SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

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WILLIAM ADAGIO and CATHY ADAGIO,

Plaintiffs,

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, NEW YORK CONVENTION CENTER OPERATING CORPORATION, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, UNITED STATES ROOFING CORPORATION, A-DECK, INC., RACANELLI CONSTRUCTION COMPANY, INC., EUROTECH CONSTRUCTION CORP., EMPIRE TRANSIT MIX, INC., JENNA CONCRETE CORP., and JOHN CIVETTA & SONS, INC.,

Index No. 150273/13
(***Action No. 1***)

Motion Sequence Nos.
009, 010, 011, 012, 013 & 014

Defendants.

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UNITED STATES ROOFING CORPORATION,

Third-Party Plaintiff,

-against-

TOTAL SAFETY CONSULTING, LLC,

Third-Party
Index No. 595336/14

Third-Party Defendant.

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WILLIAM ADAGIO and CATHY ADAGIO,

Plaintiffs,

-against-

TOTAL SAFETY CONSULTING, LLC,

Index No. 160646/14
(***Action No. 2***)
Motion Sequence No. 001

Defendant.

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**JENNIFER G. SCHECTER, J.:**

Motion sequence numbers 009, 010, 011, 012, 013, and 014 in Action No. 1, and motion sequence number 001 in Action No. 2, are consolidated for disposition.

In these Labor Law actions, plaintiff William Adagio (Adagio), a superintendent employed by nonparty Tishman Construction Corporation of New York (Tishman), alleges that, on January 25, 2012, he was injured on a construction site at the Jacob K. Javits Convention Center (Javits Center) in Manhattan. Adagio was allegedly injured while carrying a ladder when he slipped on construction debris in a yard at the site.

Defendant Empire Transit Mix, Inc. (Empire Transit) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross claims against it with prejudice (motion sequence number 009).

Defendants United States Roofing Corp. (USRC) and A-Deck, Inc. (A-Deck) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any and all cross claims asserted against them (motion sequence number 010).

Defendant Racanelli Construction Company, Inc. (Racanelli) moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against it (motion sequence number 011).

Defendants New York State Urban Development Corporation, Empire State Development Corporation, New York Convention Center Development Corporation, New York Convention Center Operating Corporation, and Triborough Bridge and Tunnel Authority (TBTA) (collectively, the Javits Center Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' common-law negligence, Labor Law §§ 200, 240 (1), and 241 (6) claims and all cross claims asserted against them (motion sequence number 012).

Third-party defendant Total Safety Consulting, LLC (Total Safety) moves, in Action No. 1, pursuant to CPLR 3212, for summary judgment dismissing all direct claims, third-party claims, and cross claims against it (motion sequence number 013). Total Safety also moves, in Action No. 2, for summary judgment dismissing plaintiffs' complaint (motion sequence number 001).

Defendant Eurotech Construction Corp. (Eurotech) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross claims against it (motion sequence number 014).

**BACKGROUND**

The New York State Urban Development Corporation (UDC) d/b/a Empire State Development Corporation was created by statute for the purpose of designing and constructing the Javits Center and acquiring the property upon which the Javits Center was built (Wynn affirmation, ¶ 2). The New York Convention Center Operating Corporation is responsible for operating and maintaining the Javits Center (Guerin aff, ¶ 1).

On June 1, 2009, the New York Convention Center Development Corporation, a subsidiary of UDC, hired Tishman as a construction manager on a construction and renovation project at the Javits Center (Weiss affirmation in support, exhibit H).

On November 18, 2009, Tishman hired Racanelli as a prime contractor to construct a pre-engineered building at the Javits Center (Lawrence affirmation in support, exhibit I). On November 23, 2009, Tishman hired USRC as a prime contractor to perform roofing and waterproofing work (McCaskey affirmation in support, exhibit E). USRC hired A-Deck to perform a portion of its work. By agreement dated May 19, 2010, Tishman hired Total Safety as a safety consultant in connection with the construction of the Javits Center Phase I renovations (Glaws affirmation in support, exhibit

F). Eurotech built architectural concrete at the perimeter of office entrances and concrete curbs on the roof. Empire Transit supplied concrete to Eurotech.

Adagio testified at his deposition[1] that he was employed as a field superintendent by Tishman (plaintiff tr at 21, 30). As a superintendent, his job duties included overseeing a project and making sure that it was completed in accordance with the plans (*id.* at 23). On January 25, 2012, there were numerous projects ongoing at the Javits Center (*id.* at 27). The projects included constructing a new building and renovating the existing building (*id.* at 27-28). By January 25, 2012, the new building was completed, but the main building was still being renovated (*id.* at 29). Tishman's general superintendent for the renovation work was Roger Centinna (Centinna) (*id.*). Centinna gave Adagio his assignments during the renovation project (*id.* at 31).

The renovation had been ongoing for about a year and a half before Adagio's accident (*id.* at 30). In January 2012, the renovations included constructing new entrances, and performing roof work and some exterior work (*id.* at 31). Tishman's trailer was located in a yard, which was off 12th Avenue on West 39th Street (*id.*). There were other trailers in the yard, as well as materials being stored in the yard (*id.* at 39). As of January 2012, the materials being stored in the yard included sand, concrete, lumber, and some rebar (*id.* at 50). Adagio did not know who brought the sand in, but it was brought in for the roofing contractor, A-Deck (*id.*). When Adagio first started working at the Javits Center, the yard was unpaved dirt (*id.* at 42). However, after the new building was completed, it was paved to be used as a parking lot (*id.*).

