[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART ✓
Justice

Index Number : 108890/2011
WALLS, EDWARD
vs.
CITY UNIVERSITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
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

FILED
APR 28 2014
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 4/25/14

LOUIS B. YORK 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 : PART 2

EDWARD WALLS and PEGGY WALLS,

Plaintiffs,

-against-

TURNER CONSTRUCTION COMPANY, NEW YORK STATE DORMITORY AUTHORITY and FIVE STAR ELECTRIC,

Defendants.

INDEX NO. 108890/2011
Motion Sequence 002 & 003
DECISION & ORDER

TURNER CONSTRUCTION COMPANY and NEW YORK STATE DORMITORY AUTHORITY,

Third-Party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP. and ENCLOS CORP.,

Third-Party Defendants.

Third-Party Index No. 590035/2012

LOUIS B. YORK, J.:

Motion sequences bearing the numbers 002 and 003 are hereby consolidated for disposition. In this action for personal injury, defendants and third-party plaintiffs Turner Construction Company (Turner) and Dormitory Authority of the State of New York (DASNY), sued here as New York State Dormitory Authority, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and for partial summary judgment in their favor on the third-party complaint (mot. seq. 002). In turn, defendant and third-party defendant Five Star Electric

Corp. (Five Star) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint as against it (mot. seq. 003).

The City University of New York (CUNY) was originally a defendant in the action, but was discontinued as a defendant on January 12, 2012. Bremner affirmation in support, exhibit A.

BACKGROUND

Plaintiff Edward Walls (Walls), then an ironworker employed by Enclos Corp. (Enclos), was injured on April 13, 2011, while working on a construction site at John Jay College, a division of CUNY. The premises were owned by DASNY, and Turner was the general contractor on the project. Walls was allegedly struck by an improperly placed electric heater, installed by Five Star.

The original action commenced on August 2, 2011, with the complaint charging negligence, and violations of Labor Law §§ 200, 240 and 241 (6). Bremner affirmation in support, exhibit A. Plaintiff Peggy Walls is Walls's wife, but no cause of action is asserted on her behalf in the complaint. Turner and DASNY filed a third-party complaint on January 23, 2012, asserting causes of action against Five Star for contribution, common-law indemnity, contractual indemnity and failure to procure insurance, and against Enclos for contractual indemnity and failure to procure insurance. On November 14, 2013, after most of the papers addressing the two instant motions were submitted, the court granted plaintiffs' motion to add Five Star as a direct defendant and amend the caption in the original action.

Testimony

Plaintiff Walls was deposed on October 2, 2012. Bremner affirmation in support, exhibit D (Walls tr). Jose Abreu (Abreu), Turner's assistant project superintendent at the time of the incident, was deposed on October 9, 2012. *Id.*, exhibit E (Abreu tr). Christopher J. Rice (Rice),

Five Star's general foreman, was deposed on October 24, 2012. *Id.*, exhibit G (Rice tr). Shane Wilborne (Wilborne), Enclos's general foreman, was deposed on April 30, 2013. *Id.*, exhibit I (Wilborne tr).

Walls testified that he had been at the John Jay site seven or eight months at the time of the incident. Walls tr at 19. Most of the time, his job was to caulk around newly-installed windows. He only recalled that Enclos's second-in-command had the first name of Shane. *Id.* at 22. Wilborne was supervising plaintiff on the day of the incident. *Id.* at 27. Walls said that the only information or direction that he received from Turner, through Wilborne, was which storage room to use for material, tools and hardware. *Id.* at 26-27. He said that DASNY never told him what to do at all. *Id.* at 28. He stated that, until the day of his deposition, he never knew that Five Star was involved in the construction project. *Id.* at 98.

Walls stated that he followed Thomas Ambrose (Ambrose), a coworker, to a certain storage area for the first time, down a corridor on the ground floor. *Id.* at 30-31, 37. This was about one or two hours after he started his shift at 7 a.m. *Id.* at 32-33. Walls testified that he was wearing a hard hat and safety glasses that Enclos gave him. *Id.* at 49-50. He said that he "couldn't see too well with them down there anyway." *Id.* at 49. He was not wearing the prescription bifocal eyeglasses, which he had had for about nine years. *Id.* at 100.

