Wirkus v Cedry LLC
2019 NY Slip Op 30094(U)
January 4, 2019
Supreme Court, Kings County
Docket Number: 511728/14
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN *Justice* **PART** 97

CZESLAW WIRKUS,

INDEX NO. 511728/14

Plaintiff,

MOTION SEQ. NO. 9, 10, 11

-against-

CEDRY LLC, OLIWA CONSTRUCTION INC. and MOST PLUMBING & HEATING CORP.,

Defendants.

CEDRY LLC,

Third-Party Plaintiff,

-against-

DYR-EX GENERAL CONTRACTING, INC.,

Third-Party Defendant.

The following papers, numbered 1 to 17, were read on the motions herein.	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-3, 9-11, 13-14
Answering Affidavits — Exhibits (Memo)	4-6, 12, 15, 16
Replying Affidavits (Reply Memo)	7, 8, 17

Motion sequence numbers 9, 10, and 11 are consolidated for purposes of disposition.

Before the Court is a motion by defendant Most Plumbing & Heating Corp. (Most) for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Czeslaw Wirkus's (plaintiff) claims and all cross-claims asserted against Most (motion sequence 9). Defendant Oliwa Construction Inc., (Oliwa) cross-moves for summary judgment dismissing

plaintiff's Complaint and all cross-claims as asserted against it (motion sequence 10). Defendant/third-party plaintiff Cedry LLC (Cedry) moves for summary judgment in its favor dismissing plaintiff's claims as asserted against it (motion sequence 11). In the same motion sequence, Cedry also moves for summary judgment in its favor on its indemnity cross-claims against Most, and on its Third-Party Complaint against third-party defendant Dyr-Ex General Contracting, Inc. (Dyr-Ex).

BACKGROUND

On March 18, 2014, a new building was being constructed at 165 Nassau Avenue in Brooklyn. The premises was owned by Cedry. Cedry contracted with Dyr-Ex to serve as the general contractor for the project. Plaintiff was employed by Dyr-Ex as a bricklayer. Most was a plumbing contractor hired by Dyr-Ex to provide plumbing services to the site. Oliwa was issued a permit to place a dumpster outside of the premises commencing on March 31, 2014. On the morning of the incident, plaintiff arrived at the work site at approximately 7:30 a.m., and worked in the basement installing a concrete floor until approximately 9:30 a.m. Plaintiff then had to perform some brickwork. He testified that he had to go up to the third floor to get a copy of the brickwork plans from his co-worker, Andrzej Andrzejewski, in order to know how to lay certain stones. While plaintiff was walking down the stairs between the second floor and the ground floor, he tripped over an extension (electrical) cord that was on the landing between the two staircases. Plaintiff tried to reach out to grab a temporary handrail but missed it and fell. Plaintiff landed on the stairs and slid down them, thereby sustaining various injuries. The record reveals that the extension cord had been used to connect the power supply located on the third floor to workers using power tools on the lower levels of the building.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). 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 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

A. Most's Motion - Motion Sequence 9

Most moves for summary judgment dismissing plaintiff's claims and any cross-claims

asserted against Most. Most argues that plaintiff cannot make out a prima facie case against it under Labor Law §§ 240(1), 241(6) and 200. In support of its motion, Most submits the affidavit of its principal David Most (Mr. Most). Mr. Most affirms that Most was not a general contractor for the project, did not have any supervisory personnel on the site, and was only responsible for its own employees. Most did not conduct or attend safety or tool box meetings at the site or have any responsibility for overall site safety. Mr. Most further affirms that plaintiff was not his employee and that neither he, nor anyone from Most, ever supervised plaintiff's work. Additionally, Mr. Most avers that his company did not provide any tools, equipment or materials to plaintiff. Finally, he affirms that Most never performed any work in or above the stairway where plaintiff was injured, and did not create any dangerous or defective condition on the stairway or have any notice of such a condition.

Most further points to plaintiff's deposition testimony in which he stated that there were no plumbers working at the building prior to his accident, and no plumbers had used the 230 volt cable, supplied plaintiff with any tools, or had ever directed plaintiff's work (Wirkus tr at 39-42). Plaintiff specifically testified that he did not see any plumbers performing work in the building on the day of his accident or the prior day (*id.* at 38, lines 14-20).

