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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. PART 36

Justice

Index Number : 103319/2010
PEREZ, RICHARD
vs.
AL-STONE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is for summary judgment by plaintiff is decided in accordance with the attached memorandum decision.

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

Dated: 10/17/13

DORIS LING-COHAN, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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RICHARD PEREZ,

Plaintiff,

-against-

AL-STONE LLC., MATRIX MECHANICAL CORP., TRITEL CONSTRUCTION GROUP DOWNTOWN, LLC. d/b/a TRITEL CONSTRUCTION GROUP LLC, CNY BUILDERS LLC., REGAL USA CONSTRUCTION INC., BROADWAY WALLBOARD, INC. and SAFETY AND QUALITY PLUS, INC.,

Defendants.

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Index No.: 103319/2010

Motion Seq. No.: 001, 002, 003 004 & 005

Decision and Order

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AL-STONE LLC., MATRIX MECHANICAL CORP., TRITEL CONSTRUCTION GROUP DOWNTOWN, LLC. d/b/a TRITEL CONSTRUCTION GROUP LLC and CNY BUILDERS LLC.,

Third-Party Plaintiffs,

-against-

BASS PLUMBING & HEATING CORP.,

Third-Party Defendants.

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Third-Party Index No.: 590675/2010

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AL-STONE LLC., MATRIX MECHANICAL CORP., TRITEL CONSTRUCTION GROUP DOWNTOWN, LLC. d/b/a TRITEL CONSTRUCTION GROUP LLC and CNY BUILDERS LLC.,

Second Third-Party Plaintiffs,

-against-

BROADWAY WALLBOARD, INC.,

Second Third-Party Defendant.

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Second Third-Party Index No: 591086/2010

BASS PLUMBING & HEATING CORP.,

Fourth-Party Index No.: 591140/2010

Fourth-Party Plaintiff,

-against-

SAFETY AND QUALITY PLUS, INC.,

Fourth-Party Defendant.

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Ling-Cohan, J.:

Motion sequence numbers 001, 002, 003, 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages sustained by a plumber's apprentice when he fell through an unprotected opening in a floor while working at a construction site located at 8 Stone Street, New York, New York (the premises) on June 2, 2009.

In motion sequence number 001, plaintiff Richard Perez moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against defendants/third-party/second third-party plaintiffs Al-Stone LLC (Al-Stone), Tritel Construction Group Downtown, LLC d/b/a Tritel Construction Group LLC (Tritel) and CNY Builders LLC (CNY) (together, the Al-Stone defendants).

In motion sequence number 002, the Al-Stone defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, as well as granting contractual and common-law indemnification in their favor as against defendant/second third-party defendant Broadway Wallboard, Inc. (Broadway) and third-party defendant/fourth-party plaintiff Bass Plumbing & Heating Corp. (Bass).

In motion sequence number 003, defendant/third-party/second third-party plaintiff Matrix

Mechanical Corp. (Matrix) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it.

In motion sequence number 004, fourth-party defendant Safety and Quality Plus, Inc. (Safety) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it; and alternatively, for a conditional order of summary judgment in its favor on its contractual indemnification claims against Matrix, Broadway and Bass.

In motion sequence number 005, defendant and second third-party defendant Broadway moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint as against it.

BACKGROUND

The project being worked on at the premises on the day of the accident involved the new construction of a Double Tree hotel (the building), which was owned by Al-Stone. Al-Stone hired Tritel to serve as general contractor and CNY to serve as construction manager on the project. In turn, CNY hired various contractors, including Bass, the plumbing contractor, Broadway, the carpentry contractor responsible for the protection of floor openings and holes, Matrix, the HVAC subcontractor and Safety, which provided site safety management services for the project. Matrix subcontracted its HVAC duct work to nonparty FRP Sheet Metal (FRP). On the day of the accident, plaintiff was working as a plumber's apprentice for Bass.

Plaintiff testified that his work on the project was solely supervised by his Bass foreman, and that Bass provided him with all of his tools. Plaintiff explained that, at the time of the accident, plaintiff was in the process of assisting his co-worker, Eddie Orlowski, to install a pipe

on the ninth floor of the building. After the pipe was installed, Orlowski asked plaintiff to step back to see if the pipe was straight. As he stepped backward, plaintiff fell partially into a rectangular opening in the floor (the opening), up to just below his hip and including a portion of his right foot. Plaintiff was injured when he attempted to stop his fall by grabbing onto a metal stud with his right hand, causing him to injure tendons and nerves on four of his fingers.