Walls and Ambrose were headed back in the direction they came from. Both passed the electric heater in the corridor without interference the first time. *Id.* at 47. Walls said that he never saw the heater on the way in. *Id.* at 48. Ambrose walked by the heater again without incident. "He was ahead of me. I guess he already had passed it. He was ahead of me." *Id.* at 42. Walls said, however, that he never actually saw Ambrose pass the heater. *Id.* at 43, 44. Walls said that he was five feet eight inches tall and he estimated that Ambrose was two or three

inches taller. *Id.* at 46.

Ambrose retrieved a plastic garbage can from a side room, and Walls said that he then walked towards Ambrose, 10 or 15 feet away. *Id.* at 40. Walls stated that he struck his head on a suspended heating unit that hung between him and Ambrose. *Id.* at 41. "I didn't see it at all. It was out of my eyesight. I didn't see it at all." *Id.* He was not carrying anything. *Id.* at 45.

When asked if the corridor where the incident occurred was strung with bare light bulbs, Walls answered, "not in this one hardly at all." *Id.* at 53. He was next asked if there was any lighting. "No, no really," was his response. *Id.* At that point, he was shown four photographs that he was not able to "positively" identify as the accident scene.[1] He recalled that the floor in the area was smooth, but the "job site is very rarely clean." *Id.* at 90. He said that he did not trip over anything in the corridor. *Id.*

Walls was wearing his hard hat when "my forehead hit the unit." *Id.* at 50. He said that he fell, but jumped up quickly so as not to be observed by Ambrose, and thereby avoid embarrassment. *Id.* at 51. Walls thought that Ambrose heard the collision, and Walls told him that he walked into the heater. *Id.* at 52. Ambrose sat him down and called for assistance. *Id.* Wilborne and the shop steward soon arrived, and one of them called an ambulance. *Id.* at 57-58.

Abreu, for Turner, testified that Five Star installed temporary electric heaters in the building under construction during the winter of 2010-2011. Abreu tr at 39. The heaters were hung from the ceiling in the hallways on various floors. *Id.* at 41-42. He said that no heaters were installed for the previous winter. *Id.* at 45. Abreu made regular walks through the building, and he said that he "walked right by," without having to maneuver around the heaters. *Id.* at 57.

---

[1] Color and black and white copies are attached as exhibit D to Bremner affirmation in support.

He was shown the same photographs produced at Walls's deposition,[2] and Abreu agreed that the heaters appeared similar to the heaters installed by Five Star. *Id.*

Abreu claimed to know very little about the installation of the heaters, how the locations were selected, and whether there were any complaints about their location or operation. *Id.* at 86. Except for the matter at hand, he did not know of any injuries associated with the installation, placement or operation of the heaters. *Id.* at 89. Abreu said that he had no personal knowledge of the incident at issue, and that he never attended a meeting during which the incident was discussed. *Id.* at 96-97. He stated that he never spoke to anyone at Enclos about the incident, and that he never met Walls. *Id.* at 97-98.

Rice, for Five Star, said that Turner chose the model heaters for Five Star to install, and determined the location of the heaters throughout the construction site. Rice tr at 24, 29. Five Star, however, was responsible for leasing the heaters from the manufacturer. *Id.* at 27. He testified that he "refused to decide where the heaters go because I didn't feel it would heat the building sufficiently." *Id.* at 29. "Turner would walk around and see if there was a spot that they felt was cold and ask us to install on the spot heaters." *Id.* at 30. Rice stated that Five Star made no changes to Turner's plans for heater placement. *Id.* at 32. If Five Star encountered a problem with a location, it would "[g]o to Turner Construction and ask them, 'Where do you want it?'" *Id.* at 56. He claimed that there were no discussions with Turner about fire codes or building codes in regard to placement of the heaters. *Id.* at 73.

