SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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LUIS SANCHEZ,

Index No.: 155329/2013

Plaintiff,

-against-

404 PARK PARTNERS, LP, SCIAME CONSTRUCTION, LLC, UNITED AIR CONDITIONING CORP. II and CORD CONTRACTING CO. INC.,

Defendants.

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404 PARK PARTNERS, LP and SCIAME CONSTRUCTION, LLC,

Third-Party Index No.: 590939/2013

Third-Party Plaintiffs,

-against-

UNITED AIR CONDITIONING CORP. II and CORD CONTRACTING CO. INC.,

Third-Party Defendants.

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UNITED AIR CONDITIONING CORP. II,

Second Third-Party Plaintiff,

-against-

BURGESS STEEL ERECTORS OF NEW YORK, LLC,

Second Third-Party Defendant.

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Kalish, J.:

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a sheet

metal worker on April 5, 2013, when he fell through an opening in the floor while working at a construction site located at 404 Park Avenue South, New York, New York (the Premises).

In motion sequence number 004, plaintiff Luis Sanchez moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims as against defendants/third-party plaintiffs 404 Park Partners, LP (404 Park), Sciame Construction, LLC (Sciame) (together, the Park defendants) and defendant/third-party defendant Cord Contracting Co. Inc. (Cord) (collectively, defendants).

The Park defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence, Labor Law §§ 200 and 241 (6) claims and all cross claims and counterclaims against them, as well as for summary judgment in their favor on their third party claims for contractual indemnification against Cord and third-party defendant/second third-party plaintiff United Air Conditioning Corp. II (United).

Cord cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it in its entirety.

In motion sequence number 005, second third-party defendant Burgess Steel Erectors of New York, LLC (Burgess) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party claim against it, as well as for an order, pursuant to the Rules of the Chief Adminstrator, 22 NYCRR 130.1.1, for reasonable attorneys' fees and costs.

BACKGROUND

On the day of the accident, 404 Park owned the Premises where the accident occurred. Pursuant to a construction management contract between 404 Park and Sciame (the 404 Park/Sciame Contract), Sciame oversaw a project at the Premises, which entailed the renovation

of an office building into a condominium (the Project). Sciame retained nonparty City Safety to act as the site safety manager on the Project. Pursuant to subcontracts, Sciame also hired United, as the Project's mechanical contractor, and Cord, as the Project's carpentry subcontractor. Plaintiff was employed by United as a mechanical sheet metal worker.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by United as a sheet metal worker. Plaintiff maintained that his work on the Project was solely supervised and directed by his United foreman, Mike Ryan. Plaintiff's duties that day included moving duct around on the sixth floor of the Premises. At the time of the accident, with the help of another worker, plaintiff was consolidating the duct on pallets and moving the pallets from one side of the sixth floor to the other with a pallet jack, which weighed approximately 200 pounds. Plaintiff described the sixth floor as extremely dirty, covered with an inch of soot.

Plaintiff testified that, as he was walking backwards and pulling the pallet jack, he suddenly felt as if "the earth was moving underneath [him],"before falling through an opening in the floor (the Opening) to the fifth floor below (plaintiff's tr at 40). Plaintiff then found himself laying flat on the fifth floor and looking up at the Opening in the fifth floor ceiling. From that vantage point, plaintiff observed the underside of the Opening's plywood cover, noticing that it did not have any "bracing" on it (*id.* at 46). As a result of his fall, plaintiff suffered injuries to both of his feet, ankles, knees, shoulders, spine, ribs, back, left thumb, left elbow, neck and teeth.

Plaintiff testified that, on the date of the accident, he walked past the accident location at least six times. During these times, he never observed anyone working in the area, and he never observed anyone hoisting anything through the Opening. He also did not notice any steelworkers

working on the sixth floor on the day of the accident.

The Bill of Particulars

In the bill of particulars, plaintiff alleged that, as a result of the accident, he sustained, among other things, head trauma, fractured teeth, rib fractures, a thumb sprain and surgical scarring.

