NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

CHRISTOPHER R. NAGLE,

Plaintiff,

- against-

ONE NY PLAZA CO. LLC, MORGAN STANLEY, and JAMES G. KENNEDY & CO. INC.,

Defendants.

Index No. 33815/09

Motion Date February 8, 2016

Motion Cal. No. 108, 109, 110, 111, 112, & 113

Motion Seq. No. 7, 8, 9, 10, 11, & 12

JAMES G. KENNEDY & CO., INC.,

Third-Party Plaintiff,

- against -

PETROCELLI ELECTRIC CO., INC.,

Third-Party Defendant.

Index No. 350180/10

JAMES G. KENNEDY & CO., INC.,

Second Third-Party Plaintiff,

- against -

PENGUIN AIR CONDITIONING CORP., PAR PLUMBING CO., INC., COMPUTER FLOORS, INC., CALL ENTERPRISE, INC.,

Second Third-Party Defendants.

Index No. 350255/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PENGUIN AIR CONDITIONING CORP., Index No. 350540/11

Third Third-Party Plaintiff,

- against -

PENAVA MECHANICAL CORP.,

Third Third-Party Defendant.

PENGUIN AIR CONDITIONING CORP., Index No. 350005/12

Fourth Third-Party Plaintiff,

- against -

ENTERPRISE MECHANICAL, INC. and
ENTERPRISE MECHANICAL CORP.,

Fourth Third-Party Defendants.

PAR PLUMBING CO., INC.

Fifth Third-Party Plaintiff,

- against -

SHELTER ROCK CONTRACTING CORP.,

Fifth Third-Party Defendant.

JAMES G. KENNEDY & CO INC.,

Sixth Third-Party Plaintiff,

- against -

ENTERPRISE MECHANICAL, INC. and
ENTERPRISE MECHANICAL CORP.,

Sixth Third-Party Defendants.

The following papers numbered 1 to 132 read on this motion by defendant/third-party plaintiff/second third-party plaintiff/sixth third-party plaintiff, James G. Kennedy & Co., Inc. (Kennedy & Co.), for summary judgment dismissing plaintiff, Christopher R. Nagle's (plaintiff) claims brought under Labor Law §§ 200, 240 (1), 241 (6), dismissing any and all cross claims and counter claims, and for summary judgment on its claims for contractual indemnification and/or conditional contractual indemnification and common-law indemnification against second third-party defendant/third third-party plaintiff/fourth third-party plaintiff, Penguin Air Conditioning Corp. (Penguin), second third-party defendant, Computer Floors, Inc. (Computer Floors), and fourth third-party/sixth third-party defendants, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp.; by separate notice of motion by second third-party defendant/fifth third-party plaintiff, Par Plumbing Co., Inc. (Par Plumbing), for summary judgment dismissing the second third-party complaint of Kennedy & Co., and dismissing any and all cross claims; by separate notice of motion by defendants, One NY Plaza and Morgan Stanley, for summary judgment dismissing plaintiff's complaint and for summary judgment on their claims for contractual indemnification and failure to procure insurance against Kennedy & Co.; by separate notice of motion by Penguin for summary judgment dismissing the second third-party complaint and all third-party claims and cross claims, for conditional summary judgment on its claims for contractual indemnification and failure to procure insurance against Enterprise Mechanical, Inc. and Enterprise Mechanical Corp., and for summary judgment dismissing plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6); by separate notice of motion by Computer Floors for summary judgment dismissing the second third-party complaint and all cross claims; by separate notice of motion by Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. for summary judgment dismissing the second third-party complaint by Kennedy & Co. against Penguin, for summary judgment dismissing the fourth third-party complaint by Penguin, and for summary judgment dismissing all other cross claims or third-party actions; by notice of cross motion by plaintiff for summary judgment against Kennedy & Co. on the claim brought under Labor Law § 240 (1), and for leave to serve a supplemental verified bill of particulars against Kennedy & Co.; and by separate notice of cross motion by plaintiff for summary judgment against One NY Plaza, Morgan Stanley and Kennedy & Co. on the claim brought under Labor Law § 240 (1), and for leave to serve a supplemental verified bill of particulars against Kennedy & Co.

