Second Third-Party Defendant.
----------X
NEW YORK PRESBYTERIAN HOSPITAL,

Third Third-Party Plaintiff,

-against-

Third Third-Party
Index No. 590930/10

SIEMENS BUILDING TECHNOLOGIES, INC., SIEMENS CORPORATION,

Third Third-Party Defendants.
----------X

DORIS LING-COHAN, J.:

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

This is an action to recover damages sustained by an electrician when he slipped on snow, ice and debris on January 23, 2004 while taking measurements around an outdoor HVAC/air conditioning unit at New York Presbyterian Hospital.

In motion sequence number 003, third third-party defendant Siemens Industry Inc. f/k/a Siemens Building Technologies, Inc. (Siemens) moves, pursuant to CPLR 3212, for summary judgment dismissing the third third-party complaint and the cross claims asserted by fourth-party defendant/second third-party defendant Matrix Mechanical Corp. (Matrix) against it. In motion sequence number 004, defendant/second third-party plaintiff/third third-party plaintiff New York Presbyterian Hospital s/h/a New York and Presbyterian Hospitals, Inc. (New York Presbyterian) moves, pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims and all claims for common-law indemnification asserted against it; and (2) granting it contractual and common-law indemnification against third-party defendant West Contracting Corp. (West), or alternatively, conditional contractual or common-law indemnification against West. In motion sequence number 005, third-party defendant/fourth-party plaintiff West moves, pursuant to CPLR 3025 (b) and 3212, for an order:

Second Third-Party Defendant.
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NEW YORK PRESBYTERIAN HOSPITAL,

Third Third-Party Plaintiff,

-against-

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Index No. 590930/10

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Third Third-Party Defendants.
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Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

This is an action to recover damages sustained by an electrician when he slipped on snow, ice and debris on January 23, 2004 while taking measurements around an outdoor HVAC/air conditioning unit at New York Presbyterian Hospital.

In motion sequence number 003, third third-party defendant Siemens Industry Inc. f/k/a Siemens Building Technologies, Inc. (Siemens) moves, pursuant to CPLR 3212, for summary judgment dismissing the third third-party complaint and the cross claims asserted by fourth-party defendant/second third-party defendant Matrix Mechanical Corp. (Matrix) against it. In motion sequence number 004, defendant/second third-party plaintiff/third third-party plaintiff New York Presbyterian Hospital s/h/a New York and Presbyterian Hospitals, Inc. (New York Presbyterian) moves, pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims and all claims for common-law indemnification asserted against it; and (2) granting it contractual and common-law indemnification against third-party defendant West Contracting Corp. (West), or alternatively, conditional contractual or common-law indemnification against West. In motion sequence number 005, third-party defendant/fourth-party plaintiff West moves, pursuant to CPLR 3025 (b) and 3212, for an order:

(1) dismissing the third-party complaint and all cross claims asserted by defendants and third-party and fourth-party defendants; (2) dismissing plaintiff's Labor Law claims; (3) permitting amendment of its pleadings to assert a cross claim against Siemens for common-law indemnification; (4) granting it contractual and common-law indemnification against Matrix; and (5) granting it common-law indemnification against Siemens.

BACKGROUND

New York Presbyterian is the owner of the premises. On June 10, 2003, New York Presbyterian hired West as a general contractor to provide all labor and material necessary for the hospital's Irving Pavilion MRI renovation project. Pursuant to a purchase order dated July 24, 2003, West hired a prime mechanical contractor, Matrix, to install HVAC equipment to provide air conditioning and heating for the new MRI suite. Matrix installed HVAC units on the south side of the Irving Pavilion in the outside garden area. By purchase order dated August 19, 2003, Matrix retained Siemens to furnish and install electronic controls and components for the MRI suite and equipment. Plaintiff was an employee of nonparty Cardinal Electrical Contractors & Communications Corp. (Cardinal), the electrical contractor, which had been hired by Siemens to wire thermostats and other control devices for the MRI suite.