Deposition of Peter Politi (Sciame's Project Superintendent)

Peter Politi testified that he was Sciame's project superintendent on the day of the accident, and that Sciame was "the general contractor for [the] job" (Politi tr at 14). Politi's duties at the Project included "overseeing scheduling, day-to-day operations . . . mak[ing] sure everything runs smoothly" (Politi tr at 11). Sciame hired a group of laborers to keep the Premises clean. In addition, Sciame hired City Safety to provide site safety guidance at the Project. It was Politi's job "to work alongside of [the site safety manager] and . . . oversee general safety of the project" (*id.* at 14).

Politi testified that he was advised by Sciame's labor foreman that plaintiff was injured when he fell "through a hole in the . . . slab [on the sixth floor]" (*id.* at 16). Politi maintained that Cord, the carpentry subcontractor, was responsible for installing plywood coverings over floor openings. The coverings had cleats underneath them, in order to safeguard the floor openings. He explained that the cleats, which secured the plywood covers against movement, are "[t]wo by four [pieces of lumber] screwed to bottom of the plywood . . . [a]nd [they] would write 'hole' on top of that plywood in safety orange" (*id.* at 20-21).

Politi also testified that, after the accident, he observed that the Opening's cover "was off of the [O]pening," and that the cleats were still attached to the cover. He noted that, eventually,

duct work was to "rise up to the building" through the Opening. After the accident, Politi filled out an incident report (the Incident Report).

The Incident Report

The Incident Report stated that the accident occurred as plaintiff was "pushing a furniture dolly loaded w/ duct from the South side of the 6th floor to the North side of the same floor" (plaintiff's notice of motion, exhibit J, the Incident Report at 1). In addition, the report stated that, "[w]hile [plaintiff was] pushing the duct over a plywood hole cover, secured with 2X4 cleats from below, the dolly caused the cover to lift up and slide to the side . . . . This left a hole that [plaintiff] fell through, landing on the 5th floor (about 10-12 feet)" (*id.*).

The Incident Report explained that the accident occurred because

> "the dolly that was being used did not have wheels big enough to go over the plywood protection. Instead of rolling over the lip, it pushed it causing it to shift. Although the plywood cover was secured with cleats, it was not shot to the slab, which could have prevented it from moving"

(*id.* at 3). The Incident Report noted that, in the future, "[a]ll hole covers throughout the job will be shot to the slab to ensure that they cannot be moved inadvertently . . . [and] Cord Contracting (carpenter subcontractor) will correct" (*id.*).

Deposition of Joseph Grgas (United's Account Executive and Director)

Joseph Grgas testified that he was an account executive and director for United on the day of the accident. He explained that United was hired by Sciame to serve as the mechanical subcontractor on the Project. United's duties on the Project included installing duct work, air conditioning units and piping. United's workers were responsible for unloading the trucks that

transported the duct, and then moving the duct to various floors on rolling "[d]ollys, pushcarts [and] handtrucks" (Grgas tr at 29). These materials were brought to their designated floors using hoist cars located outside of the building. The hoist cars were "temporary elevators set up on a construction site to bring materials upstairs and to different parts of the building" (*id.*). Grgas testified that, at the time of the accident, plaintiff was moving duct and piling it in the areas on the sixth floor where it needed to be installed.

Grgas explained that the Opening was a "riser duct," that "travel[ed] vertically throughout the building" (*id.* at 42). He explained that, before the riser duct was installed, "plywood" was used to cover the Opening. It was not United's job to provide the protection for the openings at the Project, as it was "carpentry['s] job" (*id.* at 48). Grgas maintained that, typically, the plywood covers were "affixed with nails or nail-like devices into the concrete" (*id.* at 44). Grgas did not know whether the Opening's plywood cover was "shotgun[ned] down" to the concrete that surrounded it (*id.*).

Deposition Testimony of Michael Ryan (United's Foreman)

Michael Ryan testified that he was United's foreman on the day of the accident. At the time of the accident, at the request of Politi, United workers, including plaintiff, were moving duct work from one side of the sixth floor to the other side of the sixth floor, so that another trade could perform their work. Ryan maintained that he never instructed plaintiff to move the subject materials to another floor, only to move them to a different place on the sixth floor. Ryan testified, due to the size and amount of the duct work, it would have been impossible to transport the duct to another floor through the Opening, and that United workers would have had to use the elevator or stairs for such an undertaking.

Ryan also testified that he inspected the Opening's plywood cover shortly after the accident and observed that it was "warped" and "not shot down" (Ryan tr at 61). He asserted that, as a result of the plywood cover being warped, the cleats could not properly do their job of securing the cover to the ground. Ryan also noted that the area surrounding the Opening was dusty and dirty.