Most argues that it cannot be held liable for plaintiff's Labor Law §§ 240(1) or 241(6) claims since it was not the owner of the premises, a general contractor or the statutory agent thereof. In support of this position, Most points to the affidavit submitted by its owner which establishes that it was not the owner, nor was it the general contractor at the site. In addition, Most contends that it did not have any supervisory personnel on the site. Most further contends that it was not responsible for providing plaintiff with any safety devices.

Most also argues that plaintiff's Labor Law § 200 claim should be dismissed as his injuries were caused by the presence of an electrical cable/extension cord on the stairs and the evidence establishes that Most did not use this kind of a cable to perform its plumbing work.

Thus, Most contends that it could not have created the alleged dangerous or defective condition that caused the plaintiff's injuries. Moreover, Most notes that it was not responsible for supervising plaintiff's day-to-day activities and, thus, it cannot be held liable for plaintiff's claim.

Finally, Most requests sanctions and costs in connection with its motion as plaintiff's counsel has refused to voluntarily discontinue this action against Most despite any good faith basis to continue the prosecution of his claims.

Plaintiff opposes Most's motion arguing that it is premature since necessary discovery has not yet taken place. Specifically, plaintiff points out that depositions of some defendants, including Most, have not occurred. Thus, plaintiff argues that it cannot substantively oppose Most's motion at this point. However, plaintiff argues that Most has not established its entitlement to summary judgment as it has failed to demonstrate that it is not a Labor Law defendant. In this regard, plaintiff does not dispute that Most was neither an owner nor a general contractor, but argues that it has failed to demonstrate that it did not act as an agent of the general contractor at this job. Plaintiff contends that Most has offered no evidence regarding its relationship with Dyr-Ex, plaintiff's employer and the entity that hired it. Specifically, plaintiff maintains that Most has failed to offer evidence that it was not delegated any supervisory duty over plaintiff and the work he was performing.

In reply, Most argues that by plaintiff's own admission there were no plumbers working on the staircase where plaintiff alleges the accident occurred. Further, Most contends that the record is clear that it did not control the methods or means of plaintiff's work. Moreover, Most points out that, in plaintiff's affidavit in opposition to its motion, he does not allege the presence of plumbers at the site at the time of the accident.

Cedry also opposes Most's motion arguing that it is premature since Most's deposition has not been held. Cedry points out that its witness, Mr. Wszeboroski, the owner of the

premises, testified that plumbers were working in the basement of the building on the day of the accident, as well as during the prior month. Cedry argues that a deposition from a witness from Most is necessary to determine what machines or equipment Most used in its work on the premises that required the use of the subject electrical cable. Cedry notes that the subject electrical cable was the only power source to the lower levels of the building. Cedry further argues that the plaintiff had not been on the site for several months prior to returning the day before his accident and, thus, might not be aware of what other contractors were present at the site. Thus, Cedry contends it has demonstrated that the deposition of witnesses from Most are needed to determine the usage and placement of the subject electrical cable/power cord. Additionally, Cedry notes that Most has failed to respond to a July 18, 2017 Notice for Discovery.

Cedry further argues that Most has failed to make out a prima facie case of its entitlement to summary judgment dismissing plaintiff's Labor Law §§ 241(6), 200 and common-law negligence claims. In this regard, Cedry argues that there are triable issues of fact as to whether Most employees moved the power cord into the position it was in on the date of the accident, and that Mr. Most's affidavit does not address this issue. In light of Mr. Wszeborowski's testimony that Most was at the site on the date of the accident, Cedry contends there is a possibility that a Most employee could have moved the subject power cord to the location it was in at the time of plaintiff's accident.

In reply, Most argues that Mr. Most's affidavit is sufficient to demonstrate its entitlement to summary judgment. Most further argues that Cedry's assertion that discovery might yield an admission that a Most employee was responsible for leaving the subject power cord/cable on the staircase lacks merit. In this regard, Most points to paragraph 9 of Mr. Most's affidavit in which he affirms that his company did not perform any work in or above the stairway where the accident occurred. Moreover, Most contends that the deposition testimony of Mr.