Turner observed the installation of the heaters, according to Rice. "They saw how we hung and supported them." *Id.* at 75. He testified that the shop drawings used to place the

---

[2] Walls had been shown black and white photographs only. They are date stamped 4/13/2011. The color photographs, without a date stamp, were found in the interim and Abreu was shown both sets.

heaters did not indicate the height at which they would be installed. *Id.* at 36, 71. He said that "Turner wanted them hung for one reason, that nobody could start moving the heaters and dragging them to where they wanted heat or where they wanted to work with heat." *Id.* at 37. Were they bolted to the floor, he thought they would be in the way of the movement of material and equipment. *Id.* at 72. "Somebody could trip over it and instead of hitting their head." *Id.*

Rice explained that the first floor, where the incident occurred, was near completion when the heaters were installed, unlike some higher floors. *Id.* at 43. Therefore, the estimated 10- to 12-feet raw ceiling height was reduced to eight feet on the first floor, because a dropped ceiling was in place. *Id.* at 42. Where dropped ceilings had not been installed, he estimated that the heaters hung about eight feet above the floor. *Id.* at 93. He stated that he brought the lowered height to Turner's attention.[3] *Id.* at 43-44. He thought that the lowered height might be obstructive, but "[i]t was done already. . . . They accepted it." *Id.* at 76. He paraphrased Turner's reaction as, "If that is as high as you can get it, we will leave it." *Id.* at 78.

Two different sized heaters were used at the construction site. Rice said that the larger one was installed at the first floor site of the incident, because it gave off more heat, and no discussions were held about using the smaller size there. *Id.* at 60. He stated that this large heater was visible as you approached from either side, and "[t]here was also caution tape hanging from it." *Id.* at 66. He testified that "[e]very heater and every line feeding every heater" had caution tape on it, placed by Five Star workers. *Id.* It was not merely height that was a concern, according to Rice. "[H]eaters are hot . . . and the lines were 480-volt . . . and we didn't want to see anybody getting hurt." *Id.* at 80. While not Five Star's responsibility, as Rice saw it, he

---

[3] Rice recalled telling Turner that at least one heater was "as high as we can get it," repeating what one of his sub-foremen told him. *Id.* at 50-51.

directed that caution tape be affixed, "to make it safer." *Id.* at 86. He was unaware if anyone from Five Star or Turner regularly inspected the caution tape and replaced it as needed. *Id.* at 81-82. When shown one photograph of the purported accident site, taken two days after the incident, Rice admitted that no tape could be seen hanging down from the heater. *Id.* at 85. Only the knot where the tape was tied to the heater remained in view. He noted, however, that caution tape was visible in other parts of the photograph. *Id.* at 87.

Rice claimed that he never received any complaints about the height of the heaters, knew of no other accidents involving the heaters, and never moved or repositioned any of the heaters until they were removed entirely. *Id.* at 67. He said that a company called Total Safety was "in charge of safety" on the project. *Id.* at 74. Their inspector walked the job site regularly, passing the heaters hanging from the ceiling. *Id.*

When looking at the photographs of the purported accident scene, Rice observed that temporary lighting was still in place in that corridor. *Id.* at 68. Five Star installed the temporary lighting at the start of the construction project, about two years before the incident. He testified that they generally placed one 100-watt bulb every 15 feet. *Id.* at 69-70. Five Star also maintained the lighting, inspecting it every day. *Id.* at 101. He knew of no complaints regarding the lighting conditions on the first floor. *Id.* at 70. Rice also characterized the accident site as "a back corridor, almost dead end." *Id.* at 79. It was "not a major corridor or major walkway or egress and not an emergency egress." *Id.* at 78.

Wilborne, for Enclos, said that neither Turner nor DASNY assigned work to Walls. Wilborne tr at 14-15. Wilborne thought that Walls was moving materials at the time of the incident, from one interior location to another. *Id.* at 14-17. While he could not recall who was working with Walls at the time, he stated that "one guy never works by himself." *Id.* at 18.

Wilborne testified that he walked the project site each day, checking on material supplies and looking for unsafe conditions. *Id.* at 21-22. He said that he also met with his work crew daily, at the 7 a.m. start of the shift, for a "toolbox talk," focusing on safety. *Id.* at 19-21. He stated that he had seen the heater at issue before the incident and noticed its height. *Id.* at 37-38. Further, he said that "Turner would have weekly safety foremen meetings, so that the matter was brought up, numerous times, from, you know, for the height that it was at." *Id.* at 38. "Five Star brought it up to Turner, probably before they even installed it, or temped it in, that it was going to be, you know, too low." *Id.* at 41. Rice spoke for Five Star on this matter, according to Wilborne. *Id.* He recalled that Abreu was among several Turner representatives at these meetings. *Id.* at 39. On the other hand, Wilborne never saw anyone from DASNY at these meetings, although they might have stoped by the project site. *Id.* at 102-103. Enclos's toolbox talks never addressed the heater height. *Id.* at 61-62.