Plaintiff testified at his deposition[1] that he was employed by Cardinal, an electric subcontractor, as a foreman on the date of his accident (Plaintiff EBT, at 10, 19). Plaintiff arrived at the Irving Pavilion at around 8:00 A.M. (*id.* at 78). Plaintiff testified that it was an extremely cold morning and that it had snowed the day before or overnight (*id.* at 84, 88-89). The snow covered the ground, but the snow on the sidewalks outside the Irving Pavilion had been shoveled to the side (*id.* at 91). Plaintiff saw someone salting the sidewalks who he

[1]Plaintiff was deposed on two occasions: on March 4, 2010 and on October 8, 2010. The court cites to plaintiff's March 4, 2010 deposition, unless otherwise indicated.

believed was from the hospital (*id.* at 188-189). When he arrived at the Irving Pavilion that morning, there was flooding in the building (Plaintiff 10/8/10 EBT, at 100-102). According to plaintiff, "it seemed that the temperatures would drop so low that they had pipes frozen up to the second floor. They had a flood, water was pouring out [of] the side of the building, icing all over the place, and they needed heat in there to keep the building from freezing over" (*id.* at 30). Plaintiff's boss told him that the hospital was pushing to get the HVAC unit connected to the MRI room because heat was needed (*id.* at 25, 29-30, 103).

At around 10 A.M., plaintiff went outside to work on the HVAC unit (Plaintiff EBT, at 79-80). After exiting the building, plaintiff climbed over a gate to enter the garden area (*id.* at 91, 92). There was snow and ice on the ground near the HVAC unit (*id.*). While taking measurements of the HVAC unit, plaintiff slipped on snow and ice and grabbed onto the unit to prevent himself from falling (*id.* at 119, 122-124, 129, 208-209). After he slipped on the snow and ice, he noticed pieces of pipe debris and holes in the ground, which he later described as uneven ground, underneath the snow where he slipped (*id.* at 187, 201-202; Plaintiff 10/8/10 EBT, at 40). Plaintiff did not know how the scraps of pipe got there (Plaintiff 10/8/10 EBT, at 41).

Sean Murray, a vice president of West, testified that the HVAC unit was installed by Matrix in October or November of 2003 (Murray EBT, at 7, 50). Murray testified that West was required to keep the site clean and free of tripping hazards (*id.* at 60). However, no member of any trade working at the location ever requested that the area be salted (*id.* at 42). West employed a full-time laborer to clean up the site on a daily basis (*id.* at 60). Murray did not receive any complaints regarding snow or ice at the site (*id.* at 89).

Carol Baker, a project manager of facilities development for New York Presbyterian,

testified that the hospital's landscapers removed snow from the sidewalks adjacent to the Irving Pavilion (Baker EBT, at 8, 33-34). Baker states in an affidavit that the location where plaintiff fell is not a pedestrian walkway open to the public; therefore, the hospital did not regularly undertake to remove snow or ice from the location, and the work area would have been delegated to the general contractor (Baker Aff., ¶ 2). Baker does not know of any complaints regarding this work area prior to plaintiff's accident (*id.*).

Glenn Boyd testified that he is a vice president of Matrix (Boyd EBT, at 11). Matrix installed an HVAC unit outside the hospital, which had to be piped in and out of the MRI equipment rooms (*id.* at 20). He never made any complaints regarding the condition surrounding the HVAC equipment, other than that the area was gated off (*id.* at 68-69).

Andrew Tannenbaum testified on behalf of Siemens (Tannenbaum EBT, at 8). Tannenbaum was a general engineer employed by Siemens (*id.* at 9). Tannenbaum did not make any complaints about snow conditions prior to plaintiff's accident (*id.* at 61).

