontractors ... servants or employees or (b) any use made or thing done or occurring on the Property not due to the omission, fault, willful act, negligence or other misconduct of OWNER, or (ii) resulting from the failure of CONTRACTOR to perform and discharge its covenants and obligations under this Agreement

(Pritchard's Notice of Motion, Exhibit I, Istithmar/Pritchard Contract, at 4).

Initially, it should be noted that Pritchard contends that the indemnification provision at issue in this case violates General Obligations Law § 5-322.1, in that it purports to indemnify and hold harmless Istithmar for liability caused by its own negligence. Under General Obligations Law § 5-322.1 (1), a contract or agreement, relative to the construction or repair of a building, purporting to "indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons" caused by the negligence of the promisee, his agents or employees, "whether such negligence be in whole or in part, is against public policy and is void and unenforceable" (*see Carriere v Whiting Turner Contracting*, 299 AD2d 509, 511 [2d Dept 2002]; *Castrogiovanni v Corporate Property Invs.*, 276 AD2d 660, 661 [2d Dept 2000] [General Obligations Law prohibits enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent]).

As the indemnification provision in the service contract contains the language, "any use made or thing done or occurring on the Property not due to the omission, fault, willful act, negligence or other misconduct of OWNER" the indemnification provision does not violate General Obligations Law § 5-322.1 (*Dutton v Pankow Builders*, 296 AD2d 321, 322 [1st Dept 2002]).

In any event, where there is no negligence on the part of the proposed indemnitee, as in the instant case, that statute does not apply (*see Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 177 [1990] [violation of Labor Law § 240 (1) is not the equivalent of negligence and does not give rise to an inference of negligence]). A party who has been held liable to an injured worker solely on the basis of statutory liability, without any fault on its part, is entitled to recover under a contract of indemnity (*id.* at 179).

In addition, Pritchard argues that the parties did not intend to obligate Pritchard for indemnification of the building in instances of losses that occur outside the scope of the work contracted for. To that effect, Pritchard maintains that plaintiff's negotiation of the steps at the time of his accident was unrelated to his duties or status as a window washer. Pritchard also contends that it was not responsible, pursuant to the service contract, for maintaining and/or cleaning the staircase

However, plaintiff's act of descending the stairs in order to retrieve water was within the scope of his duties as a window washer. As a result, as it has been established that plaintiff's injuries arose from a "use made or thing done or occurring on the Property," and as it has not been established that plaintiff's injuries were due to any omission, fault or negligence of Istithmar, pursuant to the service contract, Istithmar is entitled to contractual indemnification as against Pritchard. Accordingly, Pritchard is not entitled to summary judgment dismissing Istithmar's claim for contractual indemnification as against it.

Further, "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Thus, as the indemnity provision of the service contract clearly expresses the intent of the parties to award attorney's fees in the event of litigation, Istithmar is also entitled to legal and other expenses incurred in defense of this action from the date of tender to the present, with a hearing to be held to determine the amount of such legal and other expenses.

ISTITHMAR'S THIRD-PARTY CLAIM FOR FAILURE TO PROCURE INSURANCE

AGAINST PRITCHARD

Pursuant to Section 3.3 of the service agreement between Pritchard and Boston Properties, as agent for BP, Pritchard agreed to maintain general liability insurance naming the "Owner as an additional insured on their respective liability policies" (Pritchard's Notice of Motion, Exhibit I, Service Contract, at 4). As stated previously, pursuant to Section 5.7 of the service agreement, as of June 2006, the service agreement was properly assigned to Istithmar.

It is not disputed that Pritchard's general liability insurance policy with ACE American Insurance Company (the ACE policy), Policy Number HDO G23730662, effective dates July 31, 2007 to July 31, 2008, includes a blanket additional insured endorsement regarding any organization that they agreed to include as an additional insured under a written contract. As such, as the parties acknowledge, Istithmar is, in fact, an additional insured on Pritchard's commercial general liability policy. In fact, Istithmar is included as an "additional insured" on the certificate of liability insurance for the ACE policy (Istithmar's Notice of Motion, Exhibit Q, ACE Certificate of Insurance).

Since Pritchard obtained the requisite insurance to cover Istithmar in this action, there is no breach of contract. Thus, Pritchard is entitled to summary judgment dismissing Istithmar's third-party claim for failure to procure insurance as against it. In addition, under the facts of this case, Istithmar is entitled to a declaration that it is an additional insured on Pritchard's general liability insurance policy.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that third-party defendant Combined Building Services, Inc. and Pritchard

Industries, Inc.'s (together, Pritchard) motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing defendant/third-party plaintiff Istithmar Building 280 Park, LLC's (Istithmar) third-party complaint against it for common-law indemnification, contribution and failure to procure insurance is granted, and these third-party claims are severed and dismissed as against these defendants, and the motion is otherwise denied; and it is further

ORDERED that plaintiff Yuriy Wowk's cross motion, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims against defendant/third-party plaintiff Istithmar is denied; and it is further

ORDERED that the part of defendant/third-party plaintiff Istithmar's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as all third-party counterclaims, against it, is granted, and the complaint and all counterclaims are dismissed as to this defendant, with costs and disbursements to said defendant as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the part of Istithmar's motion seeking summary judgment in its favor on its third-party contractual indemnification claim against Pritchard, which includes legal fees and other expenses incurred in defense of this action, from the date of tender to the present, is granted; and it is further

ORDERED that the issues regarding Istithmar's contractual indemnification claim against Pritchard, including the amount said legal fees and other expenses owed to Istithmar, are severed, and these issues are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties,

as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ADJUDGED AND DECLARED that Istithmar is an additionally named insured on Pritchard's general liability insurance policy, Ace American Insurance Company Policy Number HDO G23730662, effective dates July 31, 2007 to July 31, 2008; and it is further

ORDERED that the remainder of the action is severed and continued.

DATED: New York, New York
April 5, 2011

ENTER:

Hon. Judith J. Gische, JSC

[1]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.