Wilborne testified that he could see the height of the heater at issue from 60 or 70 feet away, down the long corridor. *Id.* at 47-48. He estimated that the corridor went another 30 feet beyond the heater. *Id.* at 48. He stated that he never saw the heater up close (*id.* at 134), yet he said that he saw "caution tape hanging from it. I mean, there was actually corded off around the actual heater itself" (*id.* at 52). He stated that "[t]hey had all types of colors, they had yellow caution, and red danger tape." *Id.* He acknowledged that "as workers walked by, you know, [they] tore off the danger tape." *Id.* The several colors of tape indicated to him that it was being removed and replaced. *Id.* at 53.

Wilborne said that Enclos gave its workers a hard hat, safety glasses and gloves. *Id.* at 56. Glasses with a clear lens and glasses with an amber-tinted lens were provided. *Id.* at 57. While the workers were required to always wear safety glasses, they were not required to use the

clear lenses indoors. *Id.* at 65. He stated that workers were advised at the toolbox talk to wear clear safety lenses if they were going into an area with poor lighting. *Id.* at 66. And, "depending on the worker also, if they have poor eyesight, you don't want them to wear a darker shade, that's for sure." *Id.* at 67.

Wilborne received a telephone call about Walls's accident, and, by the time he walked to the scene, Walls was lying on a bench. *Id.* at 80. They had a brief conversation, but not about the cause of the accident. Walls told him that "he really could not, you know, speak too much, . . . because he was in so much pain." *Id.* at 95. Wilborne testified that he was "baffle[d]" by the injury, because, although Walls was bareheaded, Wilborne saw Walls's hardhat nearby. *Id.* at 82-83. Wilborne said that he learned details of the accident in a later conversation with the shop steward, who summoned an ambulance for Walls. *Id.* at 84-85.

DISCUSSION

Legal Standards for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, 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).

Turner and DASNY's Summary Judgment Motion – Mot. Seq. 002

Dismissal of the Complaint

Turner and DASNY move to dismiss plaintiffs' claims under Labor Law §§ 200, 240 (1) and 241 (6), and in common law. The court grants this motion to the extent of

- dismissing the Labor Law § 200 and common-law negligence claims as against DASNY alone;
- dismissing the Labor Law § 240 (1) claim as against both defendants;
- dismissing the Labor Law § 241 (6) claim as against both defendants except for the alleged violation of Industrial Code (12 NYCRR Part 23) § 23-1.30.

Cause of Action Concerning Labor Law § 200 and Common-Law Negligence

Labor Law § 200 announces a general duty to protect the health and safety of employees at their workplace.

> "To support a finding of liability under Labor Law § 200, which codifies the common-law duty of an owner or general contractor to provide a safe work site, a plaintiff must show that the defendant supervised and controlled the plaintiff's work, or had actual or constructive knowledge of the alleged unsafe condition in an area over which it had supervision or control, or created the unsafe condition."

Torkel v NYU Hosps. Ctr., 63 AD3d 587, 591 (1st Dept 2009) (citation omitted).

Turner was the general contractor on the construction project. It undisputably engaged Five Star to install temporary electric heaters throughout the building as it rose. According to Rice, for Five Star, Turner determined the placement of the heaters, and was aware of the height issue at some locations. Wilborne, for Enclos, confirmed that Five Star brought the issue of the height of some heaters to Turner's attention. In sum, the evidence is that Turner, Five Star and Enclos had actual notice of the hazardous condition posed by the height of some heaters in the corridors of the construction site. This satisfies a condition for a finding of liability as against

Turner under Labor Law § 200.

It is insufficient to argue, as defendants do, that Turner did not have actual supervisory authority over Walls, when it participated in creating the allegedly hazardous condition in the first floor corridor, and subsequently was cautioned about the position of the electric heater in that corridor. *Murphy v Columbia Univ.*, 4 AD3d 200, 202 (1st Dept 2004) ("It was not necessary to prove [contractor] supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to the contractor . . .").

Additionally, defendants request dismissal of the Labor Law § 200 and common-law negligence claims, because the electric heater "was conspicuously mounted in open and obvious position in a wide-open corridor." Memorandum of law in support (mot. seq. 002) at 2. New York law does not require a warning of an open and obvious danger. *Tagle v Jakob*, 97 NY2d 165, 169 (2001). However, "while an open and obvious danger negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition." *Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 (1st Dept 2010). The cause of action concerning Labor Law § 200 and common-law negligence shall not be dismissed as against Turner.