Wszeborowski that the plumbers were working in the basement of the premises on the day of the accident, does not create a question of fact as there has been no evidence that Most was performing work in or around the staircase. Most points to Mr. Wszeborowski's testimony that he had seen the workers throw an extension cord out a third floor window and back in through a lower floor window to power the second floor or below. Most further points to Mr. Wszeborowski's testimony which indicates that he had observed an extension cord hanging from the third floor down to the landing between the first and second floors that was used by Dyr-Ex employees to cut stones. Thus, Most contends that the foregoing testimony demonstrates that it was not involved in plaintiff's accident.

"A summary judgment motion is not premature merely because discovery has not been completed" (*Northfield Ins. Co. v Golob*, 164 AD3d 682, 683-684 [2d Dept 2018]; *see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]; *Lamore v Panapoulos*, 121 AD3d 863, 864 [2d Dept 2014]). "A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (*Reynolds v Avon Grove Props.*, 129 AD3d 932, 933 [2d Dept 2015]; *see Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329 [2d Dept 2017]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Rather, there must be 'some evidentiary basis . . . to suggest that discovery may lead to relevant evidence'" (*id.* at 1329, quoting *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999]).

The evidence submitted by Most demonstrates that it was not an owner, general contractor or an agent of the owner or general contractor. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and

authority over the work being done where a plaintiff is injured" (*Vazquez v Humboldt Seigle Lofts, LLC*, 145 AD3d 709, 709 [2d Dept 2016], quoting *Delahaye v Saint Anns School*, 40 AD3d 679, 683 [2d Dept 2007], quoting *Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]). Here, the evidence submitted in support of Most's motion, as well as the record before the Court, reveals that Most exercised no supervision or control over the plaintiff's work. Indeed, it is undisputed that the plaintiff received all of his direction from his Dyr-Ex supervisor, Andrzej Andrzejewski. As such, there has been no showing that Most was a statutory agent of either the owner or the general contractor here. Thus, it follows that Most cannot be held liable under any theory of liability under the Labor Law §§ 240, 241(6) or 200 (*see Cusumano v AM&G Waterproofing, LLC*, 160 AD3d 922, 923-924 [2d Dept 2018]; *Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328 [2d Dept 2017]; *Vazquez v Humboldt Seigle Lofts, LLC*, 145 AD3d 709, 709 [2d Dept 2016]; *Bennett v Hucke*, 131 AD3d 993, 994 [2d Dept 2015]; *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 720 [2d Dept 2014]). Furthermore, the Court finds that the plaintiff and Cedry have failed to demonstrate that additional discovery might lead to relevant evidence in this regard. Accordingly, that branch of Most's motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims on the ground that it is not a proper Labor Law defendant is granted and said claims are hereby dismissed as against Most.

However, as to plaintiff's common-law negligence claim against Most, the Court finds that a question of fact has been raised as to whether Most was the entity responsible for placing the electrical cord/cable that caused plaintiff's accident in the stairwell. Although Most contends that it did not perform work in or above the stairwell where plaintiff sustained his injuries, there is evidence in the record that Most was working in the basement, and it is undisputed that the only electrical power source was located on the third floor. Thus, in order to access this power source, an extension cord/cable had to run from the third floor to the lower

levels, including the basement. Most has failed to establish that it did not require the use of a power source and an extension cord/cable in order to perform its work in the basement. Thus, the Court finds that a question of fact has been raised which precludes granting that branch of Most's motion which was for summary judgment dismissing the plaintiff's cause of action alleging common-law negligence (*see Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 719 [2d Dept 2007]; *Bell v Bengomo Realty*, 36 AD3d 479 [1st Dept 2007]; *see also Mendez v Union Theol. Seminary in City of N.Y.*, 17 AD3d 271 [1st Dept 2005]). All other relief requested by Most, including its request for sanctions, costs and attorneys' fees is denied.

B. Oliwa's Cross-Motion - Motion Sequence 10

Defendant Oliwa cross-moves for summary judgment dismissing plaintiff's claims arguing that it did not have any relationship with the subject premises until weeks after plaintiff's accident occurred, and therefore it owed no duty to the plaintiff. Oliwa contends that plaintiff's accident did not arise out of its work. In support of its cross-motion, Oliwa submits an affidavit from its president Rafal Ziolkowski (Mr. Ziolkowski). Mr. Ziolkowski affirms that he reviewed the file maintained by his company in relation to this project and attests that Oliwa was not involved in the project on the date of plaintiff's accident. He affirms that Oliwa was issued a dumpster permit, which is annexed to Oliwa's cross-motion, which states that Oliwa was only allowed to place an exterior dumpster outside the premises commencing on March 31, 2014, weeks after plaintiff's accident occurred. He affirms that Oliwa did not perform any interior work at the site at any time. He further affirms that, at no time prior to March 31, 2014, were any Oliwa employees working at, or on the site of the project, nor did Oliwa lend out tools, supervise any work or have involvement whatsoever with the project.