On the date of the accident, Kevin Taylor of Tishman called Adagio and told him that he needed laborers to bring a ladder to the Link building (*id.* at 58). Adagio went down to the yard via

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[1]Adagio was deposed on two occasions: on May 19, 2015 and August 12, 2015. The court cites to the transcript of Adagio's May 19, 2015 deposition as plaintiff tr and the transcript of Adagio's August 12, 2015 deposition as plaintiff Aug tr.

the loading ramp and met another Tishman employee, Kingsley Palmer (Palmer), so that they could carry the ladder to the Link building (*id.* at 62-64). Adagio and Palmer carried a 40-foot, aluminum ladder into the Link building (*id.* at 66). The ladder was in its closed position, and was approximately 20 feet in length in that position (*id.*). Adagio did not know who owned the ladder (plaintiff Aug tr at 24). Adagio waited inside the Link building for approximately 15 to 20 minutes while an inspection was performed with the ladder (plaintiff tr at 70). After the inspection, Adagio and Palmer carried the ladder back to the yard (*id.* at 71). Palmer carried the front part of the ladder, and Adagio carried the rear (*id.*). Adagio carried the ladder on his right side (*id.* at 75). Adagio and Palmer walked a similar path exiting the Link building as they did entering it from the yard, but they were a little further to the right (*id.* at 71). His accident occurred as they walked on the blacktop in the yard (*id.* at 73). As Adagio was carrying the ladder, he lost his footing (*id.* at 76). He felt both feet going out from underneath him, causing him to fall backwards, but was able to catch himself (*id.* at 77-78). Adagio felt pain and dropped the ladder (*id.* at 77). He felt a pain in his neck and back, shooting down his legs, arm and right shoulder (*id.* at 78). After he slipped, Adagio looked down and saw debris and sand on the ground and surmised that it was what caused him to lose his footing (*id.* at 81). He did not notice the sand or debris before the accident (*id.* at 168-169). Adagio did not know how long the sand, wood, and rebar were in the area before the accident (*id.* at 190, 195).

Palmer testified that Adagio's accident occurred when they were taking the ladder back to where it was stored (Palmer tr at 9-10). The accident happened right after they exited the Link building (*id.* at 12). He stated that "there's a stairway [going] all the way down bout 15, 20 feet. So we got around to the stairway and coming down and then we got to hit a little steps, and that's when

[Palmer] heard [plaintiff] scream out" (*id.*). Palmer did not recall walking through any piles of sand (*id.* at 15).

Eric Lorenzo (Lorenzo) testified that he was a site safety manager for Total Safety on the Javits Center construction site (Lorenzo tr at 9). Total Safety was hired by Tishman (*id.* at 10-11). Total Safety worked on the renovation project, which included replacement of the roof, curtain walls, interior walls, paint, flooring, and other upgrades (*id.* at 11-12). The site safety manager for the expansion project was Shawn McKee of the Velez Organization (*id.* at 22). Lorenzo testified that it was not his job to inspect the yard (*id.* at 22-23). However, Lorenzo also stated that he was in the yard every morning, and that if he saw an unsafe condition, he would notify Tishman (*id.* at 23-24).

Kevin Taylor (Taylor) stated that he was Tishman's project manager on the Javits Center project (Taylor tr at 7). On the date of the accident, Racanelli's work was substantially complete, but there were a few remaining items, including the inspection (*id.* at 12). According to Taylor, it was Tishman's responsibility to inspect all areas that needed to be cleaned up, including the yard (*id.* at 15-16, 39-40). Taylor had requested that Adagio get the ladder for an inspection (*id.* at 10). He asked Adagio to "make arrangements" for the ladder as a supervisor (*id.* at 11-12).

William Walsh (Walsh), a project manager employed by Racanelli, stated that he had returned to the site on January 25, 2012 for a meeting about an inspection of a fire-stop detail (Walsh tr at 7, 12-14). The fire-stop details had been installed by multiple subcontractors of Racanelli, depending on their location (*id.* at 14-15). Walsh met with employees of Tishman at their office on site, and went into the Link building to look at the detail (*id.* at 13, 49). The architect and Walsh climbed the ladder, and then the meeting was over (*id.*). Walsh was at the Javits Center for about a half hour in total (*id.* at 19). Walsh was unaware of Adagio's accident (*id.* at 53-54).

Ken Baker (Baker), USRC's superintendent, testified that USRC did not use sand in its operations (Baker tr at 20) and did not store any materials in the yard (*id.* at 15, 90, 91).

In an affidavit, Baker states that USRC was not performing operations on January 25, 2012 near the area of the accident (Baker aff, ¶ 5).

A-Deck's director of operations, Bernard Joly (Joly), testified that A-Deck was hired to pour a lightweight concrete roof deck at the Javits Center (Joly tr at 8, 22). A-Deck did not use sand in its operations (*id.* at 35, 106). A-Deck's last day performing work was on December 30, 2011; A-Deck did not perform any work at the Javits Center from December 30, 2011 through March 2012 (*id.* at 102-103).

Donald Maher (Maher), Eurotech's superintendent, testified that Eurotech built architectural concrete walls at the perimeter of all office entrances and concrete curbs before air handles were installed (Maher tr at 6, 9). Eurotech stored rebar in the yard (*id.* at 21, 34).

Doreen Guerin (Guerin), an employee of the New York Convention Center Operating Corporation, states that the Jacob Javits Convention Center was not responsible for the yard, which was part of the construction project and was under the control of Tishman and the contractors engaged in that construction work (Guerin aff, ¶ 4). Guerin avers that the Javits Center did not have any employees involved in the maintenance or clean-up of the yard during the construction project, and did not hire anyone to maintain or clean the yard during the project (*id.*, ¶ 5).

**PROCEDURAL HISTORY**

Plaintiffs commenced Action No. 1 on January 10, 2013, seeking recovery under principles of common-law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff Cathy Adagio asserts a derivative claim for loss of society, services, and consortium. As relevant

here, the Javits Center Defendants asserted claims for contractual indemnification against USRC, A-Deck, and Racanelli.[2]

On October 28, 2014, plaintiffs commenced Action No. 2 against Total Safety, also seeking recovery for common-law negligence and under Labor Law §§ 200, 240 (1) and 241 (6). Mrs. Adagio also asserts a derivative claim for loss of society, services, and consortium against Total Safety.

Action No. 1 and Action No. 2 have not been consolidated.

**DISCUSSION**

It is well settled that "'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

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[2] By decision and order dated July 1, 2015, the court granted motions for summary judgment, in Action No. 1, by defendants Jenna Concrete Corp. (Jenna) and John Civetta & Sons, Inc. (Civetta). Jenna established that its last delivery to the site was in May 2011. Civetta also completed its work in December 2011. None of the opponents to the motions linked Jenna or Civetta to the accident in any way.