Plaintiff testified that the opening, which went through to the eighth floor below, was not protected by any covering or barricade, nor was it marked in any way. Plaintiff estimated the opening to be one foot by two feet in size. Plaintiff also testified that, although he was not aware of its existence prior to his accident, after getting up, he observed a piece of plywood, which was bigger than the opening, lying to the right of the opening, but not covering it.

In his deposition, Orlowski, who witnessed the accident, confirmed plaintiff's version of events. In addition, Orlowski noted that, as plaintiff stepped backwards, his foot "dislodged" a piece of plywood (Plaintiff's Notice of Motion, Exhibit T, Orlowski Deposition, at 75). However, unlike plaintiff who described the opening as measuring approximately one foot by two feet, Orlowski described the opening as measuring approximately "a foot [by] a foot and a half" (*id.* at 81). Importantly, Orlowski testified that, prior to the time of the accident, he never observed the opening to be uncovered or unprotected.

It should be noted that, pursuant to stipulation, the action has been discontinued as against defendant Regal USA Construction Inc.

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 Univ. Med. Ctr.*, 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 fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Defendant Matrix's Untimely Motion for Summary Judgment (motion sequence number 003)

Initially, this court cannot consider Matrix's motion for summary judgment, because it is untimely. This court's so-ordered stipulation that extended the time to file dispositive motions, dated March 1, 2012, required that all motions for summary judgment and other dispositive motions be filed by April 5, 2012. It is undisputed that Matrix did not file the instant motion with the Supreme Court, New York County Motion Support Office, until April 6, 2012, after the court imposed deadline.

"In that a summary judgment motion may resolve the entire case, obviously the timing of the motion is significant" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). "CPLR 3212 (a) [as amended effective January 1, 1997 (the amendment)], provides that the 'court may set a date after which no [dispositive] motion may be made,' and, '[i]f no such date is set by the court, such

motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown'" (*Fofana v 41 W. 34th St., LLC*, 71 AD3d 445, 447-448 [1st Dept 2010]; *Perini Corp. v City of New York*, 16 AD3d 37, 39 [1st Dept 2005]). As noted by the Court in *Brill*, the amendment prevents "[e]leventh-hour summary judgment motions, sometimes used as a dilatory tactic [which] left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial" (*Brill v City of New York*, 2 NY3d at 651).

Moreover, in *Miceli v State Farm Mut. Auto. Ins. Co.* (3 NY3d 725, 726-727 [2004]), the Court stated:

> As we made clear in *Brill*, and underscore here, statutory frames - like court-ordered time frames (*see Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]) - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored.

Further, the "good cause" indicated in CPLR 3212 (a), requires "a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d at 652). In *Brill*, the Court reversed an award of summary judgment for the defendant, without considering its merit, on the ground that the motion was made more than 120 days after the note of issue was filed, and that it failed to comply with the statutory requirement that "good cause" be shown for the late filing. Thus, "[i]n the absence of such a showing, a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary" (*Dettmann v Page*, 18 AD3d 422, 422 [2d Dept 2005]; *Perini Corp. v City of New York*, 16 AD3d at 38 [parties may no

longer rely on the merits of their cases to extricate themselves from failing to show good cause for a delay in moving for summary judgment pursuant to CPLR 3212 (a)]). Importantly, the courts have held that Brill applies equally to court-imposed deadlines as to the statutory deadline set forth in CPLR 3212 (a) (*see Bevilacqua v City of New York*, 21 AD3d 340, 340 [2d Dept 2005]; *Milano v George*, 17 AD3d 644, 644 [2d Dept 2005]; *First Union Auto Fin., Inc. v Donat*, 16 AD3d 372, 373 [2d Dept 2005]).

Here, contrary to Matrix's argument that its motion was *served* within the so-ordered time period, this fact does not demonstrate good cause for the late *filing* of such motion (*see Fontanez v Lazarus*, 68 AD3d 558, 558 [1st Dept 2009]; *Corchado v City of New York*, 64 AD3d 429, 429-430 [1st Dept 2009]).

