SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THEODORE WILSON and LYNDIA WILSON,

Plaintiffs,

-against-

DAVACO NCS, INC., MACY'S CORPORATE SERVICES, INC., MACY'S OF NEW YORK, MACY'S OF NEW YORK n/k/a MACY'S INC., MACY'S RETAIL HOLDINGS, INC., RALPH LAUREN CORPORATION, and RALPH LAUREN RETAIL, INC.,

Defendants,

Index No.: 150590/2015

DECISION/ORDER

Motion Seq. 003 and 004

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memos of Law annexed	3-7
Reply Affidavits/Affirmations/Memos of Law annexed	8, 9

ERIKA M. EDWARDS, J.:

Plaintiffs Theodore Wilson ("Plaintiff") and Lyndia Wilson (collectively "Plaintiffs") brought this action against Defendants Davaco NCS, Inc. ("Devaco"), Macy's Corporate Services, Inc., Macy's of New York, Macy's of New York n/k/a Macy's Inc., Macy's Retail Holdings, Inc. (collectively "Macy's"), Ralph Lauren Corporation, and Ralph Lauren Retail, Inc. (collectively "Ralph Lauren"), for personal injuries Plaintiff sustained when a strap broke around a stack of oak wood floor planks which Plaintiff and another worker were attempting to move on a hand jack without using a pallet base. Plaintiffs' allege Defendants Macy's and Ralph Lauren are liable for Plaintiff's accident under common-law negligence, res ipsa and violations of Labor Law §§ 200, 240(1) and 246(1). Plaintiff Lyndia Wilson asserted a claim for loss of services, society, companionship and consortium as the spouse of Plaintiff Theodore Wilson against the Defendants. Plaintiffs stipulated to discontinue all of their claims against Davaco on June 7, 2017, and the court dismissed all cross-claims against Davaco in a decision, dated January 17, 2018, under motion sequence 002.

Defendants Ralph Lauren and Macy's move for summary judgment dismissal of Plaintiffs' complaint and all cross-claims against them and for summary judgment in their favor

as to their cross-claims for contractual indemnification against Davaco, under motion sequences 003 and 004, respectively. These motions are consolidated for purposes of this decision.

Based on the evidence submitted, the court grants in part Ralph Lauren's and Macy's motions by 1) granting dismissal of Plaintiffs' common-law negligence and Labor Law § 200 claims against all Ralph Lauren and Macy's Defendants; 2) granting dismissal of Plaintiff's res ipsa claims; 3) granting dismissal of Plaintiffs' Labor Law § 240(1) claims against all Ralph Lauren and Macy's Defendants; 4) denying dismissal of Plaintiffs' claims regarding Labor Law § 241(6) pertaining to an alleged violation of Industrial Code § 23-2.1(b) against all Ralph Lauren Defendants and Macy's Retail Holdings, Inc., if Plaintiffs properly asserted this claim in a Supplemental Bill of Particulars or by another means not provided to the court; 5) granting dismissal of Plaintiffs' remaining claims regarding alleged violations of Labor Law § 241(6) against all Ralph Lauren and Macy's Defendants; 6) denying dismissal of the cross-claims against Ralph Lauren and Macy's and 7) denying summary judgment in favor of all Ralph Lauren and Macy's Defendants as to their cross-claims for contractual indemnification against Davaco.

As such, the only remaining claims are 1) Plaintiffs' claim under Labor Law § 241(6) regarding a violation of Industrial Code § 23-2.1(b) against the Ralph Lauren Defendants and Macy's Retail Holdings, Inc., if Plaintiffs properly asserted this claim; 2) Plaintiff Lyndia Wilson's derivative claim against the Ralph Lauren Defendants and Macy's Retail Holdings, Inc., as long as Plaintiffs' Labor Law § 241(6) claim remains viable; and 3) the cross-claims against Ralph Lauren and Macy's, including Davaco's cross-claims against Ralph Lauren and Macy's and Macy's cross-claims against Ralph Lauren. Ralph Lauren's cross-claims were only asserted against Davaco, so they were all dismissed under the court's decision in motion sequence 002.