Ryan further testified that the Opening "was constantly open," because Juliet balconies, which were "big iron balcon[ies] that ironworkers were bolting to the outside of the building," were being brought up an elevator shaft nearby (*id.* at 67). These ironworkers sometimes used the Opening as a "holdback" during this work (*id.* at 68).

United's C-2 Report

United's C-2 report, which was filled out by United employee Ozzy Basrudin, plaintiff's United supervisor, states that plaintiff was "moving duct work on a dolly when he fell through a hole on the 6th floor and landed on the 5th floor slab" (plaintiff's notice of motion, exhibit M, United's C-2 report at 2).

Deposition Testimony of Pasqualino Giordano (Cord's Carpentry Foreman)

Pasqualino Giordano testified that he was Cord's carpentry foreman on the day of the accident. He testified that Cord installed the plywood cover over the Opening prior to the day of the accident, noting that it was never nailed down. He explained that, while some of the hole coverings at the job site were once nailed to the ground, at some point, he and someone from Sciame made the decision to stop nailing down hole coverings, and to use cleats instead, "[s]o multiple trades [could] access the opening . . . [t]o install whatever belongs in the opening" (Giordano tr at 36).

OSHA Violations

OSHA inspected the job site after the accident and issued multiple violations, shutting down the Project for a period of time. To that effect, Sciame was cited for not properly inspecting and maintaining the floor opening coverings at the Premises. In addition, some floor opening markings were not visible, and some covers were not adequately secured. While the citations noted that there were sometimes cleats on the underside of the covers to keep them in place, the covers were not properly nailed down.

A photograph of the opening that plaintiff fell through was included on page 47 of the OSHA report (the OSHA Report). The OSHA Report describes said photograph as depicting

> "the floor cover edge-on with the cleat attached to the underside cover, to keep it in place in the hole. The photo shows that the cover is bent/warped about 1.5 inches, about the same as the wood 2 by 4 cleat on the underside of the cover. So the cleat was probably not very effective to keep the cover in place"

(plaintiff's notice of motion, exhibit K, the OSHA Report at 47).

A description of another photograph of the Opening, also taken on the day of the accident, was included in the OSHA Report on page 49. There, the cover is described as being a "full sheet of 3/4 inch plywood . . . [with] a loose fit; the end is up off the floor about an inch or more because it is warped, which limits the ability of the cleats to hold it in place" (*id.* at 49). In addition, the OSHA Report states that "the cover does not appear to be marked 'Floor Hole'" although may have been at one time but now not visible due to site dust" (*id.* at 48).

Deposition Testimony of Michelle Depew (City Safety's Site Safety Manager)

Michelle Depew testified that she was employed by City Safety as the site safety manager for the Project on the day of the accident. Depew testified that she conducted safety training at

the Project, wherein she would discuss "fall protection . . . that if you're more than six feet up from leaning edge, meaning, slab work [on] or around a hole, elevator shaft, that you would need to be tied off . . . properly. Full body harness" (Depew tr at 96). Her duties also included doing daily walkthroughs of the Premises, wherein it was her responsibility to check opening coverings on a "regular basis" (Depew tr at 45). She asserted that, prior to the accident, the floor coverings at the Premises were not nailed down, and that they "all had cleats" as per "city practice throughout construction" (*id.* at 76, 97). However, after the accident, all opening covers were nailed down.

Depew also testified that, during her inspections, she never noticed any problems with the Opening's cover, and that she knew it to always be "[f]lat and level to the floor" (*id.* at 35). She performed her inspections by "kick[ing] them to see if anything [was] loose, to make sure everything is in place" (*id.* at 84). Depew disagreed with the OSHA Report's description of the Opening's cover, wherein it was described as being warped. She maintained that if the Opening's cover had been warped, she "would have had it replaced" (*id.* at 78).

After the accident, Depew performed an investigation and prepared an accident report. At that time, she did not observe any issues with the Opening's plywood cover, although she did notice that it was only partially covering the Opening. When asked if, after the accident, she checked to see if the Opening's cover "worked properly," she replied, "I don't believe so. No." (*id.* at 83).