**Public Authorities Law § 553-b**

The Javits Center Defendants argue that the TBTA cannot be held liable in negligence or under the Labor Law for injuries sustained by construction workers, pursuant to Public Authorities Law § 553-b.

Public Authorities Law § 553-b provides, in relevant part, as follows:

> "1. In relation to the convention center and for the purpose of effectuating the development of the same, the authority shall have power, in its discretion and subject to and in accordance with all contract provisions with respect to any bonds and the rights of the holders of bonds, to:
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> * * *
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> "(b) Lease in its own name the convention center from the subsidiary of New York state urban development corporation (such subsidiary being herein referred to as the development corporation) created pursuant to a chapter of the laws of nineteen hundred seventy-nine for studies, site acquisition, planning, design, construction and development of the convention center, and sublease its interest therein to the state (acting by and through the commissioner of general services) . . . provided that . . . such (ii) sublease shall . . . (d) *relieve the authority of any obligation to operate, repair, maintain or reconstruct the convention center*" (emphasis added).

Although the statute gave the TBTA the authority to lease the Javits Center from the UDC, and to sublease the Javits Center to the state, the statute does not immunize the TBTA from any statutory obligations that it may have under the Labor Law by virtue of ownership or having an interest in the property and contracting to have work done for its benefit. Therefore, dismissal of the claims against the TBTA based on Public Authorities Law § 553-b is denied.

**Labor Law § 240 (1)**

The Javits Center Defendants, Empire Transit, and Racanelli move for summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim. Plaintiffs did not oppose dismissal of their section 240 (1) claim (*see* Massaro affirmation in opposition to Javits Center Defendants' motion at 46 n 6). Accordingly, plaintiffs' Labor Law § 240 (1) claim is dismissed.

**Labor Law § 241 (6)**

Labor Law § 241 states that:

> "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:
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> * * *
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> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. The statute is not self-executing, and "require[s] reference to outside sources to determine the standard by which a defendant's conduct must be measured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). To establish liability under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct," rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross*, 81 NY2d at 505). The plaintiff must also show that the violation was a proximate cause of the accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]). Comparative negligence is a defense to liability pursuant to section 241 (6) (*Once v Service Ctr. of N.Y.*, 96 AD3d 483, 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

> "Responsibility under Labor Law § 241 (6) extends not only to the point where the . . . work was actually being conducted, but to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work"

(*Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000] [internal quotation marks and citation omitted]).

"A general contractor will be held liable under [Labor Law § 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]). It is well established that an entity's "right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right" (*Milanese v Kellerman*, 41 AD3d 1058, 1061 [3d Dept 2007]).

In addition, a party may be held liable as a statutory agent if it was delegated the authority to supervise and control the work that gave rise to the injury (*see Solano v Skanska USA Civ. Northeast Inc.*, 148 AD3d 619, 619-620 [1st Dept 2017]). As noted by the Court of Appeals,

> "Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been 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. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [citations omitted]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

"Labor Law § 241 (6) does not automatically apply to all subcontractors on a site or in the 'chain of command'" (*Vargas v Peter Scalamandre & Sons, Inc.*, 105 AD3d 454, 455 [1st Dept 2013], quoting *Russin*, 54 NY2d at 317-318). "Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control, either over the plaintiff, the

specific work area involved or the work that gave rise to the injury" (*id.*; *see also Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011]).

*Javits Center Defendants*

The Javits Center Defendants have not disputed ownership of the property; therefore, they may be held liable under Labor Law § 241 (6).

*Racanelli*

Racanelli argues that it cannot be held liable under the Labor Law because it was not a general contractor or agent of the owner on the site. Racanelli contends that it was a prime contractor hired for the limited purpose of erecting a pre-engineered steel shell, which had been completed many months prior to the accident. On the day of the occurrence, Racanelli's employee was only sent to the site for a meeting that took 30 minutes in total.

In response, plaintiffs contend that Racanelli was a general contractor, since: (1) Racanelli was on site for purposes of performing inspection work required under its contract; (2) Racanelli's work was "substantially complete," but not totally complete; and (3) Racanelli's contract identified it as a general contractor, required it to have its own safety plan and safety inspector on site, and required it to conduct safety meetings.

Contrary to plaintiffs' contention, Racanelli was not a "contractor" within the meaning of the Labor Law. Racanelli was hired as a prime contractor to erect a "Pre-Engineered Building" at the Javits Center (Lawrence affirmation in support, exhibit I). Tishman hired the various trades, including Racanelli (*id.*), USRC (McCaskey affirmation in support, exhibit E), and Total Safety (Glaws affirmation in support, exhibit F). Tishman was responsible for seeing that the work areas were kept in an orderly fashion (Taylor tr at 14).

Plaintiffs rely on the following provisions in Racanelli's contract:

"B. **SCOPE OF WORK**

"Without restricting the generality of work which shall be performed within the Contract Price, it is clearly understood and agreed that the Contractor shall provide all material, labor, engineering, scaffolding, power hookups, protection, applicable taxes, permits, layout, equipment, supervision, applicable insurance, etc., necessary for the performance of all specified testing work contained herein in accordance with the Contract Documents which become part of this Contract:

"Jacob Javits Convention Center/Existing Building and 39/40 Expo Building

* * *

"F. **SAFETY**

"1. The Contractor must submit its own Site Specific Health and Safety Plan (HASP) prior to commencing work on the site or initial progress payment will be withheld. The Contractor shall revise the HASP, as many times as project conditions require at not [sic] additional cost.

"2. The Contractor shall designate a competent individual from its employ to act as a Safety Manager anytime the Contractor is performing work. The Safety Manager shall have satisfactory [sic] completed a minimum of 10 hour OSHA safety course from an approved program. No work shall occur unless the Contractor's Safety Manager is on site.

"3. The Contractor will conduct weekly Job Box Safety Meetings (JBSM) on a regularly scheduled basis and New Employee Safety Orientations as required for its own personnel. The Contractor shall provide a written JBSM schedule to the Construction Manager, within two (2) weeks of contract award. The Construction Manager, at its option, shall be allowed to attend the JBSM. The Contractor shall provide copies of meeting minutes and attendance sheets of all JBSM to the Construction Manager as a condition of processing payment requisitions. Requisitions will not be processed without receipt of JBSM minutes for the requisition period"

(Lawrence affirmation in support, exhibit I, Rider "A," General Addendum).

