

<b>Francis v Plaza Constr. Corp.</b>
2013 NY Slip Op 30882(U)
April 22, 2013
Supreme Court, New York County
Docket Number: 108239/07
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden  
Justice

PART 11

Index Number : 108239/2007  
FRANCIS, JEREMIAH  
vs.  
PLAZA CONSTRUCTION  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/13/13  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
attached Memorandum Decision & Order.

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

**FILED**

APR 26 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 22, 2013

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
JEREMIAH FRANCIS,

Plaintiff,

-against-

Index No. 108239/07

PLAZA CONSTRUCTION CORP.,

Defendant.

-----X  
PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

Third-Party  
Index No. 591119/07

SAGE ELECTRICAL CONTRACTING INC.,

Third-Party Defendant.

-----X  
SAGE ELECTRICAL CONTRACTING, INC.,

Second Third-Party Plaintiff,

-against-

Second Third-Party  
Index No. 590676/10

CENTURY-MAXIMUM CONSTRUCTION CORP.  
and TOTAL SAFETY CONSULTING, LLC,

Second Third-Party Defendants.

-----X  
JOAN A. MADDEN, J.:

This action arises out of a construction site accident which occurred on February 16, 2007 at 306 Gold Street, Brooklyn, New York. Defendant/third-party plaintiff Plaza Construction Corp. (Plaza) moves, pursuant to CPLR 3212, for an order: (1) dismissing plaintiff's claims pursuant to Labor Law § 240 (1), Labor Law § 200 and for common-law negligence, and pursuant to Labor Law § 241 (6) to the extent it is predicated on certain violations of the

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

Industrial Code; (2) granting Plaza contractual indemnification over and against third-party defendant Sage Electrical Contracting, Inc. (Sage); and (3) granting Plaza common-law indemnification over and against Sage; or, in the alternative, (4) granting Plaza a conditional order of contractual indemnification or partial contractual indemnification against Sage. Plaintiff and Sage oppose the motion.

### BACKGROUND

Plaza entered into a construction management agreement with 147 Flatbush Avenue Property Owner, LLC as construction manager for the construction of a new 40-story mixed-use residential and commercial condominium tower located at 306 Gold Street in Brooklyn, New York. Pursuant to the construction management agreement, Plaza hired various contractors to perform various work on the project, including Sage to perform electrical work. Plaza retained second third-party defendant Century-Maxim Construction Corp. s/h/a Century-Maximum Construction Corp. (Century-Maxim) as the concrete superstructure contractor on the project, which subsequently subcontracted the rebar work to Rebar Lathing Corporation (Rebar). Plaza hired Total Safety Consulting, LLC (Total Safety) as the site safety consultant on the work site. Plaintiff was an employee of Rebar on the date of his accident.

Plaintiff testified at his deposition that, on February 16, 2007, he was working for Rebar, a subcontractor, on a residential high-rise construction project on Gold Street in Brooklyn (Plaintiff EBT, at 7, 8, 18, 20). Plaintiff's foreman was Tommy Steinhart and his subforemen were Dennis Moylan and Roger (*id.* at 19-20, 22). Plaintiff testified that he received all of his directions and instructions as to how to perform his work from his foreman and subforemen (*id.* at 22-23). According to plaintiff, on the date of his accident, he was working on the top floor of

the building (which plaintiff believed was the fourteenth floor), which was made of sheets of plywood decking and rebar laid on top of the wood decking, over which concrete would be poured (*id.* at 25-26). Plaintiff testified that various trades were working on the top floor, including engineers, plumbers, carpenters, electricians, laborers, and ironworkers (*id.* at 27-30, 31). The electricians were marking the deck (*id.* at 30).

On the date of his accident, plaintiff was carrying bundles of steel from the southeast corner to the northeast corner on the fourteenth floor, a distance of about 30 or 40 feet (*id.* at 34, 38). He had made about 20 trips before his accident (*id.* at 38). The route plaintiff took changed each time he carried the steel because the floor was crowded with workers and workers moving materials (*id.*). While plaintiff was carrying a bundle of approximately 20 rods of rebar on his shoulder, plaintiff's left foot made contact with an electrical conduit pipe on the floor (*id.* at 45, 46, 47). Plaintiff testified that he took the path that he did because there was an open elevator shaft to his left, and workers, bundles of steel, and a steel horse to his right (*id.* at 135-137). The electrical conduit pipe was about three feet long and one inch in diameter and silver (*id.* at 47, 49). Plaintiff believed that the conduit had been cut because it was only three feet long and it usually comes in eight-foot lengths (*id.* at 115-116). Plaintiff testified that he went into mid-air and landed on his lower back, spine, and tailbone (*id.* at 53). Plaintiff did not make any complaints about any conditions on the deck level (*id.* at 64-65). Plaintiff testified that Plaza did not have any laborers working on the top floor where the accident occurred (*id.* at 113).