In their Bill of Particulars, Plaintiffs allege that Defendants violated Labor Law § 241(6) by violating several OSHA sections and Industrial Code sections 12 NYCRR §§ 23-1.5; 23-1.6; 13-1.7; 23-1.11; 23-1.12; 23-1.16; 23-1.28; 23-1.32; and 23-3.2. However, Ralph Lauren, Macy's and Plaintiffs also discuss Plaintiffs' allegations pertaining to §§ 23-2.1(a); 23-9.8(h) and 23-3.3(k)(ii), which should be 23-3.3(k)(1)(ii). Ralph Lauren incorrectly labeled its argument under 23-2.1(a) as 23-2.1(a)(b). Plaintiff addressed 23-2.1(b), but there is no indication that Plaintiff ever asserted this violation in any document and none of the parties argued that Plaintiffs failed to properly assert this claim. As such, the court will address these regulations as well, in case Plaintiffs properly alleged them in a supplemental Bill of Particulars or in another document which was not annexed to the parties' motion papers.

Plaintiff was a construction laborer for True Blue Labor Ready temporary employment agency. The temp agency had a contract with Davaco to provide temporary laborers. Plaintiffs and Macy's stipulated that the store where the accident occurred was owned by Macy's Retail Holdings Incorporated. Since 2011, Ralph Lauren and Macy's had an agreement to permit Ralph Lauren to create display areas or mini shops inside of Macy's stores.

Davaco submitted a Proposal, dated July 31, 2014, to Ralph Lauren for Davaco to remove 152 wooden dance floors from Ralph Lauren display shops inside of 127 Macy's stores across the country. The Proposal included the scope of the work and pricing based on the number of shops at each location for a total amount not to exceed $153,700. It also included several pages of terms and conditions which included an indemnification clause requiring Davaco to

indemnify Ralph Lauren for all claims arising out of or related to the Proposal or the relationship between them. However, the amount was limited to money damages not to exceed the amount of fees paid by Ralph Lauren pursuant to the Proposal, which was $144,602.49. The Proposal was unsigned.

Ralph Lauren sent Davaco a Purchase Order, dated August 14, 2014, for dance floor removal in the Macy's Men's and Women's areas for a total of $138,100. The Purchase Order's preprinted terms and conditions primarily pertain to Ralph Lauren's purchase of merchandise or goods and it expressly states that Ralph Lauren rejects and objects to any additional or different terms which vary to any degree the terms in the Purchase Agreement unless such other terms are expressly contained in the Purchase Order. The Purchase Order also specifies that the Purchase Order, together with any samples or any documents and materials referred to in the Purchase Order constitute the entire agreement between the parties. Additionally, the Purchase Order contains an indemnification clause for claims arising out of, or which relate to, or are connected in any way with, the resale and/or use, including misuse, of the merchandise covered by the Purchase Order.

Plaintiff was assigned to work for Davaco to remove a wooden dance floor from a Ralph Lauren shop located inside of a Macy's store in Yonkers, New York. It is undisputed that Davaco's employee directed, controlled and supervised Plaintiff's work and Davaco was responsible for controlling the means and methods of Plaintiff's work. However, it is unclear whether Davaco provided the hand jack or whether they borrowed it from Macy's. Davaco assigned Plaintiff to assist a Davaco employee in disassembling shelving racks, dismantling the oak floor planks, stacking them onto a hand truck and moving the load down to a truck to be removed from the premises and reassembling the racks. The Davaco employee directed Plaintiff to remove the planks and load them onto the hand truck.

Plaintiff testified in substance that the Davaco employee directed him to remove the planks and load them onto the pallet jack. The planks varied in size, but each one averaged 2 to 3 inches thick, 2 to 3 feet wide, 3 feet long and weighed approximately 32 pounds. They stacked approximately 80 to100 planks about 7 ½ feet high. Plaintiff testified that he suggested that they make 4 to 5 trips with smaller loads and that they use a pallet on the bottom to stable the load, but the Davaco worker declined to do so. The Davaco worker attempted to move the jack as Plaintiff guided him. After only a couple of inches, Plaintiff heard the strap snap and the stack of wooden planks collapsed and fell onto Plaintiff, causing his injuries.

Plaintiff alleges that Macy's and Ralph Lauren violated their non-delegable duty toward Plaintiff by failing to provide adequate equipment to properly secure the load by using a pallet or pallets to secure the base, wrapping to prevent wobbling, slipping, shifting and movement of the load and by making multiple trips with smaller, more manageable and controllable stacks.