Racanelli's contract, however, did not give it the authority to insist that proper safety practices be followed by other contractors. Pursuant to its contract, Racanelli was only required to have a safety program in place for its own work, to conduct safety meetings for its own personnel, and to provide safety equipment for its own employees. Thus, Racanelli has shown that it was not

a general contractor or statutory agent and is entitled to dismissal of plaintiffs' section 241 (6) claim.

*USRC and A-Deck*

USRC and A-Deck argue that: (1) A-Deck was hired by USRC to pour a lightweight concrete roof deck at the Javits Center construction project, but it left the construction site on December 30, 2011, moved its equipment from the Javits Center by January 6, 2012, and did not use sand in its operations; and (2) USRC performed waterproofing and exterior work on the roof, but did not perform operations in the yard, and did not use sand in its work.

In opposition, plaintiffs contend that USRC and A-Deck may be held liable under section 241 (6), because there are questions of fact as to whether both A-Deck and USRC used sand in their work and stored the sand in the yard.

Adagio testified that A-Deck stored sand in the yard (plaintiff Aug tr at 78). When asked if the concrete used by A-Deck required sand, Adagio stated "I don't know. No, of course it needed sand. That's the sand they had delivered for the concrete" (*id.* at 79). A-Deck's director of operations testified that it poured the roof deck on the Javits Center construction project (Joly tr at 20). A-Deck started working on the project in May 2011 and did not finish working on the project until after January 25, 2012 (*id.* at 24, 27). The last day that A-Deck was on the site prior to the accident was December 30, 2011 (*id.* at 102-103). While Adagio testified that he did not know whose sand was involved in his accident (plaintiff Aug tr at 80), there are issues of fact as to whether A-Deck had control over the work that resulted in Adagio's injury in light of Adagio's testimony that A-Deck stored sand in the yard and was at the site about a month before the accident (*see Vargas*, 105 AD3d at 455-456 [since there were issues of material fact as to whether concrete supplier and concrete contractor exercised control over the disposal of excess concrete at site, their motions seeking dismissal of plaintiff's Labor Law § 241 (6) claim were properly denied]).

Adagio also testified that the sand was used by the roofing contractor (plaintiff tr at 83). According to USRC's superintendent, USRC was hired to "install a new roof" (Baker tr at 13). USRC started working at the Javits Center in June 2010, and finished its work in December 2014 (*id.* at 9). In view of this evidence, there are questions of fact as to whether USRC had control over the work that gave rise to Adagio's injury.

*Eurotech*

Eurotech contends that it was not an owner or general contractor, that it did not have overall responsibilities for safety, and that it did not supervise Adagio.

In response, plaintiffs argue that Eurotech stored materials in the yard, including rebar. Plaintiffs contend that there are issues of fact as to whether the rebar contributed to Adagio's accident.

Here, there is no evidence that Eurotech had supervisory authority and control over Adagio's work area or the work that gave rise to Adagio's injury (*see Headen v Progressive Painting Corp.*, 160 AD2d 319, 320-321 [1st Dept 1990] [painting subcontractor could not be held liable under section 240 (1) for injury suffered by iron worker where worker failed to present evidence of painting subcontractor's supervision and control over the site]). Eurotech's witness testified that it built architectural concrete walls at the perimeter of entrances and concrete curbs on the roof before air handles were installed (Maher tr at 9). The whole construction site was under Tishman's supervision (*id.* at 39). While Eurotech used concrete on the job, it was brought to the site already mixed in a ready-mixed truck (*id.* at 67). Concrete was not stored at the site because "you can't store concrete" (*id.*). In addition, Eurotech's laborers did not clean the yard (*id.* at 59). Although Maher testified that Eurotech stored rebar in the area (*id.* at 21, 34), when asked whether he slipped on rebar, Adagio

stated that he "believe[d] it was just sand. That's what [he] slipped on" (plaintiff tr at 170). Accordingly, plaintiffs' Labor Law § 241 (6) claim is dismissed as against Eurotech.

*Empire Transit*

Empire Transit argues that it cannot be held liable under the Labor Law because it was not an owner or general contractor, and did not have responsibilities for overall site safety. In addition, Empire Transit contends that it did not exercise supervisory control or authority over plaintiff's work or the yard where Adagio's accident occurred. Empire Transit points out that it last delivered concrete to the site on January 15, 2011, about one year prior to Adagio's accident.

In opposition, plaintiffs contend that Empire Transit may be liable under section 241 (6) as a subcontractor, relying on Adagio's testimony that Empire Transit provided ready-mix concrete, and that "they" were mixing lightweight concrete for the roof. Furthermore, plaintiffs argue that Empire Transit's records that it last delivered concrete to the site on January 25, 2011 are insufficient.

There is no evidence that Empire Transit had the authority to control Adagio's work, the yard, or the work that gave rise to Adagio's injury (*see Vargas*, 105 AD3d at 455).[3] There is evidence that Empire Transit provided ready-mix concrete to Eurotech (plaintiff Aug tr at 80). Adagio testified that "basically what they did is brought a concrete plant on site because they were mixing lightweight concrete for the roof. They were pouring it on the roof" (plaintiff tr at 83). However, Adagio also testified that Empire Transit did not mix concrete at the site or use sand at the site (plaintiff Aug tr at 81). Maher testified that Empire Transit supplied Eurotech with concrete

[3]Although Empire Transit relies on a notice to admit requesting that Eurotech admit whether its last delivery to the site was on or before January 25, 2011 (Gillespie affirmation in support, exhibit Q), Eurotech's admission is not binding on plaintiff (*see Mack v Arnold Gregory Mem. Hosp.*, 90 AD2d 969, 969 [4th Dept 1982] ["it (is) impermissible to hold that one defendant's failure to respond to the notice to admit of another defendant is binding on a plaintiff"]).