On the other hand, there is no evidence nor even any allegations that DASNY had a role in or knowledge of the placement of the heaters. There is undisputed testimony that Five Star leased heaters specified by Turner, and installed them at Turner's direction. No one alleges that DASNY attended the regular weekly safety foremen meetings where the height of the heaters was raised, or was otherwise informed of the expressed concerns about the issue. It had no role in creating the alleged hazard, and had no actual or constructive notice of its existence. There are

no material issues of fact in dispute concerning DASNY's conduct, as an absentee landlord, in this matter, and the cause of action concerning Labor Law § 200 and common-law negligence shall be dismissed as against DASNY.

Cause of Action Concerning Labor Law § 240 (1)

Labor Law § 240 (1), the so-called "scaffold law," makes the owner of, general contractor at, or their agent at a property undergoing construction, demolition, repair or painting strictly liable for elevation-related risks to workers on site. It requires that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed." This statute has been broadened beyond scaffolds and ladders to include "the protection against risks due in some way to relative differences in elevation." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 (1991).

Walls had his feet on the ground of the first floor of the John Jay construction project when the incident occurred. The electric heater was firmly attached to the dropped ceiling in the corridor where he went to fetch materials. Nothing moved vertically; Walls, according to his testimony, struck his forehead as he walked into the electric heater, which he claims not to have seen. There is no elevation-related risk as required by Labor Law § 240 (1). *Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781 (1993) (where a cable, attached to a crane located at ground level, which was being used to drag heavy machinery across the floor of a subterranean concrete vault, snapped and propelled a 200-pound metal tension ball against plaintiff, his injury did not result from an elevation-related hazard); *Smith v Hovnanian Co.*, 218 AD2d 68, 70 (3d Dept 1995) ("Plaintiff neither fell from a height nor was he struck by a falling object. Rather,

plaintiff was injured as a result of the horizontal movement of the load of sheetrock"); *Nunnenkamp v Bay Point Assoc.*, 212 AD2d 585, 586 (2d Dept 1995) (Plaintiff was not injured as the result of an elevation-related hazard "when he backed into a jagged, copper pipe, which pierced his pants and punctured his scrotum"). The Labor Law § 240 (1) claim shall, therefore, be dismissed against both defendants.

Cause of Action Concerning Labor Law § 241 (6)

Labor Law § 241 (6) imposes liability on property owners, general contractors and their agents without regard to their involvement in the day-to-day operations of their construction project, under certain circumstances. It provides that "the owners and contractors and their agents for such [construction, demolition or excavation] work . . . shall comply" with the New York State Industrial Code (Industrial Code). However, holding an owner or general contractor liable for work site injuries, pursuant to Labor Law § 241 (6), requires a specific, applicable violation of the Industrial Code. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 (1993) ("we hold that, for purposes of the nondelegable duty imposed by Labor Law § 241 [6] and the regulations promulgated thereunder, a distinction must be drawn between provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards").

Plaintiffs' complaint alleges violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-2.1, 23-2.2 and 23-2.3, which are repeated in their bill of particulars. In both places, unspecified violations of part 1926 of the safety and health regulations for construction of the United States Department of Labor's Occupational Safety & Health Administration (OSHA) are alleged as well. Industrial Code section 23-1.5 announces itself as

dealing with the "[g]eneral responsibility of employers," far from enunciating specific job site requirements. Section 23-1.7 (a) (1) and (2) deal with overhead hazards, that is, "expos[ure] to falling material or objects," not at issue here, where the electric heater was a fixed object. Section 23-1.8 (a) requires eye protection equipment, and section 23-1.8 (c) (1) requires an approved safety hat, for certain workers. These conditions were met for Walls, according to his own testimony.

Section 23-1.15 deals with safety railings, not at issue here; section 23-1.16 deals with safety belts, harnesses and attached lines, also not involved with this incident. Section 23-1.17 addresses life nets, for which there was no purpose on the interior first floor of this construction project. Section 23-2.1 provides for the safe storage of equipment and material, not an element of this incident. Section 23-2.2 outlines the requirements for concrete work, not relevant here. Finally, section 23-2.3 deals with structural steel assembly, nothing akin to the placement of a temporary electric heater on a work site.