Matrix also argues that good cause exists for its late filing, because it provided its motion for summary judgment to the lawyer's service on April 5, 2012, with specific instructions to file it with the Supreme Court, New York County Motion Support Office. Matrix contends that it did not become aware that the lawyer's service did not timely file the motion until Matrix was served with the Al-Stone defendants' affirmation in opposition. However, although Matrix attached proof that the motion was served on the parties on April 5, 2012, it failed to provide this court with any proof that it submitted the motion to the lawyers' service for filing on that date, as well. Thus, as Matrix has not offered good cause for its failure to timely file the motion, this court is constrained from considering Matrix's untimely summary judgment motion.

Plaintiff's Complaint As Against Matrix and Safety (motion sequence numbers 003 and 004)

Regardless of the untimeliness of Matrix's motion, given that, at footnote one (1) on page

two (2) of his affirmation in opposition to the motions of the Al-Stone defendants, Matrix, Broadway and Safety, plaintiff states that he does not oppose Matrix and Safety's motions for summary judgment dismissing the complaint against them. Thus, Matrix and Safety are entitled to dismissal of plaintiffs claims asserted against them for common-law negligence and Labor Law § § 200, 240 (1) and 241 (6), on consent of plaintiff.

Plaintiff's Labor Law § 240 (1) Claim As Against the Al-Stone Defendants and Broadway (motion sequence numbers 001, 002 and 005)

Plaintiff argues that he is entitled to summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against the Al-Stone defendants, because these defendants were proper Labor Law defendants, because his accident falls within the purview of the statute, and because these defendants violated the statute by not properly and adequately securing the plywood covering over the opening or placing a barricade around it so as to prevent him from falling into it (motion sequence number 001).

In opposition to plaintiff's motion, and in support of their own motions to dismiss the Labor Law § 240 (1) claim against them, the Al-Stone defendants (motion sequence number 002) and Broadway (motion sequence number 005) argue that summary judgment must be denied to plaintiff because questions of fact exist as to the location, size and shape of the opening. As such, they claim that plaintiff cannot meet his burden of showing that the accident falls within the type of extraordinary hazard that Labor Law § 240 (1) is designed to prevent. In addition, the Al-Stone defendants and Broadway argue that, because the accident was not the result of an elevation-related hazard, it does not fall within the purview of Labor Law § 240 (1). Thus, they

claim that they are entitled to dismissal of plaintiff's Labor Law § 240 (1) claim against them.

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, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was 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-Elec. Co.*, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but applies where the work itself involves risks related to differences in elevation (*Binetti v MK W. St. Co.*, 239 AD2d 214, 214-215 [1st Dept 1997]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500-501]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhassat Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a

workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

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 Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Here, Al-Stone, as owner of the construction site, and Tritel, as general contractor, fall within the purview of both Labor Law §§ 240 (1) and 241 (6). However, it must be determined whether defendant CNY, as construction manager, and Broadway, the contractor in charge of protection of floor openings, fall within the purview of the Labor Law as statutory agents of the owner and general contractor.

"Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Millard v Hueber-Breuer Constr. Co.*, 4 AD3d 817, 818 [4th Dept 2004]; *Falsitta v Metropolitan Life Ins. Co.*, 279 AD2d 879, 880-881 [3d Dept 2001]).

When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains "'the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor'" (*Walls v Turner Constr. Co.*, 4 NY3d at 864, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). The parties' actual course of practice is controlling for the

purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240 (1) (*Ortega v Catamount Constr. Corp.*, 264 AD2d 323, 324 [1st Dept 1999] [statutory agency found where construction manager was understood to be in charge of the project and to have overall responsibility for the work, including matters of safety]).

A review of the record in this case reveals that CNY did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the installation and maintenance of the floor protection, so as to be held vicariously liable for plaintiff's injuries as a statutory agent for the purposes of Labor Law § 240 (1) (*see Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005] [Labor Law § 241 (6) claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]; *Lazarou v Turner Constr. Co.*, 18 AD3d 398, 399 [1st Dept 2005] [Labor Law § 240 (1) claim dismissed as against defendant where record established that defendant did not have sufficient supervision or control over the injury-producing work]; *Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125, 126 [1st Dept 1996] [no Labor Law § 240 (1) liability where defendant's contract with owner was limited to demolition and construction of two walls, and where it had no right to control the work site]).

Although plaintiff argues that CNY was involved in the hiring, supervising and coordinating of the various trade contractors at the site, and that CNY had the authority to stop unsafe work practices, "[a] construction manager whose 'duties [are] limited to observing the work and reporting to the contractor safety violations by the employees' does not thereby become liable to the contractor's employee when the latter is injured by a dangerous condition arising from the contractor's negligent methods" (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468

[1st Dept 1998]). In addition, a construction manager's "authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees" (*id.*).