(Maher tr at 44). According to Maher, Empire Transit brought ready-mix concrete in a ready-mixed truck (*id.* at 67). Maher stated that Empire Transit did not use sand at the site (*id.* at 74). Empire Transit's witness testified that it delivers concrete to a site in a concrete mixer (Ferrotti tr at 16). Before it delivers concrete to the site, it adds all the necessary ingredients into a barrel at the concrete mixer at its plant (*id.* at 19-21, 56). Therefore, plaintiffs' Labor Law § 241 (6) claim is dismissed against Empire Transit.

*Total Safety*

In Action No. 2, Total Safety argues that it provided safety management services in connection with the renovation project, not the expansion project, and that it was not responsible for safety in the yard. Additionally, Total Safety contends that it did not direct, control or supervise the means or methods of Adagio's work.

In opposition to Total Safety's motion, plaintiffs maintain that Total Safety had the ability to correct dangerous conditions, and therefore, may be found liable under Labor Law § 241 (6). According to plaintiffs, Total Safety conducted weekly safety meetings and contractors for both projects stored materials in the yard.

Total Safety's contract states that "Consultant shall provide services for a complete project including but not limited to the Services described in Schedule A, 'Designated Services,' (hereinafter, 'Services') attached hereto and made a part hereof" (Massaro affirmation in opposition, exhibit I, § 1.02). Schedule A states that Total Safety was to provide, among other things, a site safety plan, an OSHA safety program, and a HAZCOM program (*id.*). Lorenzo testified that Total Safety was working on the Javits Center renovation (Lorenzo tr at 11). The renovation entailed replacement of the roof, curtain wall and interior paint, flooring, and the interior upgrades (*id.*). Lorenzo only worked on the renovation project; the site safety manager for the expansion was Shawn

McKee of the Velez Organization (*id.* at 22). Lorenzo stated that it was not his job to inspect the yard (*id.* at 22-23). The yard was just used for storage and for the trailers (*id.* at 23). The contractors stored "[r]oofing material, carpentry material, plumbing material, a little bit of everything" in the yard (*id.*). Total Safety did not direct the contractors' workers (*id.* at 33). Accordingly, Total Safety has shown that it did not have responsibilities for job site safety in the yard, and that it did not have the authority to supervise Adagio's work (*see Cappabianca*, 99 AD3d at 148 [safety consultant could not be liable under Labor Law or in negligence "where its contract limited its responsibilities and did not confer any authority to supervise and control (plaintiff's) work"]; *Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005] ["a general contractual obligation to ensure compliance with safety regulations . . . is insufficient to support imposition of liability on an agency theory, or pursuant to Labor Law § 200 and its common-law counterpart"]). As a result, Total Safety is entitled to dismissal of plaintiffs' Labor Law § 241 (6) claim.

*Industrial Code Regulations*

Plaintiffs' first supplemental bill of particulars alleges violations of 12 NYCRR 23-1.7 (d), (e) (2), and 12 NYCRR 23-2.1 (a) (1), (2), and (b) (first supplemental verified bill of particulars, ¶ 1). The Javits Center Defendants move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim on the grounds that the cited regulations are inapplicable and are too general. In opposition to the Javits Center Defendants' motion, plaintiffs only rely on 12 NYCRR 23-1.7 (d), (e) (2), and 12 NYCRR 23-2.1 (a) (1) (Massaro affirmation in opposition to Javits Center Defendants' motion at 25-39). In opposition to the motions filed by USRC, A-Deck, Racanelli, Eurotech, and Empire Transit, plaintiffs incorporate their opposition to the Javits Center Defendants' motion as to the specific Industrial Code violations (Massaro unified affirmation in opposition at 34 n 6). Therefore, plaintiffs have abandoned reliance on sections 23-2.1 (a) (2) and (b) (*see Rodriguez*

*v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [1st Dept 2013] ["Plaintiff abandoned the Labor Law § 241 (6) claims that are predicated on violations of other Industrial Code provisions and OSHA regulations cited in his bill of particulars, since he failed to address them in his motion papers or on appeal"]). Consequently, only sections 23-1.7 (d), 23-1.7 (e) (2), and 23-2.1 (a) (1) need be analyzed.

*12 NYCRR 23-1.7 (d)*

Section 23-1.7 (d) provides as follows:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing"

(12 NYCRR 23-1.7 [d]).

The Javits Center Defendants argue that section 23-1.7 (d) is inapplicable because Adagio's accident did not occur in a passageway, walkway, scaffold or other elevated working surface. Plaintiffs counter that the blacktop of the yard was a floor and a working area, and that the sand constitutes a slippery condition within the meaning of the provision. Alternatively, plaintiffs contend, based upon Palmer's testimony, that there is a question of fact as to whether Adagio slipped in a passageway.

The Court of Appeals has held that section 23-1.7 (d) is sufficiently specific to result in liability under Labor Law § 241 (6) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998] ["12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is precisely the type of 'concrete specification' that *Ross* requires"]).

Courts have held that an open area, such as a parking lot, does not constitute a "floor, passageway, walkway, scaffold, platform or other elevated working surface" within the meaning of the provision (*see Borner v Fordham Univ.*, 124 AD3d 553, 553 [1st Dept 2015]; *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585, 585-586 [1st Dept 2014]; *Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]; *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1266 [3d Dept 2010]; *Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397-1398 [4th Dept 2008]; *Jennings v Lefcon Partnership*, 250 AD2d 388, 389 [1st Dept 1998], *lv denied* 92 NY2d 819 [1999]).[4]

Contrary to plaintiffs' contention, section 23-1.7 (d) is inapplicable because Adagio fell in an open area between buildings. Adagio testified that his accident occurred in the yard before he reached the shanty (plaintiff tr at 72-76). The yard was paved to be used as a parking lot (*id.* at 42).

The court finds the cases relied upon by plaintiffs to be distinguishable. In *Ocampo v Bovis Lend Lease LMB, Inc.* (123 AD3d 456, 457 [1st Dept 2014]), the plaintiff fell on ice covering the 27th floor of a building. In *Velasquez v 795 Columbus LLC* (103 AD3d 541, 541-542 [1st Dept 2013]), the plaintiff fell on a floor that became covered with mud and water due to a water main break. In *Temes v Columbus Ctr. LLC* (48 AD3d 281, 281 [1st Dept 2008]), the worker fell while walking across a "big, open area" of a basement. In those cases, the plaintiffs fell on floors, not an open area like a yard.