	Papers Numbered
Notices of Motion - Affirmation - Exhibits.....	1-33
Notices of Cross Motion - Affirmation - Exhibits.....	34-41
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Upon the foregoing papers, it is ordered that the motions and cross motions are determined together as follows:

This is an action to recover damages for personal injuries, that plaintiff allegedly sustained on November 12, 2007, as a result of an accident, while he was working at premises located at One NY Plaza, in the County of New York. Plaintiff has alleged that while he was walking backward and carrying a spool of electrical cable, he stepped through a hole in a raised computer room floor, which was created by a missing floor tile, and that he was caused to fall to the sub-floor, located approximately 18 inches below the raised computer room floor. Plaintiff commenced the main action against One NY Plaza, Morgan Stanley, and Kennedy & Co., alleging violations of Labor Law §§ 200, 240 (1), 241 (1), and common-law negligence. Plaintiff was employed by third-party defendant, Petrocelli Electric Co., Inc. (Petrocelli). One NY owned the subject premises and leased the premises to Morgan Stanley, which allegedly retained Kennedy & Co. to perform certain construction work at the premises by acting as the construction manager.

Kennedy & Co. allegedly retained Petrocelli, Penguin, Par Plumbing, and Computer Floors pursuant to separate agreements, to perform various portions of the work at the premises. In particular, Kennedy & Co. allegedly retained Computer Floors to install the raised computer floor and to remove and replace all computer floor tiles that required removal for the various trades to perform work. Penguin allegedly retained fourth third-party defendants, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. as its subcontractors for its work at the premises.

Following commencement of the main actions, various third-party actions were commenced. As is relevant upon the instant motions and cross motions, Kennedy & Co., commenced a second third-party action against, among others, Penguin, Par Plumbing, and Computer Floors. Penguin commenced a fourth third-party action against Enterprise Mechanical, Inc. and Enterprise Mechanical Corp., and Kennedy & Co. commenced a sixth third-party action against Enterprise Mechanical, Inc. and Enterprise Mechanical Corp.

Labor Law § 240 (1)

Kennedy & Co., One NY Plaza, Morgan Stanley, and Penguin have moved for summary judgment dismissing plaintiff's claim brought under Labor Law § 240 (1), while plaintiff has cross-moved for partial summary judgment on the issue of liability on this cause of action. Initially, it is noted that the branches of plaintiff's cross motions for summary judgment on his claim brought under Labor Law § 240 (1) are untimely, in light of the fact that his cross motions have been made returnable beyond the date of September 29, 2015, as previously ordered by this court, in an order dated July 17, 2015. However, since these branches of his cross motions have been made on issues that are nearly identical to issues that are already before the court on timely motions, the court will consider them (*see Ellman v Village of Rhinebeck*, 41 AD3d 635, 636 [2d Dept 2007]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

Turning to the merits of plaintiff's claim brought under Labor Law § 240 (1), that section provides that:

> "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

On a motion for summary judgment, the moving party has the initial burden of demonstrating the absence of any material issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The scaffold law imposes absolute liability upon owners, contractors, and their agents for their failure to provide workers with safety devices that properly protect workers against elevation-related hazards (*see Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2d Dept 2011]; *Wong v City of New York*, 65 AD3d 1000, 1001 [2d Dept 2009]). In order for a plaintiff to recover under Labor Law § 240 (1), a violation of that section must be shown to be a proximate cause of his or her injuries (*see Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]; *Gittleson v Cool Wind Ventilation Corp.*, 46 AD3d 855, 856 [2d Dept 2007]).

In support of this branch of their motions, Kennedy & Co., One NY Plaza and Morgan Stanley have argued that the subject accident does fall within the protections of Labor Law because it did not involve an elevation-related risk. Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. have submitted an affirmation in support of One NY Plaza's and Morgan Stanley's motion relating to this claim and have argued that the subject accident does not fall within the purview of Labor Law. While in support of these branches of his cross motions, plaintiff has argued that his action is protected under Labor Law § 240 (1) because he was working on a raised surface, the computer room floor, that was situated approximately 18 inches above the concrete sub-floor. The record contains, among other things, plaintiff's deposition testimony and the affidavit and testimony of Robert Sundlin (Sundlin), Vice President of Computer Floors.

The record has demonstrated that plaintiff was working on a raised computer floor, situated approximately 18 inches above a concrete sub-floor. Plaintiff testified that on the date of the accident, he was assisting a co-worker to carry in a spool of electrical cable into the computer room, that he was walking backward into the room, that he stepped into a hole in the raised computer floor where a tile had been removed, and that the tiles in the area where the accident occurred had been removed because other trades were working in that area. Sundlin testified and stated in his affidavit that Computer Floors had limited involvement in the work at the subject premises and that it installed the raised computer flooring in various parts of the premises.