Thus, as CNY did not supervise or control the injury-producing work at issue in this case, CNY cannot be held vicariously liable as a statutory agent for the purposes of Labor Law §§ 240 (1) and 241 (6). Accordingly, CNY is entitled to dismissal of these claims as against it.

In contrast to CNY, Broadway "had the requisite control over the work that resulted in injury to plaintiff to be held accountable under Labor Law § 240 (1) [and] § 241 (6)" (*O'Connor v Lincoln Metrocenter Partners,* 266 AD2d 60, 61 [1st Dept 1999]). A review of the record reveals that Broadway, as the protection contractor, created the openings, placed the initial protection over the openings as construction moved forward, and was responsible for maintaining the protection for the floor openings and holes at the job site, including the opening which caused the plaintiff's accident.

Jan Grimsland, director of risk management and safety for CNY, testified that Braodway, the concrete superstructure contractor, provided the initial protection for the floor openings and penetrations on the ninth floor of the building, which included "some type of blocking, either plywood or something to cover any floor penetrations that would be in that area" (Al-Stone Defendants' Notice of Motion, Exhibit CC, Grimsland Deposition, at 108). In order to secure it from moving, the plywood was affixed with a nail gun. Grimsland testified that it was then Broadway's responsibility to "maintain all floor coverings, to monitor and inspect the building, and correct or repair any defective coverings" (*id.* at 109).

Harry Knee, superintendent of Crown Partition, a company that merged with Broadway in

about 2006, testified that, with respect to Broadway's scope of work on the project, after the concrete was poured, Broadway was responsible for covering the holes and penetrations in the decks. He explained that Broadway would lay down cable net and nail a piece of plywood into the opening so that when it was "kick[ed]... it wouldn't move" (Al-Stone Defendants' Notice of Motion, Exhibit EE, Knee Deposition, at 33). Once the openings were covered, Broadway had a continuing duty to maintain the coverings. Knee noted that Joe DiMaria, Broadway's foreman, was in charge of the protection of penetrations and holes on the deck floor and that someone from Broadway inspected and maintained the penetrations on a daily basis.

Finally, pursuant to the CNY/Broadway contract, Broadway's scope of work entailed "patching of holes made by temporary lighting, temporary heating and temporary water ... temporary protection, carpentry and maintenance ... daily review and maintenance of all temporary protection as required to ensure that these systems are in place at the completion of every work day" (Al-Stone Defendants' Notice of Motion, Exhibit Q, CNY/Broadway contract, Section A-B, Scope of Work). Thus, Broadway can be deemed an agent for the purposes of the Labor Law.

The Opening Presented An Elevation-Related Hazard Which Falls Withing the Protections of Labor Law § 240 (1)

While assisting his co-worker, plaintiff was injured when he stepped backwards into a rectangular opening, which measured approximately one foot by one and a half to two feet in size, and which passed through to the floor below. As plaintiff's risk of injury existed due to the difference between the elevation level of the required work (on the ninth floor) and a lower level (the eighth floor), plaintiff's work subjected him to an elevation-related risk (*see Carpio v*

Tishman Constr. Corp. of N.Y., 240 AD2d 234, 235 (1st Dept 1997]). Thus, plaintiff's accident was not the result of a general hazard specific to a workplace, but rather, it was the result of an elevation-related hazard falling within the purview of Labor Law § 240 (1).

In *Carpio v Tishman Constr. Corp.*, an Appellate Division, First Department case with a similar fact pattern, the plaintiff construction worker was injured when, while painting a ceiling at a job site, when he stepped backwards into an uncovered hole in the floor measuring 10-14 inches wide, causing his leg to fall three feet below the surface to his groin area. In *Carpio*, the First Department, Appellate Division, held that the plaintiff's work subjected him to an elevation-related risk covered by the statute. In doing so, the Court reasoned, in pertinent part, as follows:

> Plaintiff, whose attention was focused toward the ceiling at the time he stepped into the uncovered hole, was entitled under the statute to protection "against the known hazards of the occupation", and this he did not receive. Here, the risk of injury existed because of the "difference between the elevation level of the required work" (the third floor), and "a lower level" (the bottom of the piping shaft), and common sense alone tells us that this accident was gravity-related. Plaintiff's partial fall through a hole at a construction site can hardly be characterized as only tangentially related to the effects of gravity [citations omitted]

(*id.* at 235; *see also Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [the decedent's work exposed him to an elevation-related risk within the scope of Labor Law § 240 (1) where he was performing work at a building under construction in close proximity to two openings which were covered only by unsecured plywood boards]).