Depew also testified that, as there had never been any problems with the Opening's cover prior to the time of the accident, the accident must have been caused by plaintiff and his coworker removing the cover themselves, in an attempt "to move material from the sixth floor to

the fifth floor" through the Opening (*id.* at 62). When asked at her deposition if she had asked anyone if they knew of any material ever being transported through the Opening by United workers this way, Depew responded, "Well, I was told by somebody that that's the reason . . . but, again, it's hearsay to me because I didn't talk to anyone directly that knew exactly that that's what they were doing" (*id.*). Depew could not offer any other evidence to support her claim that United workers transported materials through the Opening. She also testified that she had never had any issues with United employees moving duct work, or any other materials, between floors. She also testified that, while Burgess employees were working on the sixth floor on the day of the accident, when she responded to the accident, she did not observe any Burgess employees in the accident area.

Deposition Testimony of Paul Valerio (Burgess's Field Superintendent)

Paul Valerio testified that he was Burgess's field superintendent on the day of the accident. He testified that Burgess was hired to provide steel work for the roof and window frames at the Premises. Valerio testified that Burgess was not hired to provide the Juliette balconies for the Project, and that another entity was hired to provide them. He also explained that Burgess moved its materials between floors via an elevator shaft, using an electric chain and a hoist. Burgess did not move materials through the Opening or remove any of the opening covers at the Premises.

Affidavit of Mark Doody (Burgess's Foreman)

In his affidavit, Mark Doody stated that Burgess never hoisted or installed Juliette balconies at the Premises. In addition, Burgess was not responsible for providing protection for the Project's floor openings. Further, Burgess moved materials between floors either by using

the construction elevators located on the outside of the building, or by hoisting the materials through the elevator shaft. None of Burgess's materials were ever transported through the Opening.

Affidavit of Thomas Parisi (Burgess's Chief Financial Officer)

In his affidavit, Thomas Parisi stated that Sciame hired Burgess to furnish and install structural steel at the Premises. He asserted that Burgess did not contract with Sciame to furnish and install the Juliette balconies for the Project, as these were provided by a separate contractor.

The 404 Park/Sciame Contract

Article 3.3.1 of the 404 Park/Sciame Contract states, in pertinent part, as follows:

> "[Sciame] shall supervise and direct the Work, using [its] best skill and attention. [Sciame] shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract"

(United's opposition to the 404 Park defendants' cross motion, exhibit A, the 404 Park/Sciame Contract, ¶ 3.3.1).

In addition, Article 10 of the 404 Park/Sciame Contract provides that Sciame "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the [404 Park/Sciame] Contract" (*id.*, ¶ 10).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept

2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the Park defendants and Cord. Cord cross-moves for dismissal of the Labor Law § 240 (1) claim against it.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec.*

Co., 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, 404 Park, as owner of the Premises, and Sciame, as the construction manager/general contractor on the Project, may be liable for plaintiff's injuries under Labor Law § 240 (1) (as well as Labor Law § 241 [6]).[1] However, it must be determined as to whether Cord, as the carpentry subcontractor, may also be liable for plaintiff's injuries as an agent of the owner or general contractor. Importantly,

> "'[w]hen the work giving rise to [the duty to conform to the requirements of Labor Law § 240 (1)] 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'"

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

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[1] It should be noted that the Park defendants do not assert that Sciame was not a proper Labor Law defendant.

Here, the accident was caused due to the fact that the plywood cover over the Opening was insufficient and defective. It is not disputed that Cord was the entity charged with installing and maintaining said protection. Therefore, Cord may be liable for plaintiff's injuries under the Labor Law as an agent of the owner and/or contractor.

That said, as defendants failed to furnish an adequate safety device to prevent plaintiff from falling through the Opening, Labor Law § 240 (1) applies (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] ["[p]laintiff established a prima facie violation of [Labor Law § 240 (1)] by showing that the plywood cover on the hole was an inadequate safety device because it was not secured at the time of the accident"]; *Burke v Hilton Resorts Corp.*, 85 AD3d 419, 419-420 [1st Dept 2011] [Labor Law § 240 (1) applied where the plaintiff "fell approximately 15 feet through an unprotected hole in the floor of a construction site" and where "[t]he evidence demonstrat[ed] that insufficient safety devices were provided"]; *Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234, 235 [1st Dept 1997]).