Ralph Lauren argues in substance that it is entitled to contractual indemnification from Davaco based on the terms of the Proposal Davaco sent to Ralph Lauren. Ralph Lauren also argues that Plaintiffs' complaint and all cross-claims should be dismissed because it is not an owner, general contractor, nor agent of either. The display area was not separated by walls from the remainder of the display areas in the stores, it had no possessory interest in the store, and there was no license agreement or lease between Macy's and Ralph Lauren. Ralph Lauren further argues that Plaintiff's common-law and Labor Law § 200 claims should be dismissed because Ralph Lauren did not control, direct, or supervise Plaintiff's work, and it did not provide

the hand jack. Ralph Lauren also argues in substance that Plaintiff's Labor Law § 241(6) claim should be dismissed because Plaintiff failed to allege a violation of an Industrial Code section that is sufficiently specific, applicable to the facts of the case and/or the proximate cause of Plaintiff's accident. Plaintiff's Labor Law § 240(1) claim should be dismissed because Plaintiff was not engaged in a covered activity or he was not exposed to a significant height differential.

Macy's argues in substance that Plaintiff's claims under common-law negligence and Labor Law § 200 should be dismissed as against Macy's because Macy's did not supervise, direct or control Plaintiff's work; the accident arose out of the means and methods by which the work was conducted and not because of an alleged defect with the premises or pallet jack; Macy's did not have notice of a dangerous condition; it did not create a dangerous condition; and it did not owe Plaintiff a duty of care, nor did it breach such duty. Macy's further alleges that Plaintiff's § 240(1) claim should be dismissed because the injury-producing work did not involve a significant height differential and was not a covered activity contemplated by the statute. Macy's further argues that Plaintiff's Labor Law § 241(6) claims should be dismissed because the Industrial Code sections are factually inapplicable to the accident or are otherwise insufficient to sustain liability under this statute. Macy's also argues in substance that it is entitled to contractual indemnification from Davaco as Ralph Lauren's customer pursuant to the terms of the Purchase Order between Davaco and Ralph Lauren.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

Ralph Lauren is an Owner under the Labor Law

As a preliminary matter, the court determines that Ralph Lauren is an owner of its display shop which contained the wooden dance floor for purposes of liability under the Labor Law. Plaintiffs claimed that Ralph Lauren was a contractor and Macy's argued that Ralph Lauren was

an owner and contractor for purposes of the Labor Law. Based on the evidence, the court finds that Ralph Lauren had an interest in the property and it fulfilled the role of an owner by contracting directly with Davaco to have the injury-producing work performed for its own benefit and it had the authority to control the work (*see Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009]).

Additionally, the Vendor Shop Letter of Agreement between Ralph Lauren and Macy's regarding installation of the Ralph Lauren shops within Macy's stores states that both parties had an ownership interest in the shops in proportion to the amounts contributed by each party. Ralph Lauren contributed 58% of the costs totaling $10,640,000 to construct the shops at Macy's, which made Ralph Lauren the majority owner. The court determines that a question of fact remains as to whether Ralph Lauren was a contractor within the meaning of the Labor Law and whether it had the power to insist on standards in how the work had to be performed. However, such issue is not determinative of the outcome of these motions as the court finds Ralph Lauren to be an owner under the applicable Labor Law provisions.

Plaintiff's Common-Law and Labor Law § 200 Claims

It is well settled that Labor Law § 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To prevail on such a claim, a plaintiff must demonstrate that a defendant has the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Accordingly, liability can only be imposed if the defendant has exercised control or supervision over the work and has actual or constructive notice of the alleged unsafe condition (*Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 289 [1st Dept 2008]; *Giovengo v P&L Mech.*, 286 AD2d 306, 307 [1st Dept 2001]).

The First Department granted summary judgment to a construction manager on a plaintiff's common-law negligence and Labor Law § 200 claims and found that the company only had general supervision which was insufficient to trigger liability (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [internal citation omitted]). The court determined that plaintiff never took orders from the company's employees, the company did not direct, manage or oversee plaintiff's work and although the company's project superintendent conducted regular walk-throughs, had the authority to investigate and stop work for unsafe conditions, discussed covering the hole and inspected the plywood, it was not enough to impose liability (*id.*).