An accident report dated January 23, 2004 states that plaintiff was "working on a/c unit outside and slipped on the ice, heard something click in shoulder, like a dislocation" (Steinberg Affirm. in Opposition, Exh. B).[2]

On January 18, 2007, plaintiff commenced the instant action, seeking recovery for common-law negligence. In plaintiff's verified bill of particulars, plaintiff additionally alleges violations of Labor Law §§ 200 and 241 (6), as well as New York State Industrial Code Part 23, 12 NYCRR 23, sections 23-1.7 (d), 23-1.7 (e) (1), 23-1.7 (e) (2), and 23-2.1 (a) (Verified Bill of Particulars, ¶ 15). Specifically, plaintiff alleges that New York Presbyterian was negligent:

"in causing, permitting and/or allowing the plaintiff to work upon the . . . premises

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[2]Plaintiff's employer filed an ADR C-2 report which also states that he slipped on ice (Steinberg Affirm. in Opposition, Exh. A).

> although the defendants knew or should have known that the same were in an unsafe, improper and unlawful condition; in causing, permitting and/or allowing construction debris as well as snow and ice to accumulate at the location where the plaintiff was working; in causing, permitting and/or allowing the plaintiff to work upon an area . . . with slipping and/or tripping hazards located thereat; in failing to clean and remove construction debris as well as snow and ice from locations within . . . the area in which the plaintiff was working at the time of the incident complained of; . . . in failing and neglecting to clean, maintain and/or otherwise protect the work areas at the . . . premises from all hazards, residues, ice, snow and...debris . . ."

(*id.*, ¶ 3).

On March 22, 2010, New York Presbyterian impleaded West, asserting three claims: (1) contractual indemnification; (2) common-law indemnification; and (3) contribution. On July 12, 2010, West commenced a fourth-party complaint against Matrix, seeking: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) damages for failure to procure insurance. On October 14, 2010, New York Presbyterian brought a second third-party complaint against Matrix, also asserting claims for: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) failure to procure insurance. New York Presbyterian also commenced a third third-party action against Siemens and Siemens Corporation for contractual indemnification, common-law indemnification, and contribution, but New York Presbyterian subsequently discontinued the third third-party complaint as against Siemens Corporation (Leach Affirm. in Support, Exh. L). Additionally, Matrix asserts cross claims for contribution, common-law indemnification, and contractual indemnification against Siemens. On August 20, 2010, the court granted defendant Bovis Lend Lease LMB, Inc.'s motion for summary judgment dismissing the complaint as against it (*id.*, Exh. B).

DISCUSSION

"It is well settled that '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

demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden 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]). "[T]he court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]).

Labor Law § 200 and Common-Law Negligence

New York Presbyterian, the owner, moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, arguing that it did not control the means or methods of West, the general contractor, and that it was never put on notice of the snow or ice. Furthermore, New York Presbyterian argues that it did not violate any nondelegable duty of care to plaintiff, because the accident occurred in a work area, not in an area open to regular pedestrian traffic.

In opposition, plaintiff argues that New York Presbyterian failed to provide a safe place for plaintiff to work after it urgently demanded that Cardinal hook up the outside HVAC unit to the MRI room in order to provide necessary heat to the facility on an extremely cold morning where pipes had frozen and had caused flooding inside the hospital. Plaintiff also contends that the snow and debris existed for a sufficient length of time because: (1) the snow storm occurred either the day before or overnight; and (2) the small pieces of cut pipe were covered in snow, indicating that the they had been there since the day of plaintiff's accident, if not longer.

Siemens also opposes New York Presbyterian's motion, arguing that there are issues of

fact as to whether the hospital exercised supervision over plaintiff's work, and had actual or constructive notice of the dangerous conditions, in light of plaintiff's testimony that it snowed the night before the accident and that there were holes and debris on the ground where he fell.

Labor Law § 200[3] is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]). Where the injury arises out of the means or methods of the work, the plaintiff must establish that the owner or contractor supervised or controlled the activity giving rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). However, where the plaintiff's injury arises out of a premises defect, the owner or general contractor may only be held liable if it created or had actual or constructive notice of the dangerous condition (*Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]). "To constitute 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 a defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Although New York Presbyterian argues that it owed no duty to plaintiff because his accident occurred in a work area rather than a pedestrian area, a property owner owes a duty to

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[3]Labor Law § 200 (1) provides that "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. The board may make rules to carry into effect the provisions of this section."

maintain and keep a safe work place for workers such as plaintiff (*see Comes*, 82 NY2d at 877).[4]