Based upon the evidence in the record and under these particular circumstances, this court cannot conclude that the floor on which plaintiff was working, and upon which he was walking at the time of the accident, constituted an elevated worksite. Plaintiff's work did not involve "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *see Shipkoski v Watch Case Factory Associates*, 292 AD2d 587, 588 [2d Dept 2002]). Such a floor was not a worksite which required the use of the protective devices enumerated in Labor Law § 240 (1) (*see Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002]). A worksite is considered elevated, within the meaning of the statute, where the work must be performed at an elevation, such that one of the enumerated safety devices would enable a worker to perform the required work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]; *see also Amo v Little Rapids Corp.*, 268 AD2d 712, 714-715 [3d Dept 2000]).

In the instant case, the record has demonstrated that plaintiff was working on an elevated, permanent floor, that had been installed as part of the work at the site, and there is no evidence that plaintiff's work warranted the use of the safety devices provided for in Labor Law § 240 (1) (*see Alvia v Teman Elec. Contr.*, 287 AD2d at 422). Therefore, the evidence has demonstrated that the subject accident did not fall within the protections of Labor Law § 240 (1), and Kennedy & Co., One NY Plaza and Morgan Stanley are entitled to summary judgment dismissing plaintiff's claim against them.

Although Penguin has referred to a memorandum of law in support of its motion, no such document was annexed to the papers. However, in light of the above determination and the court's ability to grant summary judgment even to a non-movant on an issue already before the court, Penguin is also entitled to the dismissal of this cause of action against it (*see Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]; *Whitman Realty Group, Inc. v Galano*, 52 AD3d 505, 506 [2d Dept 2008]). The branches of plaintiff's cross motions on this claim are denied.

Labor Law § 241 (6)

Kennedy & Co., One NY Plaza and Morgan Stanley have moved for summary judgment dismissing plaintiff's claim brought under Labor Law § 241 (6). Plaintiff has cross-moved for leave to serve a supplemental verified bill of particulars against Kennedy & Co. regarding his claim brought under this section. The court will first address these branches of plaintiff's cross motions for leave. Plaintiff has argued that due to a typographical error, allegations that Kennedy & Co. violated Industrial Code 12 NYCRR 23-1.7 (b)(1), were inadvertently not forwarded to or served upon Kennedy & Co. Inasmuch as no prejudice has been demonstrated, plaintiff is granted the leave requested and the annexed supplemental bill of particulars is, hereby, deemed served.

The court will now turn to the merits of plaintiff's Labor Law § 241 (6) claim. Kennedy & Co. have contended that it is not liable under Labor Law because it was not an owner or contractor within the purview of Labor Law, and that it was merely a construction manager. "Although a construction manager is generally not considered a 'contractor' or 'owner' within the meaning of Labor Law § 240 (1) or § 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises" (*Pino v Irvington Union Free School Dist.*., 43 AD3d 1130, 1131 [2d Dept 2007]). "Thus, a construction manager may be held liable for a worker's injuries under the Labor Law if it 'had the ability to control the activity which brought about the injury'" (*Id.*, quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]; *see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520 [2d Dept 2008]). Inasmuch as the evidence in the record, including the testimony of Christopher Vanderlinde (Vanderlinde), Chief Operating Officer of Kennedy & Co., reflected that Kennedy & Co. was an "extension" of the owners in this matter and performed duties as a general contractor, the evidence reflects that Kennedy & Co. acted, at the very least, as the agent for One NY Plaza and Morgan Stanley at the premises. Therefore, Kennedy & Co. has failed to satisfy its burden as to this contention (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

"In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that ... defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2d Dept 2007]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502). In his bill of particulars, plaintiff has alleged the violation of various sections of the Industrial Code, including 12 NYCRR 23-1, 1.2, 1.5 (a) and (b), 1.7 (b)(1) and (e), and 2 (b). While plaintiff has also alleged violations of various sections of New York City Administrative Code and federal regulatory standards, those standards are insufficient to support a claim brought under Labor Law § 241 (6) (*see Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]; *see also Dugandzic v New York City School Constr. Auth.*, 174 Misc 2d 702, 707 [Sup Ct, Kings County 1997, Goldberg, J.]). Therefore, the court will limit its discussion on this claim to the aforementioned alleged violations of the Industrial Code.