Here, Ralph Lauren and Macy's demonstrated their entitlement to dismissal of Plaintiff's claims under common-law negligence and Labor Law § 200 as a matter of law, in that the evidence demonstrated that Ralph Lauren and Macy's did not control, direct, or supervise Plaintiff's work. Additionally, the evidence does not support a claim that the work area was unsafe or that the pallet jack was defective, but the accident was clearly caused by the means and methods used to perform the job. There is no evidence that Ralph Lauren or Macy's had actual or constructive notice of a dangerous condition, that they created a dangerous condition, or that they owed or breached a duty to Plaintiff. It makes no difference whether Davaco or Macy's owned the pallet jack because there is no allegation that the pallet jack or the strap was defective.

Therefore, the court dismisses Plaintiff's claims under common-law negligence and Labor Law § 200 against Ralph Lauren and Macy's.

Plaintiff's Res Ipsa Loquitur Claim

Although none of the parties specifically addressed Plaintiff's res ipsa claim, the court dismisses this claim and finds that the facts of this case do not support this claim. The evidence failed to demonstrate each element of res ipsa, including that the accident would not have happened or the strap would not have snapped in the absence of someone's negligence, that the pile of wood planks was within Ralph Lauren and/or Macy's exclusive control and that the accident was not due to any voluntary action or contribution on Plaintiff's part. Therefore, the court dismisses this claim against Ralph Lauren and Macy's.

Plaintiff's Labor Law § 240(1) Claim

Labor Law § 240(1) states that all contractors, 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]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level, or the difference between the elevation level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Rocovich*, 78 NY2d at 514). However, application of the statute is not limited to situations where a worker fell or was struck by a falling object (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009]). Rather the relevant question is whether the harm flows directly from the application of the force of gravity to the object (*id.* at 604). Not all safety devices are contemplated by the statute. For example, the term "braces" set forth in the statute has been construed to mean the type used to support elevated work sites and not the ones designed to shore up or lend support to a completed structure (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]).

Absent an elevation differential which is not *de minimis*, the extraordinary protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object, regardless of whether a device specified by the statute might have prevented the accident (*Narducci*, 96 NY2d at 270). However, Labor Law § 240(1) may still apply in situations where a worker is injured by a falling object whose base stands at the same level as the worker (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011]). To determine whether an elevation differential is physically significant or *de minimis*, courts must consider the weight of a falling object and the amount of force it was capable of generating even over the course of a relatively short descent (*id.* at 10 [2011]; *Runner*, 13 NY3d at 603).

Numerous courts have held that injuries that result from usual and ordinary dangers which exist on a construction site and which do not result from an elevation-related hazard or appreciable height differential are not protected by Labor Law § 240(1) (*see Misseritti*, 86 NY2d at 491; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807-808 [1st Dept 2010] [transformer that was affixed to the wall about 6 to 7 feet high fell and struck 5 foot 8 inch worker's head as worker stood on the same level]; *Whitehead v City of New York*, 79 AD3d 858 [2d Dept 2010] [worker was struck in the knee with two steel tubes after a load of steel tubes that had just been hoisted by a crane and put down on the floor rolled out while the bindings on the load were being removed]; *Daley v City of New York*, 277 AD2d 88 [1st Dept 2000] [worker struck by shackle handle that was propelled into his leg when a chain binder opened up which was holding a concrete slab that had been hoisted up to same level as worker]; *Amato v State*, 241 AD2d 400 [1st Dept 1997] [brace which was an integral part of a ground-level structure fell and hit a worker who was demolishing the structure on the same level]; *Dias v Stahl*, 256 AD2d 235 [1st Dept 1998] [worker demolishing structure on ground level struck by a section of air conditioning duct work suspended from a 10 foot high ceiling by metal support straps]; *Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150 [3d Dept 2016] [a stack of about 30 scaffold frames about 6 feet long, 4 to 5 feet wide and 45 to 50 pounds each, standing vertically on the same level as the worker and about the same height as the worker, fell onto the worker when he was attempting to move one of the frames]; *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 [1st Dept 2014] [worker slipped on a muddy surface and tripped over an object while he and two others were carrying a metal pipe on their shoulders]; *Wilinski*, 18 NY3d 1 [vertical metal pipes which were 4 inches in diameter and stood 10 feet high fell 4 feet onto a 5 foot 6 inch worker]); *Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573 [4th Dept 2014] [drywall, which was loaded onto a cart and not being hoisted or secured, toppled over and struck worker who was unloading cart while standing on same level]; and *Joseph v City of New York*, 143 AD3d 489, 490 [1st Dept 2016] [unsecured vertical pipe swung out and struck worker as pipe was being cleaned by a highly pressurized flush mixture that was intentionally propelled through the pipes].