In this case, plaintiff's accident stems from a dangerous premises condition (i.e., the snow and debris), rather than the means or methods of his work (*see Murphy*, 4 AD3d at 202). New York Presbyterian submits evidence that it did not receive any complaints about the area in question prior to plaintiff's accident (Baker Aff., ¶ 2). However, in light of plaintiff's testimony that it had snowed either the day before or overnight, and the fact that the cut pieces of pipe were covered in snow (Plaintiff EBT, at 84, 88-89, 91; Plaintiff 10/8/10 EBT, at 40, 41), there are issues of fact as to whether the alleged dangerous conditions existed for a sufficient length of time for New York Presbyterian's employees to discovery and remedy the conditions. Notably, the sidewalks had already been shoveled and salted at the time of plaintiff's accident (Plaintiff EBT, at 91, 188-189).

Accordingly, New York Presbyterian's motion seeking dismissal of the Labor Law § 200 and common-law negligence claims is denied.

Labor Law § 241 (6)

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. This statute is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). To recover under Labor Law § 241 (6), a plaintiff must: (1) plead and prove the violation of a concrete specification of the New York State

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[4]In any case, article 3.15.2 provides that "[i]f the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor" (Platzer Affirm. in Support, Exh. K).

Industrial Code (*Morris v Pavarini Constr.*, 9 NY3d 47, 50 [2007]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998]); and (2) show that the violation was a proximate cause of the accident (*Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 563 [2d Dept 2006]).

Plaintiff's verified bill of particulars alleges that defendants violated four provisions of the Industrial Code: sections 23-1.7 (d); 23-1.7 (e) (1); 23-1.7 (e) (2); and 23-2.1 (a) (Verified Bill of Particulars, ¶ 15). However, in opposition to New York Presbyterian's motion, plaintiff only relies upon section 23-1.7 (e) (2), and has thus abandoned reliance on the remaining three sections (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . ."]).

Section 23-1.7 (e) (2), entitled "Working areas," states that "[t]he 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" (12 NYCRR 23-1.7 [e] [2]).

The parties disagree over whether this section is applicable and was a proximate cause of plaintiff's accident. New York Presbyterian argues that this section is inapplicable, because plaintiff did not testify that the debris caused him to fall, and that it only applies to the debris specified in the section.[5] West argues that this section only applies when the plaintiff slips, trips, and falls on accumulations of dirt and debris in defined passageways, and not in open areas outside premises under construction. Plaintiff maintains, in opposition, that he slipped on snow and construction debris, and that, therefore, there are triable issues of fact as to whether any violation of section 23-1.7 (e) (2) caused his injuries. In reply, New York Presbyterian points out

[5]Siemens joins in New York Presbyterian's motion seeking dismissal of plaintiff's Labor Law § 241 (6) cause of action.

that the accident reports do not mention the debris, and that the area where plaintiff was working does not qualify as a floor, platform or similar area.

Section 23-1.7 (e) (2) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*see Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]). However, this section does not apply where the tripping hazard was an integral part of the work being performed (*see Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [section 23-1.7 (e) (2) applied where electrician tripped on construction debris which was not an integral part of his work]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002] [regulation did not apply where plaintiff tripped on a piece of plywood when stacking plywood]). In *Maza v University Ave. Dev. Corp.* (13 AD3d 65 [1st Dept 2004]), the plaintiff, a bricklayer, tripped and fell over debris and snow in an interior courtyard at a construction site. The First Department held that "the pieces of wood, sheet rock and snow/ice that allegedly caused plaintiff to fall were 'debris,' 'scattered . . . materials' and 'dirt' within the meaning of the [] regulation," and were not integral to his work as a bricklayer (*id.* at 66).

Here, plaintiff was undisputedly working in the area where he fell (*see Canning v Barney N.Y.*, 289 AD2d 32, 34 [1st Dept 2001]). Given plaintiff's testimony that he slipped on snow and construction debris (Plaintiff EBT, at 119, 122), this section applies and may provide a basis for recovery pursuant to Labor Law §241(6) (*see Maza*, 13 AD3d at 66). In view of plaintiff's testimony that he slipped on snow and debris, it is for the jury to resolve, *inter alia*, whether a violation of this section was a proximate cause of his accident.