Thomas D'Ercole testified that he was Plaza's senior project manager on the Gold Street project (D'Ercole EBT, at 8, 13). D'Ercole testified, after reviewing a superintendent's daily report dated February 16, 2007, that the eleventh floor had been completed by that date (*id.* at 16,

62, 67; Prinsell Affirm. in Support, Exh. N). Plaza had laborers who worked on the job, but they only worked on floors that had been turned over to Plaza (*id.* at 37, 38). On a concrete superstructure job such as this one, floors were turned over three to four floors below the deck level being poured (*id.* at 38, 39). According to D'Ercole, Century-Maxim was the concrete superstructure contractor which subcontracted out the rebar work (*id.* at 39-41). On the floors where Century-Maxim was working, each trade was responsible for removing leftover materials before the floor was turned over to Plaza (*id.* at 41-42, 45). The trades were not supposed to center-pile leftover materials (*id.* at 42). Based upon the daily report dated February 16, 2007, D'Ercole testified that Sage, Century-Maxim, and Liberty (the plumber) were working on the top floor on the date of the accident (*id.* at 79-80).

Brian Caie testified that he was a project manager employed by Century-Maxim on the project (Caie EBT, at 8, 11, 12). Caie testified that each trade was responsible for removing its own debris (*id.* at 25). Caie also stated that, on a reinforced job such as this project, Plaza's laborers were not on the top of the working deck (*id.* at 25-26).

Adam Coniglio testified that he was employed as Sage's electrical foreman on the job (Coniglio EBT, at 9, 12). Coniglio testified that Sage installed electrical conduits after the wood framing and plywood were put down (*id.* at 19). According to Coniglio, Plaza workers were not present on the deck level during the layout (*id.* at 32-33). Coniglio described the conduit as gray galvanized pipe which came in different diameters from one-half inch to three inches (*id.* at 26-27, 31, 38). Sage's workers used a Sawzall to cut the conduit and threaded the conduit together (*id.* at 27). A plumber's pipe was either black or copper (*id.* at 31). In addition, Plaza laborers would not clean up discarded pipe; the framing or concrete laborers from Century-Maxim

\* 6]

cleaned up on the deck level (*id.* at 28-29). Sage sometimes center-piled the debris and material (*id.* at 36). Sage brought its materials to the deck level in a “boat,” and also removed discarded pipe in the same boat after it had finished laying out of all of the conduit (*id.* at 38-39).

Albert Rivera testified that Total Safety was the site safety consultant on the project, which reported safety issues on the job (Rivera EBT, at 8, 11, 12). Rivera walked the job and checked the on-site manager’s paperwork (*id.* at 11-15). Plaza did not have laborers cleaning up on the deck level (*id.* at 25). Plaza’s laborers only cleaned up after the deck was turned over, and at that time each contractor was required to center pile materials away from the edge (*id.* at 21-22).

Plaintiff commenced this action on June 13, 2007, seeking recovery under Labor Law §§ 240, 241 (6) and 200 and for common-law negligence. On December 7, 2007, Plaza brought a third-party action against Sage, asserting claims for common-law indemnification, contribution, contractual indemnification, and damages for failure to procure insurance. Subsequently, on August 4, 2010, Sage brought a second third-party action against Century-Maxim and Total Safety for common-law indemnification and contribution.

### DISCUSSION

It is well settled that “[t]he 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” (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party 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]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Sosa v 46<sup>th</sup> St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012] [internal quotation marks and citation omitted]).

#### **Labor Law § 240 (1)**

Plaintiff withdrew his Labor Law § 240 (1) claim in opposition to Plaza’s motion (Levien Affirm. in Opposition, at 2). Therefore, the court need not address this claim.

#### **Labor Law § 241 (6)**

Labor Law § 241 (6) requires that all contractors, owners, and their agents shall comply with the following requirement:

“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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.”