12 NYCRR 23-1 and 23-2 (b), as alleged in the bill of particulars, do not exist and, thus, are hereby, dismissed.

12 NYCRR 23-1.2, which sets forth certain findings of fact, is a general safety standard and is not a sufficient basis to support a claim under Labor Law § 241 (6) (*see Gordineer v County of Orange*, 205 AD2d 584 [2d Dept 1994]). Therefore, this section is dismissed.

12 NYCRR 23-1.5 (a), entitled "General Responsibility of Employers," provides that:

> "Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and

conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule)."

12 NYCRR 23-1.5 (b) provides that:

"For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work."

Kennedy & Co., One NY Plaza and Morgan Stanley aver, among other things, that these two subsections are too general to support a claim under Labor Law § 241 (6). Subsection 1.5 (a) and (b) have both been found to be too general to support a § 241(6) claim (*see Carrillo v Circle Manor Apts.,* 131 AD3d 662, 663 [2d Dept 2015]; *Ulrich v Motor Parkway Props., LLC,* 84 AD3d 1221, 1224 [2d Dept 2011]). As such, Kennedy & Co., One NY Plaza and Morgan Stanley are entitled to the dismissal of these two claims.

12 NYCRR 23-1.7 provides for "[p]rotection from general hazards. Subsection (b)(1), entitled "falling hazards," provides the following:

"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). (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit. (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (b) An approved life net installed not more than five feet beneath the

opening; or (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage."

Kennedy & Co., One NY Plaza and Morgan Stanley have argued that this section is inapplicable in the instant case because the opening through which plaintiff has alleged that he fell is not considered a "hazardous opening" within the meaning of this section. This section has been found to be sufficiently specific to support a claim under Labor Law § 241 (6) (*see Scarso v M.G. Gen. Constr. Corp.*,16 AD3d 660, 661 [2d Dept 2005], *lv dismissed* 5 NY3d 849 [2005]).

Inasmuch as this section has been found to be applicable in cases where the safety measures in this subsection have been set forth in order to "protect workers from falling through an opening to the floor below" (*Alvia v Teman Elec. Contr.,* 287 AD2d at 423; *see Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 544 [2d Dept 2010]; *c.f. Johnson v Pinmark Contr. Co., LLC*, 23 Misc 3d 1131[A][Sup Ct, Kings County 2009, Battaglia, J.]), Kennedy & Co., One NY Plaza and Morgan Stanley have satisfied their *prima facie* burden on this claim. Under the circumstances, they have adequately demonstrated that the hole that was allegedly involved in the subject accident was not a hazardous opening within the purview of 12 NYCRR 23-1.7(b)(1) (*see Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d at 544; *Alvia v Teman Elec. Contr.,* 287 AD2d at 423). In opposition, plaintiff has failed to raise a triable issue of fact. Therefore, Kennedy & Co., One NY Plaza and Morgan Stanley are entitled to the dismissal of this claim.

12 NYCRR 23-1.7(e), entitled "Tripping and other hazards," provides the following:

"(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Kennedy & Co., One NY Plaza and Morgan Stanley have argued that this section is inapplicable. Inasmuch as plaintiff's testimony has reflected that he fell into an opening in the floor as a result of a tile in the computer room floor that had been removed, the record has demonstrated that plaintiff did not trip on a hazard, nor was he injured by a sharp projection. As such, Kennedy & Co., One NY Plaza and Morgan Stanley have satisfied their burden as to this claim. In opposition, no triable issue of fact has been raised. In light of the above determination, Kennedy & Co., One NY Plaza and Morgan Stanley are entitled to the dismissal of plaintiff's claim brought under Labor Law § 241 (6).

Penguin has also moved for summary judgment dismissing plaintiff's claim brought under Labor Law § 241 (6). As to that branch of its motion, it has failed to adequately support its arguments as to this claim because, as previously mentioned, while Penguin has referred the court to its memorandum of law, no such documents was annexed to its motion papers. However, taking into consideration the above determination and this court's ability to grant summary judgment to a non-movant, Penguin is also entitled to the dismissal of plaintiff's claim brought under Labor Law § 241 (6) (*see Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d at 479; *Whitman Realty Group, Inc. v Galano*, 52 AD3d at 506).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008]). Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Claims brought under section 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a worksite and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 972 [2d Dept 2009]*; Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.,* 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63). Plaintiff's claim under this section appears to be based on both categories.