Therefore, plaintiff has a valid Labor Law § 241 (6) claim to the extent it is predicated on 12 NYCRR 23-1.7 (e) (2).

New York Presbyterian's Third-Party Claims for Contractual and Common-Law Indemnification from West

New York Presbyterian moves for summary judgment on its contractual indemnification claim against West, pursuant to section 3.18.1 of the contract between them, which provides as follows:

> "To the fullest extent permitted by law . . . the Contractor [West] shall indemnify and hold harmless the Owner [New York Presbyterian], Architect, Architect's consultants, and Owner's [New York Presbyterian's] agents and employees . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, *arising out of or resulting from performance of the Work*, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Contractor [West], a Subcontractor, anyone directly or indirectly employed by them* or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(Platzer Affirm. in Support, Exh. K [emphasis supplied]).

Based upon this language, New York Presbyterian argues that it was not negligent, and that West, as the general contractor, bears responsibility for supervision of the work and site safety. New York Presbyterian points out that West must indemnify it for the negligence of any agent or employee of any subcontractor, including the negligence or acts of plaintiff himself. In addition, New York Presbyterian seeks reimbursement of its attorney's fees incurred in defending this action.

In opposition to New York Presbyterian's motion, West argues that New York Presbyterian has not established that West or its subcontractors were negligent as a matter of law. West contends that it did not know that plaintiff would be working in the garden on the date of the accident, and that West did not have any notice of the debris or snow or ice. Furthermore, according to West, there is an issue of fact as to whether New York Presbyterian was negligent.

"A party is entitled to full contractual indemnification [for damages incurred in a personal

injury suit] 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" (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003] [internal quotation marks and citation omitted]). It is well established that "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [internal quotation marks and citation omitted]; *see also Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]).

New York Presbyterian's motion for contractual indemnification must be denied for two reasons. First, New York Presbyterian has failed to establish its freedom from negligence (*see Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 237 [1st Dept 2005] [construction manager's motion for summary judgment on contractual indemnification properly denied where it failed to establish that it was not actively negligent]; *see also State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758 [3d Dept 2001] [conditional judgment on issue of indemnity premature where issues of fact exist as to indemnitee's active negligence]). Second, the indemnification provision requires West to indemnify New York Presbyterian for claims "arising out of . . . performance of the Work . . . but only to the extent caused by the negligent acts or omissions of the Contractor [West], [or] a Subcontractor, [or] anyone directly or indirectly employed by them"(Platzer Affirm. in Support, Exh. K), and there has been no finding that West or a subcontractor was negligent or that such negligence proximately caused plaintiff's accident. Therefore, New York Presbyterian's motion for contractual indemnification against West is premature (*see Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 454 [1st Dept 2010]

[contractual indemnification correctly denied where contract required indemnitor to indemnify indemnitee for its negligent performance under contract, and there was no finding that indemnitor was negligent]; *see also Zeigler-Bonds v Structure Tone*, 245 AD2d 80, 81 [1st Dept 1997]).

New York Presbyterian also seeks common-law indemnification from West, arguing that West was clearly negligent in breaching its duties to provide plaintiff with a safe work place and in breaching its supervisory duties under its contract. Alternatively, New York Presbyterian requests a conditional order of common-law indemnification, contingent upon a finding at trial that West was negligent.

West moves for summary judgment dismissing the third-party complaint in its favor, asserting that there is no evidence that it had actual or constructive notice of the dangerous conditions which caused plaintiff's accident. West contends that no one from West directed plaintiff in his activities, and that West was unaware that plaintiff or Cardinal was on the job at the time of the accident. West also opposes New York Presbyterian's request for common-law indemnification, asserting that there is an issue of fact as to whether New York Presbyterian was negligent.