It should be noted that, as also set forth in the *Carpio* case, it is of no consequence that plaintiff fell only partially through the opening and not through to the floor below. Notably, in the case of *Becerra v City of New York* (261 AD2d 188, 190 [1st Dept 1999]), the Court held that

Labor Law § 240 (1) was applicable where the plaintiff did not fall through the opening in the floor, but instead, the plaintiff found himself trapped to the level of his shoulders. In finding that Labor Law § 240 (1) applied, the *Becerra* Court noted that "[i]t is well established that a partial fall through a hole caused by shifting boards of a scaffold is covered by Labor Law § 240 (1)" (*id.*).

The Al-Stone defendants and Broadway argue that, pursuant to relevant case law, the opening will not fall within the purview of Labor Law § 240 (1), if it is not large enough in size to permit a body to pass through it (*see Avila v Plaza Constr. Corp.*, 73 AD3d 670, 671 [2d Dept 2010]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422 [2d Dept 2001]). Therefore, the Al-Stone defendants and Broadway argue that as conflicting testimonial evidence in this case creates questions of fact requiring jury resolution as to the location, size and shape of the opening, plaintiff cannot establish that the opening posed an elevation-related hazard, rather than an ordinary hazard not covered by Labor Law § 240 (1).

However, plaintiff and his co-worker, Orlowski, both unequivocably identified the location of the accident and both similarly described the opening as measuring one foot by one and a half to two feet in size, which is arguably large enough to permit a person to pass through it. While the Al-Stone defendants assert that the conflicting testimony of site safety manager, Jason Brenner, creates a question of fact exists as to the size and shape of the opening, a review of Brenner's testimony reveals that he could only speculate as to the size and shape of the opening. Brenner testified, in pertinent part, as follows:

Q. Now, with respect to this slab penetration, can you describe the dimensions for me?
A. No.
Q. Was it square, circular, something else?

A. I'm not sure. My memory, which is vague, I am under the impression it was a round hole, but I can't be certain if I'm correct, because I don't remember it clearly enough

(Plaintiff's Notice of Motion, Exhibit N, Brener Deposition, at 37).

In addition, when he was asked to describe the diameter of the subject opening, Brenner replied, "I thought it was approximately four, five inches in diameter, if I was looking at the right thing" (*id.* at 67). Thus, Brenner's testimony, which is speculative at best, is insufficient to raise a question of fact as to the size and shape of the opening.

Thus, defendants Al-Stone, Tritel and Broadway violated Labor Law § 240 (1) in failing to properly and adequately cover the opening and/or provide a barricade around the opening to prevent plaintiff from falling into it. As this failure was the proximate cause of plaintiff's injuries, plaintiff is entitled to summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against Al-Stone, Tritel and Broadway. Accordingly, these defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them (*see John Baharestani*, 281 AD2d at 118 [the defendants were liable under Labor Law § 240 (1) because the plaintiff's injuries arose out of a fall from an unprotected and unguarded opening in the building]).

Labor Law § 240 (1) "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 [citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d at 695). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to

protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Plaintiff's Labor Law § 241 (6) Claim Against the Al-Stone Defendants and Broadway (motion sequence numbers 002 and 005)

As noted previously, defendant CNY cannot be deemed a statutory agent of the owner or general contractor, because it did not supervise or control the injury producing work, i.e., the installation and maintenance of the floor protection at the site. Thus, CNY is entitled to dismissal of plaintiff's Labor Law § 241 (6) claim as against it (*Smith v McClier Corporation*, 22 AD3d at 371).

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. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, 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.* at 502).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.7 (b) (1) and 23-1.15, plaintiff fails to address those Industrial Code violations in his opposition papers. Therefore, this court deems those parts of plaintiff's Labor Law § 241 (6) claim predicated on violations of the Industrial Code not mentioned by plaintiff in his arguments as abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). Thus, defendants Al-Stone, Tritel and Broadway are entitled to dismissal of those parts of plaintiff's Labor Law § 241 (6) claim predicated on the alleged violations of the Industrial Code not addressed by plaintiff in his motion papers.