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to “provide reasonable and adequate protection and safety” to construction workers, and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 159-160 [1982], *rearg denied* 56 NY2d 805 [1982]). The legislative history underlying section 241 (6) indicates that the statute was meant to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, *on the owner and general contractor*” (*Rizzuto v L.A. Wenger*

*Contr. Co.*, 91 NY2d 343, 348 [1998] [internal quotation marks and citations omitted]). To prevail under Labor Law § 241 (6), the plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]).

“[O]nce it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury. If proven, the general contractor . . . is vicariously liable without regard to his or her fault”

(*Rizzuto*, 91 NY2d at 350).

At the outset, the court notes that Plaza, the project’s construction manager, has not disputed that it served as the functional equivalent of a general contractor on the job site (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [a construction manager may be liable under the statute where it was delegated supervisory control and authority over the work being done when the plaintiff was injured; “The label of construction manager versus general contractor is not necessarily determinative”]).

Plaintiff’s verified bill of particulars alleges violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, 12 NYCRR 23-2.1, 12 NYCRR 23-1.30, and article 1926 of OSHA (Verified Bill of Particulars, ¶¶ 4-5). Plaza moves to dismiss this claim based on all of the cited Industrial Code regulations except for 12 NYCRR 23-1.7 (e) (2). Since plaintiff has only opposed the motion based on a violation of 12 NYCRR 23-1.7 (e) (1), the only issue raised by this motion on plaintiff’s section 241 (6) claim is the alleged violation of section 23-1.7 (e) (1). Consequently, plaintiff’s section 241 (6) claim is dismissed to the extent that it is based on violations of the

remaining Industrial Code regulations other than 12 NYCRR 23-1.7 (e) (1) and (2).

Industrial Code section 23-1.7 (e), entitled “Tripping and other hazards,” provides as follows:

“(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

“(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed”

(12 NYCRR 23-1.7 [e]).

Plaza argues, citing *Burkoski v Structure Tone, Inc.* (40 AD3d 378 [1st Dept 2007]), *Tucker v Tishman Constr. Corp. of N.Y.* (36 AD3d 417 [1st Dept 2007]), and *Vieira v Tishman Constr. Corp.* (255 AD2d 235 [1st Dept 1998]), that the area where plaintiff fell was not a “passageway.” Plaintiff contends, in opposition, that there is a question of fact as to whether there was a violation section 23-1.7 (e) (1) – he was forced to travel along a route with an open elevator shaft on his left side, and workers and stacked materials on his right side. Plaintiff contends that the passageway changed when the workers moved locations and the materials were moved around.

Section 23-1.7 (e) (1) has been held to be a sufficiently specific provision to support a Labor Law § 241 (6) claim (*Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 695 [2d Dept 2010]; *Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 514 [1st Dept 1995]).

“Although the regulations do not define the term ‘passageway,’ courts have interpreted

the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Steiger v LPCiminelli, Inc.*, – AD3d –, 2013 NY Slip Op 01738, \*3 [4th Dept 2013] [citation omitted]; see also *Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). In *Dalanna*, *supra*, the plaintiff tripped over a protruding bolt while carrying a pipe across an outdoor 50-foot concrete slab (*Dalanna*, 308 AD2d at 400). The First Department held that neither section 23-1.7 (e) (1) nor 23-1.7 (e) (2) applied in that case:

“The slab, although regularly traversed to bring pipes to the tanks, remained a common, open area between the job site and the street, and thus was not [a] ‘passageway’ covered by 12 NYCRR 23-1.7 (e) (1), and at best was a ‘working area’ covered by 12 NYCRR 23-1.7 (e) (2). However, the bolt, which was embedded in the ground, was not ‘dirt,’ ‘debris,’ ‘scattered tools and materials,’ or a ‘sharp projection [ ],’ as required by the latter provision”

(*id.* at 401 [citations omitted]).

In *Meslin*, *supra*, the plaintiff was injured when he stepped off a scaffold, which was at ground level, and onto a pipe (*Meslin*, 30 AD3d at 309). The Court held that “[t]he open area near the scaffold upon which [plaintiff] had been working was not a ‘passageway’ or walkway covered by 23-1.7 (e) (1) of the Code” (*id.* at 310).