In addition, defendants failed to demonstrate that an issue of fact exists "as to the adequacy of the unsecured plywood cover" (*id.*). While defendants put forth Depew's testimony, wherein she states that, prior to the accident, she inspected the Opening's plywood cover and found it to be stable and secure, with the cleats holding it properly in place, she further testified that she did not test the cover after the accident. Moreover, the testimonial and documentary evidence put forth by plaintiff clearly establishes that the plywood was warped at the time of the accident, which negated the cleats' ability to properly secure the plywood in place.

Further, in light of the fact that it was arguably foreseeable that a two-hundred-pound pallet jack with small wheels would be utilized in the accident area, and, in light of the fact that

the plywood cover was warped, an additional safety device was required to ensure that the plywood cover stayed in place. To be effective, the plywood cover needed to be nailed to the floor, or fastened in some other way, in order to be safe (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

Defendants argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim against them, because an issue of fact exists as to whether plaintiff was the sole proximate cause of the accident. To that effect, they argue that plaintiff may have removed the plywood cover himself, in order to transport duct work through the Opening. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]). "When the

defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

However, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiffs' showing or to raise a bona fide issue as to how the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]). Here, the only evidence that defendants put forth in support of their version of events is unsupported hearsay that an unidentified worker told Depew that United workers transported materials through the Opening. Notably, Depew could offer no other evidence to support said claim. "In the absence of any additional, nonhearsay evidence on this point, plaintiff is entitled to judgment as a matter of law" (*Alonzo*, 104 AD3d at 450, citing *Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]). That said, all of the credible evidence in this case overwhelmingly establishes that the accident occurred when plaintiff rolled the pallet jack over the plywood covering, and that, because the cover was warped and not properly nailed to the ground, the cover shifted, causing plaintiff to fall through the Opening from the sixth floor to the fifth floor.

Defendants also put forth the defense that plaintiff was recalcitrant, in that he should have been wearing a harness while working near the Opening, after being told by Depew at a safety meeting to do so when working at heights. However, defendants have not sufficiently established that this is a case where "(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose

not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

Moreover, plaintiff was under no duty to fetch an alternate safety device, because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). "[W]orkers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work" (*id.*).

In any event, any alleged negligence on plaintiff's part in not using a harness goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [Court noted that "[e]ven if there were admissible evidence [that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner'], the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness,

no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against the Park defendants and Cord, and Cord is not entitled to dismissal of said claim as against it.

Whether Cord's Cross Motion Is Timely

As plaintiff asserts, Cord's cross motion for summary judgment is untimely. Pursuant to the court's rules, all summary judgment motions must be filed within 60 days of the filing of the note of issue. Here, the note of issue was filed on June 5, 2017, and Cord's cross motion was not filed until September 5, 2017.

However,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, plaintiff's motion seeks relief on the Labor Law §§ 240 (1) and 241 (6) claims against Cord, which causes of action are identical to those raised by Cord in its cross motion. Thus, based upon the foregoing, the court will consider those parts of Cord's cross motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims against it.

However, as plaintiff has not moved against Cord on the common-law negligence and Labor Law § 200 claims, the court will not consider those parts of Cord's cross motion seeking dismissal of said claims. Thus, Cord is not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

The Labor Law § 241 (6) Claim

Plaintiff moves for summary judgment in his favor on the Labor Law § 241 (6) claim as against the Park defendants and Cord. The Park defendants and Cord cross-move for summary judgment dismissing said claim against them. Labor Law § 241 (6) provides, in pertinent part, as

follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross*, 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Although plaintiff alleges multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code sections 23-1.7 (b) (1) (i), (ii) and (iii), plaintiff does not oppose dismissal of these sections, nor does he move for summary judgment in his favor on the same, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]). Thus, the Park defendants and Cord are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions, and plaintiff is not entitled to summary judgment in

his favor as to said abandoned provisions.

Initially, Industrial Code section 23-1.7 (b) (1) (i), (ii) and (iii) are sufficiently specific to support of Labor Law § 241 (6) claim (*see Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]; *Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]; *Williams v G.H. Dev. & Constr. Co.*, 250 AD2d 959, 961 [3d Dept 1998]).

Specifically, Industrial Code 12 NYCRR 23-1.7 (b) (1) (i), (ii) and (iii) state:

"(b) Falling hazards
(1) Hazardous openings.