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). "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 Enters., Ltd.*, 14 AD3d

681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). A general contractor may be held liable in common-law negligence "'if it has control over the work site and actual or constructive notice of the dangerous condition'" (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009], quoting *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

As noted above, New York Presbyterian has failed to eliminate all questions of fact as to its alleged negligence. Additionally, pursuant to article 3.15.1 of the general contract, West was required to "keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract" (Platzer Affirm. in Support, Exh. K). Sean Murray, a vice president of West, the general contractor, testified that West was responsible for keeping the work location clear and free of tripping hazards (Murray EBT, at 60). West employed laborers at the site to keep the work area safe (*id.*). Thus, there are issues of fact as to whether West was negligent in contributing to the causation of plaintiff's accident (*see Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 414 [1st Dept 2011]; *Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]). Therefore, New York Presbyterian's requests for contractual and common-law indemnification from West, and West's motion seeking dismissal of these claims, are denied.

West's Request for Contractual Indemnification from Matrix

West also seeks contractual indemnification from Matrix under the purchase order agreement between them. Article 11.2 of that agreement provides:

> "To the fullest extent permitted by law, Subcontractor [Matrix] will indemnify and hold harmless WEST Contracting Corp. and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages,

> losses and expenses including reasonable legal fees and costs, *arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor [Matrix]*, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by Subcontractor [Matrix] pursuant to this Purchase Order and/or related Proceed Order. Subcontractor [Matrix] will defend and bear all costs of defending any actions or proceedings brought against WEST Contracting Corp. and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such omission, breach or default"

(McConnell Affirm. in Support, Exh. O [emphasis added]).

West argues that it is entitled to contractual indemnification because plaintiff's claim arises out of an act or omission by Matrix in the performance of its work.

In opposition, Matrix contends that there are questions of fact as to West's negligence, and that there is no evidence that Matrix was negligent in this matter.

Contrary to Matrix's contention, the indemnification provision does not require a finding of Matrix's negligence (*see Santos v BRE/Swiss, LLC*, 9 AD3d 303, 304 [1st Dept 2004]). Rather, it requires Matrix to indemnify West for any claim "arising in whole or in part and in any manner from the acts, omissions, breach or default of [Matrix]", in connection with the performance of its work pursuant to the purchase order (McConnell Affirm. in Support, Exh. O). In any event, there are questions of fact as to West's negligence and whether plaintiff's accident arose out of any act or omission by Matrix. Glenn Boyd, the vice president of Matrix, testified that it performed work in the area around the time of the accident; Matrix installed an HVAC unit outside the hospital which had to be piped in and out of the MRI equipment rooms (Boyd EBT, at 20). Although Matrix points to Boyd's testimony that Matrix was not retained to clean and maintain the work site (Boyd EBT, at 68), this testimony does not establish that Matrix did not create a dangerous condition. Accordingly, West's contractual indemnification claim cannot be determined at this juncture (*see D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept

2007] [since it had not been determined that plaintiff's accident was caused by an act or omission by the subcontractor, contractual indemnification was premature]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003] [issue of fact as to which entity was responsible for defect precluded summary judgment on contractual indemnification claim]).

Siemens's Motion for Summary Judgment

Siemens also moves for summary judgment dismissing New York Presbyterian and Matrix's common-law indemnification and contribution claims against it, arguing that it did not supervise, direct or control plaintiff's work, and did not create or have notice of any dangerous condition. Additionally, Siemens argues that the contractual indemnification claims asserted by New York Presbyterian and Matrix should be dismissed, because it did not have a contract with either of these entities (*see* Tannenbaum Aff., ¶¶ 8, 9, 10).[6]

In opposition to Siemens's motion, New York Presbyterian argues that Siemens has failed to show that it did not have control of the work site and that it did not have notice of the dangerous condition. New York Presbyterian points out that Siemens's supervisor, Andrew Tannenbaum, was on the scene on the date of accident, observed the work conditions, and generally supervised employees, including plaintiff.

West also argues, in opposition, that there is an issue of fact as to whether Siemens had sufficient supervision and control over plaintiff.