As an initial matter, the evidence demonstrates that Macy's and Plaintiff stipulated that Macy's Retail Holdings, Inc. owned the premises. Therefore, there is no evidence that any other Macy's Defendants owned the premises, nor that they were agents of an owner. Additionally, as discussed above, Macy's correctly argues that Ralph Lauren was also a statutory owner of the premises.

When applying the applicable law to the facts in this case, the court determines that the injury-producing work performed by Plaintiff was a covered activity under the terms of Labor Law § 240(1), as removal of the floor is included in the demolition and alteration categories set forth in the statute. However, Ralph Lauren and Macy's demonstrated that they are entitled to summary judgment dismissal of Plaintiff's Labor Law § 240(1) claim against them.

The court determines that Ralph Lauren and Macy's established as a matter of law that Plaintiff's accident was not caused by an elevation-related or gravity-related risk from an appreciable height differential as contemplated by Labor Law § 240(1) and that the injury did not result from an extraordinary hazard associated with such elevation-related risk. Rather, it resulted from an ordinary hazard incidental to a worksite. Plaintiff was injured while assisting in moving a load of wooden floor planks horizontally on the same level as Plaintiff and not while it was being hoisted or secured. There was no appreciable height differential between the top of the stack of wood planks and Plaintiff's head, although Plaintiff's height is unclear. Therefore, the harm did not flow directly from the application of the force of gravity to the planks. Additionally, the nylon strap used to attempt to secure the load and the wrapping and pallet discussed by Plaintiff were not the type of devices contemplated by the statute to support elevated worksites which would have prevented an injury caused by an elevated-related hazard. Instead, they were devices used, or which could have been used, to shore up or lend support to the stack. As such, Plaintiff's injuries were caused by the usual and ordinary dangers which exist on a construction site and are not protected by Labor Law § 240(1).

Therefore, the court grants dismissal of Plaintiff's Labor Law § 240(1) claim against Ralph Lauren and Macy's.

Plaintiff's Labor Law § 241(6) Claim

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v N. Elba*, 16 NY3d 411, 413 [2011]). Therefore, Plaintiff's § 241(6) claim is not dependent on the degree of Defendants' control over his work, rather it is dependent on the application of the specific Industrial Code provision and a finding that the violation of the provision was a result of negligence (*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [citation omitted]).

According to Plaintiffs' Bill of Particulars, Plaintiffs allege that Defendants violated Labor Law § 241(6) by violating several OSHA sections and Industrial Code sections 12 NYCRR 23-1.5; 23-1.6; 13-1.7; 23-1.11; 23-1.12; 23-1.16; 23-1.28; 23-1.32; and 23-3.2. However, Ralph Lauren and Macy's move to dismiss Plaintiffs' allegations pertaining to additional sections of the Industrial Code which were not included in Plaintiffs' Bill of Particulars, including 23-2.1(a) and (b); 23-9.8(h) and 23-3.3(k)(ii), which should be 23-3.3(k)(1)(ii). In their opposition to the motions, Plaintiffs argue in support of their allegations pertaining to Industrial Code §§ 23-2.1(a) and (b), 23-3.3(k)(ii), which should be 23-3.3(k)(1)(ii), and 23-9.8(h). As such, the court addresses these regulations as well, even though it is unclear whether Plaintiffs sufficiently asserted violations of these regulations.

Based on the facts of this case and the applicable case law, the court determines that Plaintiffs' Labor Law § 241(6) claim based on the above-mentioned alleged violations can only

be supported by a violation of Industrial Code § 23-2.1(b), if it was properly asserted by Plaintiffs. This section relates to disposal of debris and requires that debris "be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area" (12 NYCRR § 23-2.1[b]). Here, Plaintiff was injured while attempting to dispose of debris by removing it from the work area. However, there remains a question of fact as to whether this regulation was violated.