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

(ii) Where free access into such 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 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."

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based

upon a review of the regulation as a whole - particularly the safety measures delineated therein - it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'" (*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003], quoting *Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422-423 [2d Dept 2001] ["hazardous openings" regulation did not apply where the 12-inch by 16-inch hole that worker fell into was too small for him to fall through]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [a 10-to 12-inch gap was not a hazardous opening]).

Here, section 23-1.7 (b) (1) (i) applies to the facts of this case, because the Opening was large enough for plaintiff to fall through. In addition, the accident occurred because the Opening was not guarded by either a substantial covering or a safety railing of the kind that the rule requires.

In addition, section 23-1.7 (b) (1) (ii) applies, because the testimonial evidence in the record establishes that workers were expected to access the hole in order to perform various tasks. To that effect, Giordano, Cord's carpentry foreman, testified that, while hole coverings were once nailed down, at some point, Cord began to use cleats instead, so that multiple trades could access the Opening.

Further, section 23-1.7 (b) (1) (iii) applies, because plaintiff was required to work near the edge of the opening in order to move the subject materials, and no planking or safety netting was provided. While a review of the record indicates that plaintiff may have had access to a safety harness, it has not been established that a substantial fixed anchorage was also provided.

Thus, plaintiff is entitled to summary judgment in his favor as to liability on that part of the Labor Law claim predicated on alleged violations of section 23-1.7 (b) (1) (i), (ii) and (iii),

and the Park defendants and Cord are not entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

In their separate cross motions, the Park defendants and Cord move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin*, 54 NY2d at 316-317).

Labor Law § 200 (1) states, in pertinent part, 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a

Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, as the accident was caused because the Opening's plywood cover was not adequately secured to floor, so as to prevent it from shifting when plaintiff rolled the pallet jack

over it, the accident arose out of the means and methods of the work, as opposed to a dangerous condition inherent in the Premises (*see Alonzo*, 104 AD3d at 449). That said, plaintiff has not sufficiently established that 404 Park exercised any supervision and control over any aspect of the work that caused the accident, i.e., the placement, installation and maintenance of protection for the Opening and/or plaintiff's work in moving the duct from one side of the sixth floor to the other.

Thus, 404 Park is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

However, pursuant to the 404 Park/Sciame Contract, Sciame did have control over construction means and methods at the Project. This included the means and methods involved in providing protection for the Opening, as reflected in Giordano's testimony, where he asserted that he and someone from Sciame jointly made the decision to stop nailing down hole coverings, and to use cleats instead, so that the various trades on the Project could access the Opening.

Thus, Sciame is not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it.

Further, as discussed previously, that part of Cord's cross motion seeking dismissal of the common-law and Labor Law § 200 claims against it was untimely. In any event, as Cord was also responsible for directing and supervising the injury-producing work at issue in this case, it is not entitled to dismissal of said claims against it.

Finally, while the Park defendants cross-move for summary judgment dismissing all cross claims and counterclaims against them, as they have not identified said cross claims and/or counterclaims, nor offered any argument in support of said request, they are not entitled to

dismissal of said cross claims and counterclaims against them.

The Park Defendants' Third-Party Claim for Contractual Indemnification As Against United

The Park defendants move for summary judgment in their favor on their third-party claim for contractual indemnification against United, plaintiff's employer.

Additional Facts Relevant To This Issue:

The "Interim Contract" between Sciame and United (the United Contract) provided that United would "Furnish Labor and Material to install complete HVAC systems, including duct work, HVAC piping, equipment, controls and control wiring per specifications" (the Park defendants' notice of cross motion, exhibit Q, the United Contract at 1). The front page of the United Contract notes that a prime contract was entered into between 404 Park and Sciame, the 404 Park/Sciame Contract, which required that Sciame would furnish labor, materials, equipment and services in connection with the construction of the Project, and that Sciame would indemnify 404 Park for personal injury claims asserted against it.