While none of the Industrial Codes referenced in the complaint and the bill of particulars pertain to this action, plaintiffs now ask for consideration of 12 NYCRR 23-1.30, 23-1.13 (3) and 23-1.7 (e) (1) and (2), with ample authority to raise them at this point. *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60, 61 (1st Dept 1999) ("plaintiff did specifically allege violations of 12 NYCRR 23-1.7 [b] [1] [i] and 23-2.4 [b] [1] [i], albeit in response to appellant's summary judgment motion"). Such a de facto amended pleading is proper when it "entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant." *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 (1st Dept 2000). Accordingly, the court allows the amendment of plaintiffs' pleadings to incorporate

alleged violations of Industrial Code §§ 23-1.30, 23-1.13 (3) and 23-1.7 (e) (1) and (2).

Section 23-1.30 requires that "[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations." The bill of particulars, at paragraph 13, charged that defendants were "negligent in failing to provide proper illumination" at the job site. In his deposition, Walls said that there was "hardly at all" any lighting in the corridor where the incident occurred. Walls tr at 53. Rice, for Five Star, only testifies that one 100-watt bulb every 15 feet was a typical arrangement on a job site, but no one offers a factual allegation about the actual lighting in the first-floor corridor. Not enough information is known about the photographs submitted by defendants to allow them to serve as conclusive proof that the scene was sufficiently lit at the time of the incident. Therefore, a possible violation of section 23.1.30 remains an open issue. Even if the court were to accept defendants' argument that Five Star was effectively their agent when providing electrical services to the construction project, thereby qualifying Five Star as a defendant for a Labor Law § 241 (6) claim,[4] the property owner and the general contractor would not thereby be eliminated as statutory defendants.

Section 23-1.13 (3) specifies the grounding of equipment "nearer than 10 feet of an energized electric power line or power facility, located overhead or underground," at a construction site. Plaintiffs attempt, to no avail, to implicate this section by the presence or absence of caution tape on the electric heater. There is no evidence of a violation of section 23-1.13 (3).

---

[4] Defendants cite a recent trial court ruling "that Five Star is a proper Labor Law § 241 (6) defendant, since it functioned as a contractor or the City's statutory agent insofar as all electrical work at the project site was concerned." *O'Rourke v City of New York*, 35 Misc 3d 1232(A), *8, 2012 NY Slip Op 50973(U) (Sup Ct, Kings County 2012).

Sections 23-1.7 (e) (1) and (2) address tripping in passageways and working areas generally. Plaintiffs admit "that there are no cases directly on point for the theory that a low hanging obstruction in [a] passageway is a tripping hazard when a plaintiff strikes/bumps their head and not his feet or legs on the obstruction." Memorandum of law in opposition (mot. seq. 002) at 7. Resort to an unspecified edition of Webster's Dictionary definition of tripping as "to cause (someone who is walking or running) to fall or almost fall," does not advance their position. There is no evidence of a violation of sections 23-1.7 (e) (1) and/or (2).

In sum, plaintiffs' position meets the test of *Ross* (81 NY2d 494) only in regard to Industrial Code section 23-1.30, with the disputed factual issue of the illumination of the first floor corridor not appropriate for summary judgment. Further, OSHA regulations are not the predicate for a Labor Law § 241 (6) claim against a nonsupervising owner or general contractor. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 n (1998) ("As the Federal provisions relied upon by plaintiff are not the type which establish a nondelegable duty, the breach of which would constitute some evidence of negligence; any violation of the OSHA regulations by the subcontractor, plaintiff's employer, would not form the basis for liability under Labor Law § 241 [6]"). Therefore, the complaint's charge that Turner and DASNY are liable under Labor Law § 241 (6) shall be dismissed in regard to all the alleged violations of OSHA regulations and the specified Industrial Code regulations except for 12 NYCRR 23-1.30, dealing with illumination of the job site.

Third-Party Complaint

Defendants and third-party plaintiffs Turner and DASNY's summary judgment motion also addresses their third-party complaint in regard to contractual indemnity against Five Star and

Enclos.