Kennedy & Co., One NY Plaza and Morgan Stanley have moved for summary judgment dismissing plaintiff's claims brought under Labor Law § 200 and for common-law negligence. The court will first address plaintiff's statutory claim under Labor Law § 200. As to the statutory claim, Kennedy & Co., One NY Plaza and Morgan Stanley have argued that they did not direct, supervise or control plaintiff's work. "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2d Dept 2004], *lv denied* 4 NY3d 702 [2004]; *see Perri v Gilbert Johnson Enter., Ltd.*, 14 AD3d 681, 683 [2d Dept 2005]).

As to Kennedy & Co., the record contains, among other things, plaintiff's deposition testimony, and the testimony of Vanderlinde. Plaintiff testified that, while various trades were working the area where the accident occurred, he had observed employees of Kennedy & Co. replacing missing floor tiles in the computer room floor. Vanderlinde testified that Kennedy & Co. was responsible for coordinating the work at the premises and that it had the authority to control the work and stop the work if there was a safety issue. In light of this evidence, a genuine issue of material fact remains, at the very least, as to whether Kennedy & Co. had the adequate authority to control, direct, or supervise the injury-producing work, and whether it

exercised that authority as a predicate for liability under Labor Law § 200 (*see Alvarez v Prospect Hosp.*, 68 NY2d 324).

With regard to One NY Plaza and Morgan Stanley, the record contains, among other things, the testimony of James McAleer (McAleer), Vice President of Operations for Morgan Stanley. McAleer testified that Morgan Stanley hired a project manager, non-party TLM, to oversee the project and that neither he, nor anyone from Morgan Stanley supervised the work that was taking place in the vicinity where the accident occurred. McAleer further testified that while he met with representatives of Kennedy & Co. on a weekly basis and attended weekly project meetings, if he observed any unsafe conditions at the premises, he would not have the authority to stop the work in progress, but would notify TLM of the problem. The record has also demonstrated that One NY Plaza was not involved in visiting the worksite or giving any instructions to the subcontractors. In light of this evidence, One NY Plaza and Morgan Stanley have demonstrated that they did not have sufficient authority to direct, control or supervise the work which led to the subject accident (*see Dos Santos v STV Engrs., Inc.*, 8 AD3d at 224*; Perri v Gilbert Johnson Enter., Ltd.*, 14 AD3d at 683). In opposition, no triable issue of fact has been raised. Therefore, One NY Plaza and Morgan Stanley are entitled to the dismissal of plaintiff's statutory claim brought under Labor Law § 200.

The court will next turn to plaintiff's common-law negligence claim brought against Kennedy & Co., One NY Plaza and Morgan Stanley, who have contended that they did not have actual or constructive notice of the alleged condition. Liability for common-law negligence is predicated upon whether "'the defendant[] either created the condition which caused the accident, or had actual or constructive notice of the condition'" (*Steisel v Golden Reef Diner*, 67 AD3d 670, 671 [2d Dept 2009], quoting *Pomerantz v Culinary Inst. of Am.*, 2 AD3d 821 [2d Dept 2003], *lv denied* 2 NY3d 705 [2004]; *see Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882 [2d Dept 2010]).

With regard to Kennedy & Co. in addition to plaintiff's testimony that he had observed employees of Kennedy & Co. replacing missing floor tiles in the subject computer room floor, he testified that prior to the date of his accident, he had complained to Kennedy & Co. that the missing floor tiles in the computer room floor created a dangerous condition. Vanderlinde testified that if a trade working in the computer room needed a floor tile removed, they notified an employee of Kennedy & Co., which then coordinated with Computer Floors to have the tile removed. Sundlin stated in his affidavit that Computer Floors was not contracted to remove or lift any floor tiles in the area where the subject accident occurred, and that no one requested that employees of Computer Floors assist with or provide for the removal or replacement of any floor tiles in the computer room. In light of this conflicting evidence, a genuine issue of material fact remains as to whether Kennedy & Co. may have created the alleged condition or had actual or constructive notice of it (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

As to One NY Plaza and Morgan Stanley, the evidence in the record has demonstrated that plaintiff did not complaint to anyone at One NY Plaza or Morgan Stanley regarding the

missing floor tiles involved in the subject accident. Plaintiff testified that the missing floor tiles was an ongoing issue that existed for a length of time prior to the date of his accident. McAleer testified that, as a part of his duties, he would attend meetings at the worksite, that he would walk around the worksite, and that if he observed any conditions, he would notify TLM of the condition for it to be remedied. This evidence has served to demonstrate that, at the very least, a genuine issue of material fact remains, as to whether One NY Plaza and Morgan Stanley may have had actual or constructive notice of the alleged condition (*Id.*).