Industrial Code 12 NYCRR 23-1.15, which requires that safety railings be securely supported and of equivalent strength to assure safety, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Ferreira v Unico Serv. Corp.*, 262 AD2d 524, 524 [2d Dept 1999]). However, Industrial Code 12 NYCRR 23-1.15, which sets standards for safety rails, does not apply to the facts of this case, as there were no safety rails in place around the opening at the time of the accident (*Fusca v A & S Constr., LLC*, 84 AD3d 1155, 1157 [2d Dept 2011]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]).

In addition, 12 NYCRR 23-1.7 (b) (1) (i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing,

is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) states:

> (b) Falling hazards
> (1) Hazardous openings.
>
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole - particularly the safety measures delineated therein - it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'" (*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003] quoting *Alvia v Teman Elec. Contr.*, 287 AD2d at 422-423 ["hazardous openings" regulation did not apply where the 12-inch by 16-inch hole that worker fell into was too small for him to fall through]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [Labor Law § 241 (6) was not meant to apply to the drainpipe hole into which plaintiff stepped because it was not large enough for a person to fit through, and thus, it was not a "hazardous opening"]; *Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [1st Dept 2000] [where plaintiff was injured when he stepped into a hand hole, Court held that plaintiff's accident was not caused by the type of hazardous opening for which defendants would have been required to provide a cover or safety railing]).

Here, the opening, which measured approximately one foot by one and a half to two feet in size, and which passed through to the floor below, was arguably large enough in size that a

person could pass through it (*see Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727, 727 [2d Dept 2012]; *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863, 864-865 [4th Dept 2000] [where the plaintiff was injured when his foot slipped and his leg went through a 12-inch by 12-inch opening in a rebar mat, the Court held that section 23-1.7 (b) applied to the facts of the case]). Thus, Al-Stone, Tritel and Broadway are not entitled to dismissal of that part of plaintiff's Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (1).

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims (motion sequence numbers 002 and 005)

The Al-Stone defendants and Broadway move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them. 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 at 317-18). 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 the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see*

McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Moreover, general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, since such liability requires actual supervisory control or input into how the work is performed (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

When the accident arises from a dangerous condition on the property, 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 Univ.*, 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]).

Here, it appears that the subject accident resulted from both the means and methods of the work (the fact that the plywood covering was not properly nailed down and secured so as to prevent plaintiff from falling into it), and an allegedly dangerous condition (the fact that the opening was unprotected). In the first instance, as to the Al-Stone defendants, there is no indication in the record to support a finding that they controlled or supervised the injury-producing work in any way. In fact, a review of the testimonial and documentary evidence reveals that Broadway was responsible for the installation and maintenance of the floor protection at the job site.

There is also no indication in the record to support a finding that the Al-Stone defendants created the unsafe condition at issue, or that they had actual or constructive notice of the unsafe condition (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]). "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]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]).

In support of his argument that the Al-Stone defendants had constructive notice of the unprotected opening, plaintiff puts forth that, after being shown his daily reports regarding the project, Luis Rivera, Safety's site safety manager, testified that "inadequately covered, secured and identified" floor openings and holes were an ongoing problem at the job site (Plaintiff's Notice of Motion, Exhibit O, Rivera Deposition, at 98-99). However, the subject safety reports

raise no more than a general awareness that sometimes floor openings are inadequately covered, which is insufficient to establish constructive notice of the specific condition that caused the accident at bar (*see Mack v New York Yankees Partnership*, 69 AD3d 542, 542 [1st Dept 2010] [plaintiff's assertion that water accumulated on the escalators each time it rained raised no more than a general awareness that the escalators became wet during inclement weather, insufficient to establish constructive notice as to the specific condition that caused the plaintiff's accident]; *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]); *Canning v Barneys N.Y.*, 289 AD2d 32, 33 [1st Dept 2001]). As the record is devoid of evidence that there were multiple unprotected floor openings in the specific area where the accident occurred, a recurring dangerous condition has not been established (*Lance v Den-Lyn Realty Corp.*, 84 AD3d 470, 470 [1st Dept 2011] [recurring dangerous condition must occur in area of the accident to give rise to the inference of constructive notice that the condition existed at the time of the accident]).