DASNY executed written contracts with Five Star and Enclos. Bremner affirmation in support, exhibits H and J. Each contains the following identical language at section 14.05 (A) (3) (the Indemnity Clause), with Five Star and Enclos identified respectively as the Contractor:

> "The Contractor assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever, . . . to all persons, whether employees of the Contractor or otherwise, . . . caused by, resulting from, arising out of, or occurring in connection with the execution of the Work. If any person shall make said claim for any damage or injury, . . . the Contractor shall assume the defense and pay on behalf of the Owner . . . [and] the Construction Manager, . . . any and all loss, expense, damage or injury that the Owner . . . [and] the Construction Manager, may sustain as a result of any claim, provided however, the Contractor shall not be obligated to indemnify the Owner . . . [and] the Construction Manager for their own negligence, if any. The Contractor agrees to assume, and pay on behalf of the Owner . . . [and] the Construction Manager, . . . the defense of any action at law or equity which may be brought against the Owner . . . [and] the Construction Manager . . . . The assumption of defense and liability by the Contractor includes, but is not limited to the amount of any legal fees associated with defending, all costs of investigation, expert evaluation and any other costs including any judgment or interest or penalty that may be entered against the Owner . . . [and] the Construction Manager, . . . in any said action."

This contract provision extends indemnification to Turner, as construction manager, as well as to DASNY, as owner. Plaintiffs' claim for damages, movants argue, arose out of the execution of the work by both Enclos and Five Star. Walls was employed by Enclos at the construction site where he was injured; Five Star installed the electric heater that caused Walls's injury. The term "arising out of" most typically appears in liability insurance policies. "A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous." *Bradley v Earl B. Feiden, Inc.* 8 NY3d 265, 274 (2007) (internal quotation marks omitted). In reading insurance contracts, New York courts hold that, in determining whether an injury arose out of an insured's work, "the focus of the inquiry 'is

not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained.'" *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 (2010), quoting *Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 (2008); *Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 83 (1st Dept 1994) ("policy language ['arising out of operations performed'] focuses not upon the precise cause of the accident, as defendants' urge, but upon the general nature of the operation in the course of which the injury was sustained"). Since Enclos and Five Star were very much involved in the general nature of the operation, as Walls's employer and as installer of the electric heater respectively, the Indemnity Clause gives them "responsibility and liability for any and all damage or injury . . . arising out of, or occurring in connection with the execution of the Work."

Five Star opposes movants' request for partial summary judgment on the third-party complaint, because, it argues, the accident did not arise out of Five Star's work, and it cannot be held liable for movants' faulty plans and specifications. The Indemnity Clause extends Five Star's liability to damage or injury "to all persons, whether employees of the Contractor or otherwise, . . . caused by, resulting from, arising out of, or occurring in connection with the execution of the Work." Walls was allegedly injured by walking into an electric heater installed by Five Star at the construction project where Walls was employed. Walls's injury arose out of Five Star's performance of its work on the John Jay construction project. The Indemnity Clause of DASNY's contract, therefore, extends to Five Star. *See Regal*, 15 NY3d 34.

The issue of the quality of movants' plans and specifications for the selection and installation of the electric heaters is a matter of material fact. Rice, for Five Star, gave detailed

testimony about Turner's role in selecting and placing the electric heaters throughout the job site. Rice claimed that Five Star worked strictly from Turner's plans, not making any decisions in the matter. Abreu, for Turner, testified to knowing very little about the electric heaters in any regard. It remains to be determined under the original complaint whether Turner was negligent, pursuant to Labor Law § 200 and the common law.

While the Indemnity Clause does not require proof of Five Star's negligence in order to place the entire responsibility and liability for Walls's injury with Five Star, General Obligations Law (GOL) § 5-322.1 provides that an owner or contractor may only enforce an indemnification agreement in the absence of its own negligence. "[A] contractor who is guilty of negligence will be barred from recovering contractual indemnity by virtue of the General Obligations Law provision." *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 181 (1990); *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 193 (1st Dept 2004) ("Such clause indemnifies the owner and construction manager for their own negligence and therefore runs afoul of General Obligations Law § 5-322.1"). The inclusion of the language "provided however, the Contractor shall not be obligated to indemnify the Owner . . . [and] the Construction Manager for their own negligence, if any," in the Indemnity Clause, incorporates the standards of GOL § 5-322.1. With the issues of statutory and common-law negligence unsettled, there cannot be an imposition of the Indemnity Clause against Five Star, at this time, as requested by defendants. Their motion for partial summary judgment on the third-party complaint as against Five Star is denied.