Kennedy & Co., One NY Plaza and Morgan Stanley have further argued that the alleged condition which caused the subject accident was open and obvious. "While a landowner or occupant has a duty to maintain its premises in a reasonably safe manner, there is no duty to protect or warn against open and obvious conditions that are not inherently dangerous" (*Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892 [2d Dept 2011] [internal citation omitted]; *see Holdos v American Consumer Shows, Inc.*, 91 AD3d 823 [2d Dept 2012]; *see also Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [1st Dept 2009]). "[A] court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" (*Tagle v Jakob*, 97 NY2d 165, 169 [2001] [citations omitted]).

Plaintiff testified that prior to the date of the accident, he observed tiles removed from the computer room floor at various times and at differing locations. In light of the surrounding circumstances and the way in which work was being performed, Kennedy & Co., One NY Plaza and Morgan Stanley have failed to satisfy their *prima facie* burden on this branch of their motions. Whether the alleged condition was open and obvious, alone, is an issue that cannot be divorced from the surrounding circumstances and cannot be determined upon this motion (*see Shah v Mercy Med. Ctr.*, 71 AD3d 1120 [2d Dept 2010]; *Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014]; *see also Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]). The issue of whether the condition was open and obvious, together with the evidence in the record, invariably raises issues as to plaintiff's comparative negligence, which is also an issue that cannot be decided at this juncture and under these circumstances (*see Shea v New York City Tr. Auth..*, 289 AD2d 558, 559 [2d Dept 2001]; *Acevedo v Camac*, 293 AD2d 430, 431 [2d Dept 2002]). In light of the above determinations, Kennedy & Co., One NY Plaza and Morgan Stanley have failed to eliminate all triable issues of fact on this issue and are not entitled to the dismissal of plaintiff's claim for common-law negligence (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Third-Party Causes of Action

Kennedy & Co. has moved for summary judgment on its third-party claims against Penguin, Computer Floors, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. for contractual indemnification and common-law indemnification. However, in light of the above determination that various issues of fact remain as to what negligence, if any, is attributable to the parties in this matter, these branches of its motion are premature and the court will not make

a determination at this juncture (*see Dautaj v Alliance El. Co.*, 110 AD3d 839, 841 [2d Dept 2013]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]; *Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1279 [4th Dept 2007]; *Maxwell v Toys R Us*, 258 AD2d 630 [2d Dept 1999]).

Kennedy & Co. moved for summary judgment dismissing any and all cross claims and counterclaims, and has addressed its arguments in its papers only to One NY Plaza's and Morgan Stanley's claims against it for contractual indemnification. In turn, One NY Plaza and Morgan Stanley have moved for summary judgment on their claims for contractual indemnification against Kennedy & Co. However, upon a reading of the answers of One NY Plaza and Morgan Stanley, included in the record, in which they both alleged their counterclaims, the court notes that while Morgan Stanley has alleged a claim against Kennedy & Co., for common-law indemnification, it failed to allege such a claim sounding in contractual indemnification. Likewise, One NY Plaza failed, in its answer, to allege a claim against Kennedy & Co. sounding in contractual indemnification. Therefore, this branch of the motion by Kennedy & Co., is denied as moot, and this branch of the motion by One NY Plaza and Morgan Stanley is denied.

One NY Plaza and Morgan Stanley have moved for summary judgment on their claims for breach of contract for failure to procure insurance against Kennedy & Co. The evidence in the record contains, among other things, a copy of a "Commercial General Liability Coverage Part Supplemental Declarations," with an effective date of June 1, 2007, issued to Petrocelli, a copy of a "Commercial General Liability Insurance Declarations," with an effective date of June 1, 2007, issued to Kennedy & Co., as well as a copy of a letter dated May 4, 2012, from Liberty Mutual Group, stating that One NY Plaza and Morgan Stanley were insured under its policy to Petrocelli. Kennedy & Co. failed to address the cross claim by One NY Plaza and Morgan Stanley for breach of contract for failure to procure insurance. In light of the evidence in the record regarding liability insurance, One NY Plaza and Morgan Stanley have failed to meet their *prima facie* burden and this branch of their motion is denied.