*12 NYCRR 23-1.7 (e) (2)*

Section 23-1.7 (e), entitled "Tripping and other hazards," provides in subdivision (2) that:

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[4]Based upon these cases, the court rejects plaintiffs' argument that First Department cases and Fourth Department cases as to the applicability of section 23-1.7 (d) are inconsistent, and that the Javits Center Defendants are inviting the court to overrule First Department precedent.

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

(12 NYCRR 23-1.7 [e] [2]).

The Javits Center Defendants argue that section 23-1.7 (e) (2) does not apply, since Adagio did not trip. In opposition, plaintiffs contend that section 23-1.7 (e) (2) applies, even though the sand caused him to slip. Plaintiffs also maintain that there is a question of fact as to whether section 23-1.7 (e) (2) was violated, given the existence of the sand, wood, and rebar in the area.

Section 23-1.7 (e) (2) has been held to be sufficiently specific to support a Labor Law § 241 (6) claim (*Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]).

The First Department, moreover, has held that whether the plaintiff slipped, rather than tripped, is not dispositive as to the applicability of section 23-1.7 (e) (2) (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]; *see also Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 849-850 [1st Dept 2012]; *but see Velasquez*, 103 AD3d at 541). Based on this recent authority, the court rejects the Javits Center Defendants' contention that section 23-1.7 (e) (2) does not apply, because Adagio did not trip.

In *Smith v Hines GS Props., Inc.* (29 AD3d 433, 433 [1st Dept 2006]), the Court held that there was an issue of fact as to whether an area that tradesmen routinely traversed as their only access to equipment and materials was a "working area" within the meaning of section 23-1.7 (e) (2). In *Maza v University Ave. Dev. Corp.* (13 AD3d 65, 65-66 [1st Dept 2004]), the First Department held that "the courtyard, which was completely enclosed by surrounding buildings and had to be traversed by plaintiff to get to and from his work area . . . was a 'working area' under 12 NYCRR 23-1.7 (e) (2)."

In describing what was stored in the yard, Adagio testified "[e]verything that was part of the building, the job. Steel, wood, plumbing pipes, rebar, sand dirt, cement, paint, everything. That's where it was stored. It was a material yard" (plaintiff tr at 39). He stated that, as of January 2012, "[t]here was sand, concrete, lumber, some rebar and other things" (*id.* at 50). Lorenzo also testified that the yard was used "[j]ust for the storage, that's it, and the trailers" (Lorenzo tr at 23). In light of this evidence, the court finds that there are issues of fact as to whether the yard constitutes a "working area" within the meaning of section 23-1.7 (e) (2). "[O]nce it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury" (*Rizzuto*, 91 NY2d at 350).

*12 NYCRR 23-2.1*

Section 23-2.1, titled "Maintenance and housekeeping," provides as follows:

"(a) Storage of material or equipment.

"(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare"

(12 NYCRR 23-2.1 [a] [1]).

The Javits Center Defendants argue that section 23-2.1 (a) (1) does not apply, because Adagio's accident did not occur in a passageway, walkway, stairway or other thoroughfare. Plaintiffs assert, in opposition, that there is a question of fact as to whether the sand was stored in a "safe and orderly manner."

In this case, as argued by plaintiffs, there are issues of fact as to whether the sand was stored in a safe manner in violation of section 23-2.1 (a) (1) (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007]). Adagio

testified that the yard was used to store materials, including sand, and that he slipped on the sand while carrying the ladder (plaintiff tr at 50, 81; plaintiff Aug tr at 21).

In view of the above, plaintiffs have a valid Labor Law § 241 (6) claim to the extent that it is predicated on violations of 12 NYCRR 23-1.7 (e) (2) and 12 NYCRR 23-2.1 (a) (1).

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

Labor Law § 200 (1) provides as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon landowners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition'" (*Rizzuto*, 91 NY2d at 352, quoting *Russin*, 54 NY2d at 317). "'Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed'" (*DeFelice v Seakco Constr. Co., LLC*, 150 AD3d 677, 678 [2d Dept 2017], quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

With respect to the first category involving dangerous or defective premises conditions, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which

he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). Similarly, "a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

As for the second category of cases where the worker is injured as a result of the manner in which the work is performed, "liability for common-law negligence or under Labor Law § 200 may be imposed against an owner or general contractor if it 'actually exercised supervisory control over the injury-producing work'" (*Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [1st Dept 2014], quoting *Cappabianca*, 99 AD3d at 144).

*Javits Center Defendants*

The Javits Center Defendants move for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims, arguing that they did not direct Adagio in the specific task in which he was engaged, and did not exercise any supervisory control over the work.

However, the Javits Center Defendants have failed to meet their burden of demonstrating that they did not have constructive notice of the sand and debris in their moving papers, since they do not argue that they lacked notice of these conditions, and have not submitted any evidence as to when the area where Adagio fell was last inspected prior to Adagio's accident (*see Pereira v New Sch.*, 148 AD3d 410, 412-413 [1st Dept 2017] [defendants failed to establish that they lacked constructive notice of the dangerous condition, since they did not submit any evidence when the site had last been inspected before the accident]). While the Javits Center Defendants submit evidence that the yard was under Tishman's control (*see* Guerin aff, ¶ 4), they do not argue that they were out-of-possession landlords (*cf. Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]).

To the extent that the Javits Center Defendants argue in reply that they did not create or have notice of the conditions, the court has not considered these arguments as Plaintiffs did not have an opportunity to respond to them (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Therefore, the branch of their motion seeking dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims is denied.

*Racanelli*

Racanelli argues that it owed no duty to Adagio to provide a safe work place under Labor Law § 200 or the common law.

Although plaintiffs assert that Racanelli may be held liable under section 200 as a general contractor, Racanelli has established that it was not a general contractor, but was a prime contractor that was hired to construct a pre-engineered building at the Javits Center. As such, Racanelli may not be held liable under Labor Law § 200 (*see Russin*, 54 NY2d at 316-317). There is also no evidence that Racanelli committed an affirmative act of negligence. Therefore, Racanelli is entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims against it.