Article 3 of the United Contract governs indemnification (the United Indemnification Provision), and provides, in pertinent part, as follows:

> "[United] shall be solely responsible for any and all injuries to persons . . . resulting from or arising out of any act or omission or any negligence or carelessness on the part of [United], its employees, sub-subcontractors or agents in relation to this Interim Contract or the Subcontract Work hereunder. In addition to any liability or obligation of [United] to Sciame (or, if the prime contract so states, to Owner) relating to indemnification . . . [United] shall defend . . . indemnify and hold harmless Sciame, Owner, such other person or entities as Sciame or [404 Park] may identify in writing and their respective directors, officers, employees, agents . . . to the fullest extent permitted by law, for any and all liabilities, damages, expenses (including reasonable attorneys' and consultants' fees), disbursements and costs (including court costs) to which any or all of them may be subject by reason of any claim or suit alleging personal injury . . . . This indemnification obligation encompasses (1) full indemnity in the event of liability

> imposed against the Indemnitees without negligence and solely by reason of statute . . .; and (2) partial indemnity in the event of actual negligence on the part of Indemnitees either causing or contributing to the underlying claims"

(*id.*, Article 3, the Indemnification Provision at 2).

Initially, as plaintiff was an employee of United, relevant to this issue is Workers' Compensation Law § 11, which prescribes, in pertinent part, as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Therefore, "[a]n employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]).

Here, a review of the bill of particulars reveals that plaintiff's injuries do not rise to the level of "grave" as defined by New York Workers' Compensation Law § 11. That said, "[e]ven in the absence of grave injury, an employer may be subject to an indemnification claim based upon a provision in a written contract" (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771 [2d Dept 2007]; *see also Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). In order for a written contract to meet the requirements of Workers' Compensation Law § 11, it must be shown that the contract was "sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]; *Tullino v*

Pyramid Cos., 78 AD3d 1041, 1042 [2d Dept 2010]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013] [internal quotation marks and citation omitted]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911 [2d Dept 2010]).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

The United Indemnification Provision provides that United indemnify the Park defendants for all actions arising out of United's work on the Project. It is undisputed that plaintiff's injuries arose from work that he was performing as part of the Project. As to 404 Park, there is no evidence in the record establishing that any negligence on its part caused or contributed to the accident. Thus, pursuant to the United Indemnification Provision, which provides for full indemnity from United when the indemnitee was not negligent, 404 Park is

entitled to full indemnification from United.

As to Sciame, along with Cord, it's negligence contributed and/or caused the accident. To that effect, Sciame was responsible for making sure that the Opening was properly protected. In addition, Sciame and Cord jointly decided to secure the plywood cover with cleats, rather than nailing it down, which contributed to the happening of the accident.

As noted above, according to the United Indemnification Provision, United would owe only "partial indemnity in the event of actual negligence on the part of [indemnitees like Sciame] either causing or contributing to the underlying claims" (the Park defendants' notice of cross motion, exhibit Q, the United Contract, Article 3, the Indemnification Provision at 2). Thus, as Sciame's negligence contributed to the happening of the accident, pursuant to the United Indemnification Provision, Sciame is entitled to partial indemnification from United.

The Park Defendants' Third-Party Claim for Contractual Indemnification As Against Cord

The Park defendants move for summary judgment in their favor on their third-party claim for contractual indemnification as against Cord, the carpentry subcontractor charged with floor protection at the Project.

Additional Facts Relevant To This Issue:

The "Construction Agreement" between Sciame, as "the Contractor," and Cord (the Cord Contract), provides that Cord furnish and install, among other things, temporary protection, drywall, ceilings, custom doors and windows, moldings, cabinetry, ductwork enclosures, plywood for elevator floors and scaffolding for the Project. Article 4.6.1 of the Cord Contract governs indemnification, and provides, in pertinent part, as follows:

"To the fullest extent permitted by law, [Cord] shall indemnify and hold harmless

> [404 Park], [Sciame] . . . and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Cord's] Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omission of [Cord and its employees] . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(the Park defendants' notice of motion, exhibit S, the Cord Contract, Article 4.6 at 7).

Article 4.1.2 of the Cord Contract also states that Cord "shall supervise and direct [its] Work, and shall cooperate with [Sciame] in scheduling and performing [its] Work to avoid conflict, delay in or interference with the Work of [Sciame]"

(*id.*, Article 4.1.2 at 5).