Par Plumbing has moved for summary judgment dismissing the second third-party complaint by Kennedy & Co., and dismissing any and all cross claims. In the second third-party complaint, Kennedy & Co. has alleged claims sounding in common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance. In light of the above determination that issues of fact remain as to the liability that may be attributable to the parties in this action, the branch of Par Plumbing's motion regarding Kennedy & Co.'s, claims for common-law indemnification and contribution and contractual indemnification is premature (*see Dautaj v Alliance El. Co.*, 110 AD3d at 841; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d at 620; *Sheridan v Albion Cent. School Dist.*, 41 AD3d at 1279; *Maxwell v Toys R Us*, 258 AD2d at 630).

As to Kennedy & Co.'s claim for breach of contract for failure to procure insurance

against Par Plumbing, the record contains, among other things, proof of insurance dated April 27, 2007, including a copy of "Commercial General Liability Declarations," issued to Par Plumbing, which had adequately demonstrated that Par Plumbing obtained liability insurance within the terms of its agreement with Kennedy & Co. In opposition, no triable issue of fact has been raised. Therefore, Par Plumbing is entitled to the dismissal of this claim. Par Plumbing has failed to adequately address any other cross claims in its papers and the branch of its motion to dismiss any and all cross claims is denied.

Penguin has moved for summary judgment dismissing the second third-party complaint and all third-party claims and cross claims. In the second third-party complaint, Kennedy & Co. has alleged claims sounding in common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance against Penguin. As previously discussed, issues of fact remain with regard to the liability attributable to the parties in this matter, which precludes summary relief. After careful consideration of the evidence in the record, Penguin is not entitled to the dismissal of Kennedy & Co.'s second third-party claims sounding in common-law indemnification and contribution, and contractual indemnification.

As to Kennedy & Co.'s third-party claim against Penguin for breach of contract for failure to procure insurance, the record contains, among other things, a copy of an insurance policy issued to non-party Emcor Group, Inc. Under the circumstances, the evidence in the record has failed to adequately demonstrate that Penguin obtained insurance for Kennedy & Co. pursuant to an agreement with Kennedy & Co., and therefore, Penguin is not entitled to the dismissal of this second third-party claim.

Penguin has moved for conditional summary judgment on its claims for contractual indemnification and breach of contract for failure to procure insurance against Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. However, the record contains an unsigned copy of the alleged contract between Penguin, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. That evidence, as well as the testimony of Carlo Valenzisi (Valenzisi), Estimating and Project Manager of Enterprise Mechanical, Inc., at the time of the subject accident, regarding the terms of an agreement between the parties, have demonstrated that an issue of fact remains, at least, as to whether there was a valid and enforceable agreement in existence between Penguin and Enterprise Mechanical, Inc. and/or Enterprise Mechanical Corp., which would act as a predicate for Penguin's claims. Therefore, Penguin has failed to satisfy its burden of eliminating all triable issues of fact as to these claims, and this branch of Penguin's motion is denied (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Computer Floors has moved for summary judgment dismissing the second third-party complaint and all cross claims. In the second third-party complaint, Kennedy & Co. has alleged claims against Computer Floors sounding in common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance. In light of

the above determination that issues of fact remain as to the liability of the parties, the branches of the motion by Computer Floors regarding Kennedy & Co.'s second third-party claims sounding in common-law indemnification and contribution, and contractual indemnification are denied.

As to the branch of the motion by Computer Floors to dismiss Kennedy & Co.'s second third-party claim sounding in breach of contract for failure to procure insurance, the record contains Sundlin's affidavit. In his affidavit, Sundlin stated that Computer Floors purchased a commercial general liability insurance policy for the effective dates of December 31, 2006, to December 31, 2007, in order to satisfy any requirements in its subcontract with Kennedy & Co., that it purchase such insurance. No triable issue of fact has been raised in opposition. Therefore, Computer Floors is entitled to the dismissal of this claim.

Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. have moved for summary judgment dismissing the second third-party complaint by Kennedy & Co. against Penguin. As discussed previously, genuine issues of material fact preclude an award of summary judgment to Penguin on Kennedy & Co.'s second third-party claims sounding in common-law indemnification and contribution, contractual indemnification, and breach of contract for failure to procure insurance. After careful consideration of the arguments presented by Enterprise Mechanical, Inc. and Enterprise Mechanical Corp., the court has concluded that they have failed to satisfy their burden on this branch of their motion (*see Smalls v AJI Indus., Inc.*, 10 NY3d at 735; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. have also moved for summary judgment dismissing the fourth third-party complaint by Penguin and dismissing all other cross claims or third-party actions. Penguin has asserted third-party claims sounding in contractual indemnification, breach of contract for failure to procure insurance, common-law indemnification and contribution. Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. have argued that they did not owe plaintiff a duty of care and that they did not create the alleged condition, which would be the predicates for any potential liability to Penguin on these third-party claims.