However, under certain circumstances, triable issues of fact may exist as to whether a plaintiff was injured in a “passageway” in light of the configuration of the work area. In *Canning v RFD 82<sup>nd</sup> St.* (285 AD2d 439 [2d Dept 2001]), the plaintiff claimed that he was injured while walking in a clear path between an exposed open edge of the building on his left and a pile of “stringers” on his right, when he tripped on a piece of rebar. The Second Department held that plaintiff’s testimony presented issues of fact as to whether defendants violated 12 NYCRR 23-

1.7 (e), and thus, as to whether defendants violated Labor Law § 241 (6) (*id.*). Similarly, in *Aragona v State of New York* (74 AD3d 1260 [2d Dept 2010]), the claimant, a dock builder, allegedly tripped on a padeye, which was welded to the deck of a work barge, while carrying materials along a corridor created by lumber and construction material. The Court held that the defendant failed to show the absence of triable issues of fact as to whether the claimant tripped in a passageway (*id.* at 1261). In *Torres v Forest City Ratner Cos., LLC* (89 AD3d 928 [2d Dept 2011]), a sheet metal worker was injured while returning tools to his employer's gang box on the floor on which he was working. In that case, there was a row of trash containers to the left of the gang box, and there was a hoist or lift to the right of the gang box (*id.*). The hoist or lift was the only way to exit the building (*id.*). The plaintiff testified that he was injured when he stepped on a "raw" unhinged door, which was about a foot away from the gang box (*id.*). The Court held that defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim should have been denied, explaining that "defendants failed to show the absence of a triable issue of fact as to whether the plaintiff was injured in a passageway" (*id.* at 929).

Here, the court concludes that the record reveals triable issues of fact as to whether plaintiff was injured in a "passageway" (12 NYCRR 23-1.7 [e] [1]). Plaintiff testified that he was injured while carrying bundles of rebar on the top level of the building under construction, with an open elevator shaft to his left, and stacked materials and workers to his right (Plaintiff EBT, at 134, 135-136, 137). Plaintiff also testified that the path that he took before his accident was the only way to get where he was going (*id.* at 137). Accordingly, it cannot be concluded, as a matter of law, that the area where plaintiff was injured should not have been kept free of accumulations of debris which could cause tripping (*see Torres*, 89 AD3d at 929; *Aragona*, 74

AD3d at 1261; *Costabile v Damon G. Douglas Co.*, 66 AD3d 436 [1st Dept 2009]; *Cowan v ADF Constr. Corp.*, 26 AD3d 802, 803 [4th Dept 2006]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348, 350 [2d Dept 2005]; *Kerins v Vassar Coll.*, 293 AD2d 514, 515 [2d Dept 2002]; *Canning*, 285 AD2d at 439).

The cases relied upon by Plaza are not to the contrary. In *Tucker*, the First Department held that the “area where plaintiff fell was not a passageway subject to Industrial Code (12 NYCRR) § 23-1.7 (e) (1) but a work area subject to section 23-1.7 (e) (2),” without further elaboration (*Tucker*, 36 AD3d at 417). In *Burkoski*, the First Department held that section 23-1.7 (e) (1) did not apply where the plaintiff was injured while walking across a room that measured 18 feet by 20 feet, and offered an affidavit which was materially inconsistent with his prior deposition testimony (*Burkoski*, 40 AD3d at 383). In *Vieira*, the plaintiff tripped over wire mesh installed on top of a metal grid, known as “Q-decking,” covering an unfinished floor of a building under construction (*Vieira*, 255 AD2d at 235). The Court held that the plaintiff “was injured not in a passageway but while working in an open area” (*id.*). Here, in contrast, there is evidence that plaintiff was forced to traverse this pathway because of the location of an open elevator shaft, workers, and stacked materials.

In view of the above, Plaza is not entitled to dismissal of plaintiff’s Labor Law § 241 (6) claim, to the extent that it is based on 12 NYCRR 23-1.7 (e) (1). However, Plaza is entitled to dismissal of this claim to the extent it is based on violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (a), (b), (c), (d), (f), (g) and (h), 12 NYCRR 23-1.30, and 12 NYCRR 23-2.1.

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

Plaza moves for summary judgment dismissing plaintiff’s Labor Law § 200 and common-

law negligence claims. Plaza contends that there is no testimony that it controlled plaintiff's work and that it certainly did not cause or create the condition on which plaintiff tripped. Plaza further contends that the top floor of the building was under construction, and had yet to be turned over to Plaza because the concrete had not yet been poured. Plaza maintains that the conduit could only have been left there by one of the trades working on the floor, and that Sage was the only electrician performing work on that level.