Since the only evidence of ownership regarding the Macy's Defendants is that Macy's Retail Holdings, Inc. owned the premises and it is unclear as to which Ralph Lauren entity had an ownership interest in the display shop and which one contracted with Davaco, this is Plaintiff's only remaining claim against these Defendants.

The court dismisses Plaintiffs' remaining allegations that Defendants violated the remaining OSHA and Industrial Code regulations as they are either general safety standards and not sufficiently specific enough to sustain a claim under Labor Law § 241(6) or they are not applicable to the facts of the case regarding the manner in which Plaintiff was injured.

Specifically, the court dismisses Plaintiffs claims under 2.1(a), because it pertains to storage of building material in a safe and orderly manner and requires its piles to be stable. However, the flooring material in this case was not being stored. Plaintiff was injured while attempting to transport the material from the work site, so this section does not apply to the facts of this case. Industrial Code § 23-3.3(k)(1)(ii) does not apply because it also pertains to storage of materials and is inapplicable to the facts of this case. Industrial Code § 23-9.8(h) does not apply because it pertains to support of pallets being used and sets forth requirements that loaded pallets be kept level, requirements if masonry units are used as pallet supports and prohibits the use of loose material and unstable supports for pallets. Here, Plaintiff and his co-worker did not use any pallet or use masonry units or loose material as pallets. The court rejects the argument that they attempted to use the bottom layer of the wood planks that they were transporting as a pallet. Such interpretation is not contemplated by this regulation. If so, then this section could be invoked any time no pallet was used and material was being piled without using a pallet.

As such, the court grants in part Ralph Lauren's and Macy's motions to dismiss Plaintiff's claim under Labor Law § 241(6) by granting dismissal of all alleged claims under this statute, except for an alleged violation of Industrial Code § 23-2.1(b) against all Ralph Lauren Defendants and Macy's Retail Holdings, Inc. only, if Plaintiffs properly asserted this claim in a Supplemental Bill of Particulars or by another means not provided to the court.

Defendants' Cross-Claims for Indemnification

Ralph Lauren argues in substance that it is entitled to contractual indemnification from Davaco based on the terms of the Proposal that Davaco sent to Ralph Lauren. Even though neither party signed the Proposal, Ralph Lauren argues that it accepted the terms of the Proposal by sending Davaco a Purchase Order, which Davaco accepted by commencing the work, obtaining the necessary insurance and based on the course of conduct of the parties. Macy's argues in substance that it is entitled to contractual indemnification from Davaco as a direct beneficiary of the Purchase Order as Ralph Lauren's customer. Macy's further argues that the merchandise described in the Purchase Order is the removal of the wooden floor.

A party's right to indemnification may arise from a contract or may be implied based upon common-law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "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] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008] [internal quotation marks and citations omitted]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal quotation marks and citations omitted]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common-law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common-law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

Generally, parties to an agreement are free to tailor their contract to meet their particular needs and to include or exclude provisions as they see fit (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Absent some indicia of fraud or other circumstances warranting equitable intervention, the court has a duty to enforce the terms of the agreement (*id.* [internal citations omitted]). When the relevant terms of an agreement are clear and unambiguous, the intentions of the parties are apparent and the court is prohibited from altering the terms of the contract (*see Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 561-562 [1st Dept 2014]). However, when the meaning of a contract provision is reasonably susceptible to more than one interpretation, courts can look to the surrounding facts and circumstances extrinsic to the agreement to determine the intent of the parties (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 248 [1975]).

Upon review of the evidence submitted, the court determines that Ralph Lauren failed to demonstrate its entitlement to summary judgment in its favor for dismissal of the cross-claims against it and for judgment in its favor as to its contractual indemnification claim against Davaco as a matter of law. For the same reasons set forth in the court's decision, dated January 17, 2018, under motion sequence 002, where the court granted Davaco's motion for summary judgment in its favor as to dismissal of the cross-claims against it, the court finds that Plaintiff was Davaco's special employee as a matter of law, that Davaco is entitled to the protections of the exclusivity provisions of § 11 and 29(6) of the Workers' Compensation Law and that Davaco is not liable to Macy's and Ralph Lauren for common-law contribution and indemnification.