*Empire Transit, USDC, A-Deck, Total Safety, and Eurotech*

In opposing the motions of Empire Transit, USDC, A-Deck, Total Safety, and Eurotech, plaintiffs only argue that these entities may be held liable under Labor Law § 241 (6) (Massaro unified affirmation in opposition at 30-34). However, at the same time, plaintiffs incorporate all Labor Law § 200 arguments contained in their opposition to the Javits Center Defendants' motion (*id.* at 34 n 6).

Labor Law § 200 applies to owners, general contractors, and their agents (*see Lopez v Strober King Bldg. Supply Ctrs.*, 307 AD2d 681, 681 [3d Dept 2003]). As indicated above, the court has found questions of fact only as to whether USRC and A-Deck were statutory agents. There are also

issues of fact as to whether USRC and A-Deck created the conditions that caused Adagio's injury. USRC and A-Deck, therefore, are not entitled to dismissal of the section 200 and common-law negligence claims against them.

Empire Transit, Total Safety, and Eurotech have established that Labor Law § 200 does not apply to them, and that they did not create or exacerbate the conditions that caused Adagio's injury. Plaintiffs have failed to raise an issue of fact in response. Therefore, plaintiffs' Labor Law § 200 and common-law negligence claims against Empire Transit, Total Safety, and Eurotech are dismissed.

**Cross Claims Against Javits Center Defendants**

The Javits Center Defendants move for summary judgment dismissing all cross claims against them. In particular, the Javits Center Defendants argue that there is no evidence of their active negligence. However, since there are issues of fact as to whether the Javits Center Defendants had notice of the allegedly dangerous conditions, the branch of the Javits Center Defendants' motion seeking dismissal of the cross claims against them is denied.

**Cross Claims Against Empire Transit**

Empire Transit moves for summary judgment dismissing the cross claims for common-law indemnification, contribution, contractual indemnification, and failure to procure insurance against it. None of the parties has opposed this branch of Empire Transit's motion. There is no evidence of Empire Transit's negligence. It is undisputed that Empire Transit was not required to contractually indemnify any other party or purchase insurance for the benefit of any other party. Therefore, the cross claims against Empire Transit are dismissed.

**Cross Claims Against USRC and A-Deck**

USRC and A-Deck move for dismissal of "any and all cross claims" against them. In opposition, the Javits Center Defendants point out that USRC may be obligated to indemnify them pursuant to the following indemnification provision in USRC's trade contract with Tishman:

> **"INDEMNITY VIOLATION OF LAW**
> "7. To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager, such other indemnitees as may be defined herein, and their respective parent companies, corporations, members, limited liability companies and/or partnerships and their owned, controlled, associated, affiliated and subsidiary companies, corporations, members, limited liability companies, and/or partnerships, and the respective agents, consultants, principals, members, partners, servants, officers, stockholders, directors and employees thereof, from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorneys' fees and legal costs and expenses (collectively, 'Claims'), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, in connection with the Contract Documents, *the performance of, or failure to perform, the Work, or the Contractor's operations, including the performance of the obligations set forth above*. To the fullest extent permitted by law, Contractor's duty to indemnify the indemnitees shall arise except to the extent that any such claim, damage, loss or expense was caused by the proven negligence of the indemnitees or an indemnitee. The Contractor acknowledges that specific consideration has been received by it for this indemnification and that same shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefit payable by or for the Contractor or any subcontractor and/or delegates under Workers Compensation acts or other employee benefits acts. As used in this paragraph, 'Contractor' shall mean Contractor and its representatives, employees, servants, agents, subcontractors, delegates, or suppliers"

(McKaskey affirmation in support, exhibit E at 3 [emphasis added]). The "Owner" is defined therein as New York Convention Center Development Corporation (*id.*).

As explained above, USRC and A-Deck have not shown, as a matter of law, that the presence of the sand was unrelated to the performance of their work. Moreover, the provision does not require negligence to trigger indemnification. Therefore, USRC and A-Deck are not entitled to dismissal of the cross claims asserted against them.

Racanelli moves for summary judgment dismissing the cross claims against it. Specifically, Racanelli argues that the Javits Center Defendants' contractual indemnification claim, which is based upon the indemnification provision in Racanelli's trade contract, should be dismissed. Racanelli argues that the connection between the inspection work performed by Walsh and Adagio's injury is too tenuous to trigger indemnification.

In opposition, the Javits Center Defendants argue that the accident arose out of the operations of Racanelli. Specifically, the Javits Center Defendants maintain that Walsh required the ladder to perform the inspection of the fire stop.

There is no opposition to the part of Racanelli's motion seeking dismissal of the common-law indemnification and contribution claims against it. Accordingly, these claims are dismissed.

Racanelli is required to indemnify, defend, and hold harmless the Owner and affiliated companies against:

> "all claims or causes of action, damages, losses and expenses, including but not limited to legal costs and expenses (collectively, 'Claims'), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, in connection with the Contract Documents, *the performance of the Work, or the Contractor's operations, or the condition of the Site or by the condition of any other place where work Incidental to the Project is being performed or operations are being conducted, including, without limiting the generality of the foregoing, . . .all claims or causes of action . . . directly or indirectly related to any breach of statutory duty or to any willful or negligent act or failure to act by the Contractor, its representatives, employees . . . whether or not it is alleged that the Owner, Construction Manager, other indemnitees, Architect or Consultants in any way contributed to the alleged wrongdoing*"

(Lawrence affirmation in support, exhibit I at 3 [emphasis added]).

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016] [internal quotation marks and citation omitted]). It is well settled that "[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]).