Plaintiff counters that there is a question of fact as to whether Plaza violated Labor Law § 200. Plaintiff argues that his accident resulted from a dangerous condition at the jobsite, i.e., the cut electrical conduit that had not been removed from the floor, and that Plaza employees were responsible for keeping the area clean. According to plaintiff, a jury could find, based upon the evidence in the record, that plaintiff's injuries resulted from his exposure to an unreasonably dangerous work environment, and that Plaza could have and should have taken measures to assure that his work area was safe.

It is well established that Labor Law § 200<sup>1</sup> is a codification of a general contractor's duty to provide a worker with a reasonably safe work place (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "[A]n implicit precondition to this duty [to provide a safe place to work] is that the party charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition*'" (*Rizzuto*,

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<sup>1</sup>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."

91 NY2d at 352, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]).

Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from defective and dangerous premises conditions, and (2) those involving injuries arising from the method in which the work is performed (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). In most cases, “[t]hese two categories should be viewed in the disjunctive” (*id.*). General contractors may be held liable for unsafe premises conditions if they created or had actual or constructive notice of the condition and also had control over the work site (*Gallagher v Levien & Co.*, 72 AD3d 407, 409 [1st Dept 2010]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). In contrast, where the plaintiff’s injury arises out of a subcontractor’s means and methods, the general contractor may be liable only if it actually exercised supervision or control over the work that led to the injury (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]; *Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]).

Contrary to Plaza’s contention, debris (the cut electrical conduit on the floor of the deck level) may constitute a defective condition on the premises (*see e.g. Nankervis v Long Is. Univ.*, 78 AD3d 799, 800 [2d Dept 2010] [construction debris on cafeteria floor constituted dangerous condition on the premises]; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2008] [where the plaintiff tripped on a pile of debris created by several subcontractors, the debris constituted a defective condition of the premises]; *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [where plaintiff tripped in dark over debris, plaintiff’s injury arose from the condition of the work place created or known to the contractor, rather than the method of the

work]).

Nevertheless, in some circumstances, debris may also implicate the “means and methods” standard of liability. *Cody v State of New York* (82 AD3d 925 [2d Dept 2011]), a case relied upon by Plaza, is particularly instructive. In that case, the claimant was injured while descending a ladder, when he stepped on a two-by-four piece of lumbar (*id.* at 926). The Second Department held that the “means and methods” standard applied, explaining that:

“Although an accumulation of debris on property where construction is being performed may, in some cases, constitute a defective premises condition, requiring an inquiry into whether the property owner created the condition or had notice of it . . . , the piece of lumber that caused the claimant’s injuries was one of the materials being used by the claimant’s coworkers, and came to be situated at the foot of the ladder as a result of, and during the course of, the ongoing work at the construction site”

(*id.* at 926-927 [citations omitted]).

Here, plaintiff testified that his left foot made contact with an electrical conduit pipe that was three feet long (Plaintiff EBT, at 46-47). Plaintiff testified that it was definitely cut because it was three feet long and it usually comes in eight-foot lengths (*id.* at 115-116). Plaintiff also testified that, on the date of his accident, there were various trades on the deck level, including electricians (*id.* at 27-30). Thus, the cut electrical conduit on the floor could have been a product of ongoing construction work, or could have been a result of work already performed.

Plaza has established that it did not exercise supervisory control over plaintiff’s work. Plaintiff testified that he only received his directions and instructions from his foreman and subforemen (Plaintiff EBT, at 23). Plaintiff has failed to raise an issue of fact as to Plaza’s supervision, direction or control over the work.

“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 defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). On a motion for summary judgment, the defendant bears the initial burden of establishing that it lacked notice of the allegedly dangerous condition (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [a defendant who moves for summary judgment bears the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of it]; *Manning v Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006] [on a motion for summary judgment, "defendant met its burden of demonstrating, prima facie, that it did not create the alleged hazard or have actual or constructive notice of it"]; *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001] ["Contrary to defendant's suggestion, it is not plaintiff's burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law"]).