The court also finds that Davaco is not liable to Ralph Lauren for contractual indemnification because the evidence demonstrates that the terms of the Purchase Order controlled the agreement and relationship between the parties. The relevant terms of the Purchase Order are clear and unambiguous and the intentions of the parties are apparent. Therefore, the

court is prohibited from altering the terms of the Purchase Order or considering surrounding facts and circumstances extrinsic to the agreement to determine the parties' intent.

Additionally, Ralph Lauren never accepted the terms of the Proposal and expressly rejected and objected to any additional or different terms that varied the terms of the Purchase Order which were not expressly set forth in or referred to in the Purchase Order. The parties agreed that the Purchase Order was the entire agreement between the parties and there is no reference to the Proposal in the Purchase Order. Also, the testimony of the witnesses demonstrated that the parties' relationship was governed by the Purchase Order and there is no objective evidence that Ralph Lauren accepted the terms of the Proposal. Simply because Davaco performed the scope of the work and obtained insurance required by the Proposal does not mean that the parties agreed to all of the terms of the Proposal, including the indemnification clause. Ralph Lauren's arguments regarding the course of conduct between the parties and purported acceptance of the terms of the Proposal are unpersuasive. As such, Davaco's contractual indemnification is limited to claims regarding the resale, use and misuse of the merchandise covered by the Purchase Order, which is inapplicable to the facts in this case.

Furthermore, the court finds that Macy's failed to demonstrate its entitlement to judgment in its favor as to contractual indemnification against Davaco as there is no contract between Davaco and Macy's and the court finds that Macy's is not a third-party beneficiary to the contract between Davaco and Ralph Lauren as Ralph Lauren's customer.

Therefore, the court denies Ralph Lauren's and Macy's claims for contractual indemnification from Davaco.

The court has considered the remaining arguments of all parties and denies any additional relief requested not set forth herein.

Conclusion

The court dismisses the vast majority of Plaintiffs' claims set forth in their complaint and their only remaining claims are 1) Plaintiffs' claim under Labor Law § 241(6) regarding a violation of Industrial Code § 23-2.1(b) against the Ralph Lauren Defendants and Macy's Retail Holdings, Inc., if Plaintiffs properly asserted this claim; and 2) Plaintiff Lyndia Wilson's derivative claim against the Ralph Lauren Defendants and Macy's Retail Holdings, Inc., as long as Plaintiffs' Labor Law § 241(6) claim remains viable. The court denies dismissal of the cross-claims against Ralph Lauren and Macy's, including Davaco's cross-claims against Ralph Lauren and Macy's and Macy's cross-claims against Ralph Lauren. Finally, the court denies Ralph Lauren's and Macy's summary judgment motion in their favor on their cross-claims against Davaco for contractual indemnification.

Accordingly, it is hereby

ORDERED that the court grants in part Defendants Ralph Lauren Corporation's and Ralph Lauren Retail, Inc.'s summary judgment motion, under motion sequence 003, and grants in part Defendants Macy's Corporate Services, Inc.'s, Macy's of New York's, Macy's of New York n/k/a Macy's Inc.'s and Macy's Retail Holdings, Inc.'s summary judgment motion, under motion sequence 004, by 1) granting dismissal of all claims asserted in Plaintiffs Theodore Wilson's and Lyndia Wilson's complaint, except the court denies dismissal of (a) Plaintiffs' Fifth Cause of Action regarding Labor Law § 241(6) as it pertains to an alleged violation of

Industrial Code § 23-2.1(b) against Defendants Ralph Lauren Corporation, Ralph Lauren Retail, Inc. and Macy's Retail Holdings, Inc., but only if Plaintiffs properly asserted this claim in a Supplemental Bill of Particulars or by another means, and if so, (b) Plaintiffs Sixth Cause of Action for Plaintiff Lyndia Wilson's derivative spousal claims against Defendants Ralph Lauren Corporation, Ralph Lauren Retail, Inc. and Macy's Retail Holdings, Inc.; 2) denying dismissal of the cross-claims against the moving Defendants and 3) denying summary judgment in favor of the moving Defendants as to their cross-claims for contractual indemnification against former co-Defendant Davaco NCS, Inc. with prejudice and without costs.

Date: January 17, 2018

HON. ERIKA M. EDWARDS