Plaintiff also argues that constructive notice on the part of the Al-Stone defendants can be shown through the testimony of plaintiff's co-worker, Orlowski, who allegedly testified that he observed the opening as unprotected in the weeks prior to the accident. However, a review of Orlowski's deposition testimony reveals that Orlowski actually testified that he never observed the opening to be unprotected in the days prior to the accident.

Moreover, no evidence has been put forth regarding the length of time that the subject unsafe condition existed, or whether defendants had received any prior complaints, so as to establish that defendants had constructive notice of the same (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 968 [1994]; *Murphy v 136 Northern Blvd. Assoc.*, 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 defendant had received any prior complaints about said condition]).

Thus, as the Al-Stone defendants have established, as a matter of law, that they did not control or supervise the injury-producing work, nor did they create or have notice of the alleged defective condition, they are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them (*Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 736 [2d Dept 2008]).

As to defendant Broadway, as it was responsible for the installation and maintenance of floor protection at the site, it had control over the work at the site that caused the accident. In addition, as Broadway conducted regular inspections of the floor coverings, at least a question of fact exists as to whether Broadway had actual or constructive notice of the subject unsafe condition and, therefore, as to whether Broadway was negligent. Thus, Broadway is not entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against it.

The Al-Stone Defendants' Contractual Indemnification Claims Against Bass and Broadway (motion sequence number 002)

"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]; *see Torres v Morse Diesel Intl.*, 14 AD3d at 402). It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability (*De La Rosa v Philip*

Morris Mgt. Corp., 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Paragraph 16.02 of Article XVI of the CNY/Bass and CNY/Broadway contracts contain identical indemnification provisions which provide for contractual indemnification to Al-Stone, Tritel and CNY, in pertinent part, as follows:

> To the fullest extent permitted by law, the Trade Contractor shall defend, indemnify and hold harmless [Tritel], [Al-Stone], [CNY] and their respective partners ... agents, employees ... from and against all claims, demands, causes of action ... costs, penalties, attorney's fees ... damages, liens, judgments or decrees, losses or liabilities arising out of the Trade Contractor's Work [Bass/Broadway] provided that:
>
> (a) Any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death ... to the extent caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Trade Contractor, its subcontractors and/or suppliers of any tier or anyone directly or indirectly employed by the Trade Contractor or anyone for whose acts the Trade Contractor may be liable

(Al-Stone Defendants Notice of Motion, Exhibit P, CNY/Bass contract, Terms and Conditions, Article XVI, Para. 16.02, at 25-26, Exhibit Q, CNY/Broadway contract, Terms and Conditions, Article XVI, Para. 16.02, at 26).

Initially, contrary to Broadway's argument, the indemnity provisions at issue do not violate General Obligations Law §5-322.1 (1) as they include the language "to the fullest extent permitted by law" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). As such, the indemnification provisions do not require Broadway or Bass to indemnify the Al-Stone defendants for their own negligence, and therefore, said indemnification provisions are enforceable (*Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002]; *Murphy v Columbia Univ.*, 4 AD3d at 202). In any event, where there is no negligence on the part of the proposed

indemnitees, as in the instant case, that statute does not apply (*Brown v Two Exch. Plaza Partners*, 76 NY2d at 177).

Pursuant to the terms of the foregoing indemnification provisions, Bass and Broadway have a duty to defend, indemnify and hold harmless the Al-Stone defendants for any claims attributable to bodily injury arising out of or resulting from Bass and Broadway's work. As such, the indemnification provision does not require a showing of negligence on behalf of these defendants in order to be effective (*Keena v Gucci Shops, Inc.*, 300 AD2d at 82).

As to Bass, as plaintiff was performing plumbing work for Bass at the time of the accident, the indemnity provision is triggered because plaintiff's accident "arose out of" or "result[ed] from the performance of" the work contracted by Bass. Thus, the Al-Stone defendants are entitled to judgment in their favor on their contractual indemnification claim against Bass.

In addition, as discussed previously, as Broadway was responsible for providing and maintaining the floor protection for the opening at the site, which would have included the protection for the opening, plaintiff's accident was caused by, or arose out of or resulted from the performance of Broadway's work. Thus, the Al-Stone defendants are entitled to judgment in their favor on their contractual indemnification claim against Broadway.

The Al-Stone Defendants' Common-Law Indemnification Claims Against Bass and Broadway (motion sequence number 002)

"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]; *Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]).