The record contains the conflicting testimony of Valenzisi, who testified that any work performed by Enterprise Mechanical, Inc. and Enterprise Mechanical Corp., would have been completed before the raised computer room floor was installed, but that their employees would return after the air conditioning units were placed in the floor to make final connections, which would require the removal of the computer room floor. While Valenzisi testified that Kennedy & Co. was responsible for removing the floor tiles if a trade needed access to the floor below he also testified that Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. would remove the tiles itself, and that he observed various tiles missing in various locations for other trades to perform their work. Plaintiff's testimony also reflected that employees of Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. were working in the area where he fell.

Based upon this conflicting evidence, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. have failed to demonstrate that it did not create the alleged condition or that it did not owe plaintiff a duty of care when performing their work. As such, issues of fact as to Enterprise Mechanical, Inc.'s and Enterprise Mechanical Corp.'s liability in this action remain, and the court cannot make a determination as to their liability at this time. Therefore, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. are not entitled to the dismissal of Penguin's fourth third-party claims sounding in contractual indemnification, common-law indemnification and contribution, or to the dismissal of all other cross claims or third-party actions, since this branch of their motion is premature (*see Dautaj v Alliance El. Co.*, 110 AD3d at 841; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d at 620; *Sheridan v Albion Cent. School Dist.*, 41 AD3d at 1279; *Maxwell v Toys R Us*, 258 AD2d at 630).

As to the branch of the motion by Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. to dismiss the Penguin's fourth third-party claim sounding in breach of contract for failure to procure insurance, they have failed to address this claim and are not entitled to the relief sought on this branch of their motion.

Accordingly, the branch of the motion by Kennedy & Co. for summary judgment dismissing plaintiff's claim brought under Labor Law § 200 and for common-law negligence is denied. The branches of its motion for summary judgment dismissing plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6) are granted. The branch of Kennedy & Co.'s motion for summary judgment dismissing any and all cross claims and counterclaims against it is denied. The branches of its motion for summary judgment on its third-party claims for contractual indemnification and/or conditional contractual indemnification, and for common-law indemnification against Penguin, Computer Floors, Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. are denied.

The motion by Par Plumbing for summary judgment dismissing the second third-party complaint of Kennedy & Co., and dismissing any and all cross claims is granted only to the limited extent that Kennedy & Co.'s second third-party claim for breach of contract for failure to procure insurance is dismissed, and it is denied in all other respects.

The branches of the motion by One NY Plaza and Morgan Stanley for summary judgment dismissing plaintiff's statutory claims brought under Labor Law §§ 200, 240 (1), and 241 (6) are granted, while the branch of their motion for summary judgment dismissing plaintiff's claim for common-law negligence is denied. The branches of their motion for summary judgment on their claims for contractual indemnification and failure to procure insurance against Kennedy & Co. are denied.

The branches of the motion by Penguin for summary judgment dismissing plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6) are granted. The branches of the motion by Penguin for summary judgment dismissing the second third-party complaint and all third-party claims and cross claims is denied. The branch of the motion by Penguin for

conditional summary judgment on its claims for contractual indemnification and failure to procure insurance against Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. is denied.

The motion by Computer Floors for summary judgment dismissing the second third-party complaint and all cross claims is granted only to the limited extent that the second third-party claim asserted by Kennedy & Co. for breach of contract for failure to procure insurance is dismissed, and it is denied in all other respects.

The motion by Enterprise Mechanical, Inc. and Enterprise Mechanical Corp. for summary judgment dismissing the second third-party complaint by Kennedy & Co. against Penguin, dismissing the fourth third-party complaint by Penguin, and dismissing all other cross claims or third-party actions are denied.

The branch of the cross motion by plaintiff for summary judgment against Kennedy & Co. on his claim brought under Labor Law § 240 (1) is denied, while the branch of his cross motion for leave to serve a supplemental verified bill of particulars against Kennedy & Co. is granted to the extent discussed herein.

The branch of the cross motion by plaintiff for summary judgment against One NY Plaza, Morgan Stanley and Kennedy & Co. on his claim brought under Labor Law § 240 (1) is denied, while the branch of his cross motion for leave to serve a supplemental verified bill of particulars against Kennedy & Co. is granted to the extent discussed herein.

Dated: May 26, 2016

DARRELL L. GAVRIN, J.S.C.