Here, there are issues of fact as to whether Adagio's accident arose out of the performance of Racanelli's work. Walsh testified that he was called to the site in order to inspect the fire stop and that he ascended the ladder for the inspection (Walsh tr at 15-20, 49). Adagio testified that Walsh needed the ladder in order to do the inspection (plaintiff tr at 58). Thus, Racanelli may be required to indemnify the Javits Center Defendants pursuant to the broad indemnification provision in its trade contract (*see Balbuena v New York Stock Exch. Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010] ["it is not necessary that plaintiff himself be actively engaged in the type of work covered by the indemnity contract in order for such injury to fall within this broadly worded indemnification provision"]; *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 271 [1st Dept 2007] [lessee was entitled to contractual indemnification from drywall contractor where plaintiff's injury arose out of drywall contractor's work, even though plaintiff was performing electrical work at time of injury]).

The cases cited by Racanelli are distinguishable. In *Murray v City of New York* (43 AD3d 429, 431 [2d Dept 2007]), the court dismissed a contractual indemnification claim against an engineer where there was no showing of a causal connection between any act or omission of the engineer and the plaintiff's accident. Similarly, in *Pepe v Center for Jewish History, Inc.* (59 AD3d 277, 278 [1st Dept 2008]), a building owner was not entitled to contractual indemnification from a masonry contractor, where "[t]he connection between plaintiff's accident and the mere existence of the partially constructed wall where the ramp formerly had been [was] too tenuous to trigger the

indemnification clause." Here, in contrast, it is undisputed that Racanelli's employee was performing work under its contract, that Walsh required the ladder to perform that work, and that Adagio was injured when moving the ladder. Thus, Adagio's accident may arise out of or result from the performance of Racanelli's work.

Accordingly, Racanelli's request for dismissal of the Javits Center Defendants' contractual indemnification claim is denied.

**Third-Party Claims and Cross Claims Against Total Safety**

Total Safety moves for summary judgment dismissing the indemnification and contribution claims asserted against it in Action No.1.

In opposition, USRC and A-Deck argue that Total Safety's motion is untimely, and that Total Safety has not provided "good cause" for the delay in making its motion.

In reply, Total Safety argues that its motion was timely, since it was filed within 120 days after the note of issue was filed. Total Safety also provides an affidavit from Elizabeth Jean (Jean), Total Safety's counsel's calendar clerk, who states that she mistakenly counted 60 business days instead of calendar days from the date that the note of issue was filed (Jean aff, ¶ 2). In addition, Total Safety notes that it separately moved for summary judgment in Action No. 2, and the note of issue was not filed in that action.

Total Safety's motion for summary judgment in Action No. 1 is untimely. The preliminary conference order dated April 23, 2014 directed that motions for summary judgment were to be made within 60 days after the filing of the note of issue (McCaskey affirmation in opposition, exhibit C). Plaintiffs filed the note of issue on May 27, 2016. Total Safety's motion in Action No. 1 was made on August 18, 2016 well after the court-imposed deadline.

*Crawford v Liz Claiborne, Inc.* (11 NY3d 810 [2008], *rearg denied* 11 NY3d 851 [2008]), a case relied upon by Total Safety, is not to the contrary. In *Crawford*, the Court of Appeals held that a motion for summary judgment made 62 days after the plaintiff filed a note of issue was timely (*id.* at 812). The preliminary conference order directed that motions be made "per local rule" (*id.* at 813). Since the 120-day amended Local Rule was in effect at the time that the note of issue was filed, defendants' motion was timely (*id.*). In this case, however, the preliminary conference order specifically required motions to be made within 60 days after the filing of the note of issue.

Total Safety has failed to establish any good cause for the delay in making its motion for summary judgment in Action No. 1. Total Safety does not provide any explanation in its moving papers as to why its motion is untimely. "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652). Total Safety failed to request an extension of time to move for summary judgment and improperly provided a reason for why its motion was untimely for the first time in its reply papers (*see Nationstar Mortg, LLC v Weisblum*, 143 AD3d 866, 869 [2d Dept 2016] [improvident exercise of discretion to entertain summary judgment motion and consider good-cause arguments raised in reply]). In any event, courts have held that a timely motion in a related action does not provide "good cause" for an untimely motion for summary judgment (*see Jones v Ricciardelli*, 40 AD3d 936, 936 [2d Dept 2007]). While a court may consider an untimely motion or cross motion for motion for summary judgment that raises nearly identical issues as a timely motion, Total Safety's motion was not made on nearly identical grounds as the timely motions, as it rested on separate factual assertions that it did not have the authority to supervise the work and did not owe a duty to its co-defendants (*see Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]). Accordingly, Total Safety's motion seeking dismissal of the indemnification and contribution claims in Action No. 1 is denied.

**Cross Claims Against Eurotech**

Eurotech requests dismissal of all of the cross claims against it. There is no opposition to this branch of Eurotech's motion. In addition, there is no evidence that Eurotech was negligent. Therefore, the cross claims against Eurotech are dismissed.

**CONCLUSION**

Accordingly, as to Action No. 1, it is

**ORDERED** that the motion (sequence number 009) of defendant Empire Transit Mix, Inc. for summary judgment is granted, and the complaint and all cross claims are severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that the motion (sequence number 010) of defendants United States Roofing Corp. and A-Deck, Inc. for summary judgment is denied; and it is further

**ORDERED** that the motion (sequence number 011) of defendant Racanelli Construction Company, Inc. for summary judgment is granted to the extent of severing and dismissing plaintiffs' complaint as against it and the cross claims for common-law indemnification and contribution as against it, and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 012) of defendants New York State Urban Development Corporation, Empire State Development Corporation, New York Convention Center Development Corporation, New York Convention Center Operating Corporation, and Triborough Bridge and Tunnel Authority for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim and § 241 (6) claim to the extent that it is predicated on 12 NYCRR 23-1.7 (d), and 12 NYCRR 23-2.1 (a) (2) and (b), and is otherwise denied; and it is further

**ORDERED** that the motion (sequence number 013) of third-party defendant Total Safety Consulting, LLC for summary judgment is denied; and it is further

**ORDERED** that the motion (sequence number 014) of defendant Eurotech Construction Corp. for summary judgment is granted, and the complaint and all cross claims are severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

**ORDERED** that the remainder of the action shall continue.

As to Action No. 2, it is

**ORDERED** that the motion (sequence number 001) of defendant Total Safety Consulting, LLC for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: October 20, 2017

ENTER:

Jennifer G. Schecter, J.S.C.