Here, Siemens points to plaintiff's deposition testimony to show that he did not speak to

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[6]Siemens also moves for dismissal of Matrix's cross claim as untimely pursuant to CPLR 3012 (b). However, CPLR 3019 governs cross claims. Although cross claims are to be served within whatever time the defendant has to answer the complaint under CPLR 3012, courts "are not strict about the time for cross-claiming if no prejudice is shown" (Siegel, NY Prac § 227 [4th ed]). Assuming that Matrix's cross claim is untimely, Siemens has not shown any resulting prejudice. Therefore, Siemens is not entitled to dismissal of this cross claim.

anyone from Siemens on the date of the accident. However, plaintiff only testified that he did not speak to anyone from Siemens when he went back into the building after he slipped and fell (Plaintiff 10/8/10 EBT, at 46). Moreover, although Siemens's project manager, Andrew Tannenbaum, testified that plaintiff never complained about snow conditions, he also stated that he did not know whether there was snow in the garden area on the day before the accident or on the day of the accident (Tannenbaum EBT, at 57, 59, 63, 65). Therefore, Siemens has failed to demonstrate, prima facie, that it neither created, nor had actual or constructive notice of the dangerous conditions. Accordingly, Siemens is not entitled to dismissal of the common-law indemnification and contribution claims against it (*see Lyons v Schenectady Intl.*, 299 AD2d 906 [4th Dept 2002] [summary judgment was properly denied on common-law indemnification claim, where contractor failed to demonstrate that it neither created nor had notice of a dangerous condition at the work site]).

Given that Matrix and New York Presbyterian have failed to produce any contract supporting their contractual indemnification claims against Siemens, these claims are dismissed.

West's Requests for Common-Law Indemnification from Matrix and Siemens

West seeks leave to amend its answer to assert a cross claim for common-law indemnification against Siemens. In opposition, Siemens argues that the West's request should be denied because it is prejudicial and not supported by an affidavit of merit, or other evidentiary proof.

Leave to amend the complaint is ordinarily "freely given" (CPLR 3025 [b]), absent prejudice or surprise to the opposing party (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st

Dept 2007]). Under New York law, prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [internal quotation marks and citation omitted]). Moreover, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]). Nonetheless, where there has been "an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion" (*Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271, 272 [1st Dept 1999] [internal quotation marks and citation omitted]; *see also Cherebin*, 43 AD3d at 365).

Here, West has not submitted an affidavit of merit with respect to the proposed amendment and, thus, this court is constrained to deny West's motion to amend, without prejudice. *See Gair Co., Inc. v Cambridge Carpet, Ltd.*, 160 AD2d 371 (1st Dept 1990); *De Rosa v. Bendetto*, 86 AD2d 648 (1982).

Finally, West seeks summary judgment on its common-law indemnification claim against Matrix based upon their supervision and direction over plaintiff's work. However, West has failed to demonstrate that it was not negligent, or that Matrix was negligent (*see Perri*, 14 AD3d at 684-685). Therefore, West is not established entitled to common-law indemnification from Matrix, as a matter of law.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 003) of third third-party defendant

Siemens Industry Inc. f/k/a Siemens Building Technologies, Inc. for summary judgment is granted to the extent of dismissing the contractual indemnification claims asserted by third third-party plaintiff New York Presbyterian Hospital and fourth-party defendant/second third-party defendant Matrix Mechanical Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendant/third-party plaintiff New York Presbyterian Hospital s/h/a New York and Presbyterian Hospitals, Inc. for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 005) of third-party defendant/fourth-party plaintiff West Contracting Corp. for summary judgment is denied; and it is further

ORDERED that the request of third-party defendant/fourth-party plaintiff West Contracting Corp. for leave to amend its answer to the third-party complaint to assert a cross claim for common-law indemnification against third third-party defendant Siemens Industry, Inc. f/k/a Siemens Building Technologies, Inc. is denied without prejudice; and it is further

ORDERED that within 30 days of entry of this order, West Contracting Corp. Shall serve a copy upon all parties, with notice of entry.

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/9/12

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\RomanvNYPresbyterianHosp.Gatto.wpd