While plaintiff's accident was not caused as a result of any negligence on the part of the Al-Stone defendants, as discussed above, as there is a factual issue as to whether Broadway was negligent in causing plaintiff's accident, it cannot be determined at this juncture, as a matter of law, that the Al-Stone defendants are entitled to common-law indemnification from Broadway. Additionally, as it also has not been established that any negligence on the part of Bass was responsible for causing plaintiff's accident, the Al-Stone defendants are not entitled to common-law indemnification from Bass, at this point.

Safety's Motion To Dismiss Plaintiff's Complaint and All Cross Claims and Counterclaims Asserted Against It (motion sequence number 004)

As noted previously, plaintiff states in his opposition to the motions of defendants that he does not oppose the motion of Safety, which seeks dismissal of the complaint as against it. Thus, Safety is entitled to summary judgment dismissing the complaint as against it. Accordingly, it is not necessary to reach a determination as to whether Safety is entitled to contractual indemnification from Matrix, Broadway or Bass, as these claims are now moot.

Safety is also entitled to dismissal of any and all claims and cross claims asserted against it sounding in contribution and common-law and contractual indemnification. Here, no proof exists that Safety exercised any supervision or control over the work performed at the premises, that it had any authority to supervise or control the work that brought about plaintiff's accident or that it had actual or constructive notice of the allegedly unsafe condition.

With regard to safety matters, Safety's responsibilities were limited to monitoring general safety standards, which included visiting the premises and observing, reporting and making recommendations regarding compliance with the safety regulations, as required under the Building Code. The various contractors on the project were required to implement their own safety programs, and Safety merely supplemented those programs.

It is well established that "[t]he general duty to supervise the work and ensure compliance with safety regulations does not constitute such control of the work site as would render the supervisory entity liable for the negligence of the contractor who performs the day-to-day operations" (*Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 236 [1st Dept 2007]).

In addition, that Safety conducted inspections or had the ability to stop work for safety reasons does not raise an issue of fact as to its negligence (*see Capolino v Judlau Contr. Corp.*, 46 AD3d 733, 735 [2d Dept 2007]; *Crouse v Hellman Constr. Co., Inc.*, 38 AD3d 477, 477-478 [1st Dept 2007]). Importantly, while Safety was responsible for notifying CNY of any hazardous conditions that it observed, it was not responsible for rectifying those conditions.

Accordingly, Safety is also entitled to dismissal of any and all claims and cross claims for contribution, common-law and/or contractual indemnification asserted against it.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the part of plaintiff Richard Perez's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim as against defendants/third-party/second third-party plaintiffs Al-Stone LLC (Al-Stone) and Tritel Construction Group Downtown, LLC

d/b/a Tritel Construction Group LLC (Tritel) and defendant/second third-party defendant Broadway Wallboard, Inc. (Broadway) (motion sequence number 001) is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of the Al-Stone defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims, as well as plaintiff's Labor Law § 241 (6) claim, with the exception of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (motion sequence number 002), is granted, and these claims are severed and dismissed and summary judgment of dismissal is granted as to plaintiff's Labor Law §§240(1) and 241(6) claims as to defendant CNY; and it is further

ORDERED that the part of the Al-Stone defendants' motion, pursuant to CPLR 3212, for summary judgment in their favor on their contractual indemnification claims against third-party defendant/fourth-party plaintiff Bass Plumbing & Heating Corp. (Bass) and Broadway (motion sequence number 002), is granted, on liability, and the motion is otherwise denied; and it is further

ORDERED that defendant Matrix Mechanical Corp.'s (Matrix) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all claims as against it (motion sequence number 003) is granted on consent of plaintiff, to the extent that plaintiff's complaint is dismissed as to defendant Matrix, and the Clerk is directed to enter judgment of dismissal of plaintiff's complaint, with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that fourth-party defendant Safety and Quality Plus, Inc.'s (Safety) motion,

pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims against it (motion sequence number 004) is granted, and the complaint and all cross clams and counterclaims are severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this fourth-party defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the part of Broadway's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, with the exception of that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.7 (b) (1), is granted, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the caption is amended to reflect the above, and, within 30 days of entry of this order, plaintiff is directed to serve a copy of this order on the Clerk of the County and the Clerk of Trial Support, who are directed to so amend the caption.

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

DATED: October 17, 2013

Doris Ling-Cohan, J.S.C.

DORIS LING-COHAN

J:\Summary Judgment\Perez v Al-Stone LLC.Michelle kucsma.wpd