Plaza has failed to make a prima facie showing that it lacked actual or constructive notice of the debris on the deck level. Plaza has only addressed the supervision and control standard of liability under section 200 and the common law. In any event, Plaza makes much of the fact that its laborers did not clean up debris until the floors were turned over to it. However, the record shows that Plaza's *superintendents* walked the job site, and were required to address unsafe conditions (D'Ercole EBT, at 28). When Plaza's superintendents visited the floors on which Century-Maxim was working, "if they observed [an unsafe condition], they would – address it" (*id.* at 52). Plaza also employed laborers responsible for housekeeping and cleaning and removing debris (*id.* at 38-39). The site safety manager on the job inspected the floors, and

looked for unsafe conditions (*id.* at 48). Accordingly, Plaza is not entitled to dismissal of the Labor Law § 200 and common-law negligence claims against it, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad*, 64 NY2d at 853).

### **Plaza's Request for Contractual Indemnification Against Sage**

Plaza moves for contractual indemnification over and against Sage, its subcontractor, pursuant to article 9 of the General Conditions of the trade subcontract between Plaza and Sage, which provides as follows:

"To the extent permitted by law, Subcontractor [Sage] shall indemnify, defend, save and hold the Owner, the Contractor [Plaza] . . . harmless from and against all liability damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:

- "1. *The performance of Work by the Subcontractor, or any of its Sub-Subcontractors, any act or omission of any of the foregoing;*
- "2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work, either directly or indirectly through a Subcontractor or material agreement, or (b) while any of the Subcontractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work; or
- "3. The use, misuse, erection, maintenance, operation or failure of any machinery or equipment (including, but not limited to, scaffolds, derricks, ladders, hoists, rigging supports, etc.) whether or not such machinery or equipment was furnished, rented or loaned by the Owner or the Contractor or their officers, employees, agents, servants or others, to the Subcontractor"

(Prinsell Affirm. in Support, Exh. M [emphasis supplied]).

Plaza argues that under this provision, Sage is required to indemnify Plaza in connection with this action. Plaza further argues that the indemnification provision is not unenforceable under the General Obligations Law as there is no evidence that Plaza was negligent, and that its

only potential liability would be for a violation of Labor Law § 241 (6). Plaza also asserts, assuming arguendo, that there are issues of fact as to plaintiff's Labor Law § 200 and common-law negligence claims, it is entitled to partial contractual indemnification pursuant to *Brooks v Judlau Contr., Inc.* (11 NY3d 204 [2008]).

Sage contends, in opposition, that: (1) the evidence fails to demonstrate the contractor responsible for plaintiff's accident or that Sage was responsible for clearing the area of the debris; (2) pursuant to the terms of its agreement with Plaza, Century-Maxim was responsible for removing all debris from the work site before plaintiff's concrete work began; and (3) Plaza had a nondelegable duty to keep the job site free of any debris. According to Sage, in the declaratory judgment action for defense and indemnification in the within action, *Illinois Natl. Ins. Co. v Utica Natl. Assur. Co.*, Index No. 100977/09, the court (Edmead, J.) ruled on the plaintiff's motion for summary judgment that "there are questions of fact as to whether Francis's alleged accident occurred as the result of Sage's acts or omissions or [arose] out of Sage's ongoing operations, as such questions have not been resolved in the underlying action" (Prinsell Reply Affirm., Exh. A [5/10/12 Memorandum Decision, at 6]). Sage contends that this determination is res judicata, collateral estoppel, and law of the case in this action.

Contrary to Sage's position, Plaza is not collaterally estopped from relitigating the issue of whether plaintiff's accident arose out of Sage's work, since the denial of a summary judgment motion is not considered an adjudication on the merits (*see Neighborhood Partnership Hous. Dev. Fund v Blakel Constr. Corp.*, 34 AD3d 303, 303-304 [1st Dept 2006] [the denial of plaintiffs' motion for summary judgment in underlying action was not collateral estoppel as to summary judgment motion in declaratory judgment action]; *Clearwater Realty Co. v Hernandez*,

256 AD2d 100, 101 [1st Dept 1998] [“In order to invoke the doctrine of res judicata or collateral estoppel, it is essential that the disposition asserted as a bar to further prosecution of the action be one on the merits . . . [T]he denial of a motion for summary judgment . . . can[not] be considered an adjudication on the merits”] [internal quotation marks and citation omitted].<sup>2</sup>

“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.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). “In 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” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

General Obligations Law § 5-322.1 (1) voids indemnification clauses in construction contracts that “purport[] to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part . . . .”

An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795

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<sup>2</sup>Nor does the law of the case doctrine apply, because the prior determination was not made in this action (see *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]).