Enclos opposes defendants' partial summary judgment motion for enforcement of the Indemnity Clause. It argues that it "had absolutely nothing to do with the design, planning, location, or installation of any heaters in the building." Pellini affirmation (mot. seq. 002) at 8.

It continues that "there can be no claim for negligence against ENCLOS based upon the fact that plaintiff did not sustain a 'grave injury' as defined in the workers' compensation law." *Id.* at 8-9. Enclos fails, however, to recognize the role of the Indemnity Clause at the heart of movants' position.

Enclos does not have to be liable in order to be responsible for indemnification and defense according to the Indemnity Clause. Movants do not suggest that Enclos was negligently liable for Walls's injury, but that, as Walls's employer, the Indemnity Clause reached Enclos for damages arising out of the work. *See Regal*, 15 NY3d 34. As discussed above, however, movants are not now considered negligence-free, and, pursuant to GOL § 5-322.1, the court is unable to grant summary judgment as against Enclos on the third-party complaint on the issue of contractual indemnification.

Five Star's Summary Judgment Motion – Mot. Seq. 003

Five Star moves to dismiss the complaint and the third-party complaint as against it for three reasons: (1) it is not subject to New York's Labor Law, as it was not owner, general contractor or agent on the construction project; (2) it was not negligent; and (3) it cannot be held liable for the faulty plans and specifications provided to it by Turner. The court will not consider Five Star's motion as it pertains to its role as direct defendant in the original complaint. When the instant pair of motions were submitted, plaintiffs' motion to amend the complaint to include Five Star as a direct defendant was still pending. Only Five Star argued the issues as if that motion were to be granted, which it eventually was. The other parties do not take that outcome into consideration in their arguments herein. Now that the original complaint has been amended, Five Star will have to submit a new motion if it wishes to be dismissed from the underlying

action, allowing the other parties an opportunity to present their positions on the matter.

The issue of Five Star's posture as not owner, general contractor or agent is not relevant to its alleged contractual obligation to DASNY and Turner. Five Star's possible negligence concerning the harm to Walls is also not a factor in determining the applicability of the Indemnity Clause. Only the negligence of DASNY and/or Turner would relieve Five Star of the "entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever, . . . to all persons, whether employees of the Contractor or otherwise, . . . caused by, resulting from, arising out of, or occurring in connection with the execution of the Work." As discussed above, Five Star's work, the installation of the electric heaters, is central to Walls's accident. The Indemnity Clause, therefore, insulates DASNY and Turner individually, unless found negligent.

If, as alleged, Turner provided faulty plans and specifications to Five Star for the installation of the electric heaters, particularly the electric heater in the ground floor corridor which Walls walked into, this would be the basis for a negligence claim as against Turner. Turner then might be disqualified, pursuant to GOL § 5-322.1, from asserting contractual indemnification by Five Star. However, the quality of Turner's plans and specifications for the installation of the electric heaters is still to be determined. It is a factual matter for future resolution. Five Star's application for summary judgment, dismissing the complaint and the third-party complaint as against it, is denied.

Accordingly, it is

ORDERED that the motion by defendants and third-party plaintiffs Turner Construction Company and Dormitory Authority of the State of New York, sued here as New

York State Dormitory Authority, pursuant to CPLR 3212, for summary judgment dismissing the complaint (mot. seq. 002) is granted to the extent of :

- dismissing the claims for violation of Labor Law § 200 and common-law negligence as against Dormitory Authority of the State of New York;
- dismissing the claim for violation of Labor Law § 240 (1) as against both defendants; and
- dismissing the claim for violation of Labor Law § 241 (6) as against both defendants except for the alleged violation of 12 NYCRR 23-1.30;

And it is further

ORDERED that the motion by defendants and third-party plaintiffs Turner Construction Company and Dormitory Authority of the State of New York, sued here as New York State Dormitory Authority, pursuant to CPLR 3212, for partial summary judgment in their favor on the third-party complaint (mot. seq. 002) is denied; and it is further

ORDERED that the motion by defendant and third-party defendant Five Star Electric, also called Five Star Electric Corp., pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint as against it (mot. seq. 003) is denied.

DATED: **April 25, 2014**

ENTER:

J.S.C.