Here, as discussed previously, plaintiff's injuries also arose from Cord's work at the Project, i.e., its installation and maintenance of the Opening's plywood cover. Here, the testimonial and documentary evidence in this case establishes that Cord was charged with installing and maintaining fall protection for the openings at the Premises, and that it did, in fact, install and maintain the plywood cover at issue in this case. That said, as the plywood covering, which was warped, failed to properly protect plaintiff from falling through the Opening as he pulled the pallet jack over it, Cord's negligence contributed to and/or caused the accident.

It should be noted, however, that, although there is no evidence in the record establishing that any negligence on the part of 404 Park caused or contributed to the accident, as discussed above, Sciame's negligence (in determining with Cord to secure the plywood cover with cleats, rather than nailing it down) did cause or contribute to the accident.

Thus, 404 Park is entitled to summary judgment in its favor on the cross claim for contractual indemnification against Cord. In addition, Sciame is not entitled to summary

judgment in its favor as to said claim.

Burgess's Motion To Dismiss the Second Third-Party Complaint Against It

Burgess moves to dismiss United's second third-party complaint against it, on the ground that it did not owe a duty to plaintiff/United, because, not only was it not responsible for providing protection for floor openings at the Project, it did not remove the cover, and, as such, it did not create the defective condition that caused the accident.

It is well settled that, when a contractor submits evidence that demonstrates that it did not perform work where the accident occurred and did not create the alleged defective condition, it is entitled to summary judgment as a matter of law (*Sand v City of New York*, 83 AD3d 923, 925 [2d Dept 2011]; *Cino v City of New York*, 49 AD3d 796, 797 [2d Dept 2008]).

In opposition to Burgess's motion, United argues that, as Burgess was working on the sixth floor on the day of the accident, and, as Ryan testified that he observed ironworkers removing the plywood cover in order to transport steel for Juliette balconies through the Opening, at least a question of fact exists as to whether Burgess, the structural steel contractor, removed the cover.

However, while it is true that Burgess was performing work on the sixth floor windows on the day of the accident, as Depew conceded, said windows were not located in the accident area. In addition, in their affidavits, Valerio and Parisi stated that Burgess did not contract to furnish and install the Juliette balconies at the Project, and that this work was performed by a different entity. Moreover, the evidence in the record reveals that Burgess only moved materials between floors via an outside construction elevator, or by hoisting them through the elevator shaft with a chain hoist. Burgess never transported materials through the Opening.

In any event, as discussed previously, the accident was caused due to the fact that the Opening's plywood cover shifted, because it was warped and not shot down to the slab, conditions for which Burgess had no responsibility.

Thus, Burgess is entitled to dismissal of the second third-party complaint against it. That said, as Burgess has failed to establish that United's conduct in bringing the second third-party action was frivolous, Burgess is not entitled to sanctions against United.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Luis Sanchez's motion (motion sequence number 004), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) and those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.7 (b) (1) (i), (ii) and (iii), are granted as against defendants/third-party plaintiffs 404 Park Partners, LP (404 Park), Sciame Construction, LLC (Sciame) (together, the Park defendants) and defendant/third-party defendant Cord Contracting Co. Inc. (Cord) (collectively, defendants); and it is further

ORDERED that the parts of the Park defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing those parts of the Labor Law § 241 (6) claim predicated on alleged violations that were abandoned, are granted, and these claims are dismissed as against the Park defendants; and it is further

ORDERED that the parts of the Park defendants' cross motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them is granted as to 404 Park only, and these claims are dismissed as against 404 Park; and it is further

ORDERED that the part of the Park defendants' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on their third-party claim for contractual indemnification as against third-party defendant/second third-party plaintiff United Air Conditioning Corp. II (United) is granted to the extent that United will fully indemnify 404 Park and partially indemnify Sciame; and it is further

ORDERED that the part of the Park defendants' cross motion, pursuant to CPLR 3212, for summary judgment in their favor on their third-party claim for contractual indemnification as against defendant/third-party defendant Cord Contracting, Inc. (Cord) is granted in favor of 404 Park only, and the motion is otherwise denied; and it is further

ORDERED that second third-party defendant Burgess Steel Erectors of New York, LLC's (Burgess) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint against it is granted, and the second third-party complaint is severed and dismissed as against Burgess, with costs and disbursements to Burgess as taxed by the Clerk of Court, and the Clerk is directed to enter judgment in favor of Burgess, and it is further

ORDERED that the action shall continue.

This constitutes the order and decision of the Court.

Dated: Jan 10, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.