[1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent, i.e., “to the extent permitted by law,” does not violate the General Obligations Law (*see Brooks*, 11 NY3d at 210 [indemnification “to the fullest extent permitted by law” contemplated partial indemnification and was permissible under statute]). Even if the clause does not contain the savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007]).

Here, the indemnification clause at issue requires Sage to indemnify Plaza for any “claims . . . which arise out of or are connected with, or are claimed to arise out of or be connected with . . . the performance of Work by [Sage] . . . , or . . . any act or omission of [Sage]” (Prinsell Affirm. in Support, Exh. M, General Conditions, art. 9). It does not violate the General Obligations Law because it contains the savings language “to the extent permitted by law.” Moreover, the indemnification clause is broad enough to apply here (*see DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269 [1st Dept 1994] [contractor was required to indemnify site owner, despite finding of no liability in contractor’s favor in main action under indemnification calling for indemnification of liabilities “claimed” to arise out of or be connected with any accidents “alleged” to have happened in or about the place where the contractor was performing work]), where plaintiff was allegedly injured when he tripped on an electrical conduit pipe left on the floor (Plaintiff EBT, at 45, 46, 47). On this motion, Plaza has not demonstrated entitlement to contractual indemnification from Sage, since it has failed to establish its freedom from

negligence (*see Correia*, 259 AD2d at 65). As previously discussed, there are issues of fact as to whether Plaza knew about the allegedly dangerous condition, i.e., the cut electrical pipe on the floor of the deck level. However, the indemnification clause may be enforceable at trial to the extent that Plaza is not responsible for plaintiff's accident.

#### **Plaza's Request for Common-Law Indemnification Against Sage**

Plaza also seeks common-law indemnification from Sage, arguing that there is no evidence that it was negligent or that it directed, controlled or instructed plaintiff in the performance of his work. Plaza maintains that the irrefutable evidence establishes that Sage was the only contractor on the deck level using electrical conduit, which plaintiff identified as the cause of his accident.

For its part, Sage maintains that the evidence fails to demonstrate that it was responsible for plaintiff's accident.

Common-law indemnification is predicated on "vicarious liability without actual fault" on the part of the indemnitee (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006] [internal quotation marks and citation omitted]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). "To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). Common-law

22],  
indemnification includes the right to attorney's fees, costs, and disbursements in defending the main action (*Perez v Spring Cr. Assoc.*, 283 AD2d 626, 627 [2d Dept 2001]).

Here, Plaza is not entitled to common-law indemnification from Sage at this juncture. Plaza has not yet been found to be vicariously liable for Sage's negligence pursuant to Labor Law § 241 (6). Additionally, as previously indicated, Plaza has failed to establish that it was not negligent. In addition, Plaza has failed to demonstrate that Sage was negligent. Plaintiff testified that, on the date of his accident, there were various trades working on the deck level, including electricians (Plaintiff EBT, at 27). Sage's foreman testified that the electricians waited until the work was complete until it cleaned off the deck (Coniglio EBT, at 36).

#### **Plaza's Request for Conditional Indemnification Against Sage**

Plaza also requests a conditional order of contractual indemnification against Sage.

A court may render a conditional award of indemnification, pending determination of the primary action, so that the indemnitee may obtain the "earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003] [internal quotation marks and citation omitted]). "To obtain conditional relief on a claim for contractual indemnification, 'the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability'" (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011], quoting *Correia*, 259 AD2d at 65).

In light of the issues of fact as to Plaza's negligence, Plaza is not entitled to conditional indemnification from Sage. Where there are triable issues of fact as to an indemnitee's active negligence, a grant of conditional indemnification is premature (*State of New York v Travelers*

*Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758 [3d Dept 2001]).

**CONCLUSION**


Accordingly, it is

ORDERED that the motion (sequence number 002) of defendant/third-party plaintiff Plaza Construction Corp. for summary judgment is granted to the extent of dismissing plaintiff's Labor Law § 240(1) claim and his § 241 (6) claim insofar as it is based on violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (a), (b), (c), (d), (f), (g), and (h), 12 NYCRR 23-1.30, and 12 NYCRR 23-2.1, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference on May 9, 2013 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: April 22, 2013

ENTER:

  
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J.S.C.

**FILED**

**APR 26 2013**

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COUNTY CLERK'S OFFICE