Oliwa additionally argues that the contractual indemnity cross-claims asserted against it lack merit inasmuch as there is no contract between Oliwa and any party to this action. Oliwa notes that, even if there was a contract, any such claims should be dismissed since the

plaintiff's accident clearly did not arise out of Oliwa's work, which did not commence until weeks after the incident. In addition, Oliwa argues that all cross-claims for common law indemnification and contribution fail as there was no negligence on the part of Oliwa that caused or contributed to plaintiff's accident. Finally, Oliwa argues that since there was no contract between Oliwa and any party to this action, there was no contractual duty requiring it to procure insurance on behalf of any defendant and any such claims should be dismissed.

Plaintiff opposes Oliwa's cross-motion arguing that it is premature as there has been no deposition of a representative from Oliwa. Plaintiff notes that Oliwa's cross-motion relies solely on Mr Ziolkowski's self-serving affidavit. Plaintiff argues that Mr. Ziolkowski does not state whether Oliwa had any other permits for the job which may have pre-dated plaintiff's accident, nor does Oliwa produce a contract, proposal or work order that demonstrates when it was hired for this job and when it was supposed to begin its work at the site. Plaintiff further contends that Oliwa failed to produce evidence that it did not act as an agent of the owner at this site. Plaintiff maintains that Mr. Ziolkowski's affidavit is silent regarding whether it placed the subject electrical cord on the stairwell and, thus, has failed to establish that it did not create or have notice of the dangerous condition. Plaintiff therefore argues that Oliwa has failed to establish its prima facie entitlement to summary judgment.

Oliwa, through the submission of Mr. Ziolkowski's affidavit and the permit allowing it to place a dumpster outside of the premises commencing on March 31, 2014, weeks after plaintiff's accident occurred, has demonstrated that it was not present on the site at the time of plaintiff's accident and, thus, cannot be liable under the Labor Law or under a common law theory of negligence for plaintiff's injuries. Moreover, plaintiff has failed to demonstrate that further discovery would lead to relevant evidence to defeat Oliwa's motion for summary judgment. It is undisputed that Oliwa was not an owner or general contractor on this project. Nor can it be said that Oliwa was an agent of the owner or general contractor as plaintiff

testified that he received all of his direction and supervision from Dyr-Ex employees (*see Domino v Professional Consulting, Inc.*, 57 AD3d 713, 714-715 [2d Dept 2008] [holding that "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the authority to control or supervise the work being performed"]; *Borbeck v Hercules Constr. Corp.*, 48 AD3d 498, 498 [2d Dept 2008]; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331-332 [2d Dept 2005]). Further, the Court finds that plaintiff's contention that Mr. Ziolkowski's affidavit is silent with regard to whether Oliwa placed the electrical cord on the stairwell lacks merit. Mr. Ziolkowski affirms that Oliwa did not perform any interior work at the project site at any time whatsoever. Accordingly, Oliwa has made a prima facie showing that it neither created nor had notice of the alleged condition that caused plaintiff's accident inside the premises. Based upon the foregoing, Oliwa's cross-motion for summary judgment dismissing plaintiff's claims and any cross-claims asserted against Oliwa is granted.

C. Cedry's Motion - Motion Sequence 11

Cedry moves for an order granting summary judgment dismissing plaintiff's claims as asserted against it, and for summary judgment in its favor on its cross-claims asserted against Most. Cedry also seeks an order granting summary judgment in its favor on its third-party claims against Dyr-Ex seeking common-law and contractual indemnification and alleging a failure to procure insurance.

Plaintiff opposes Cedry's motion arguing that it is premature as depositions of Oliwa, Most and Dyr-Ex have not yet been held. Plaintiff contends that he cannot substantively oppose the motion until the deposition of all parties takes place.

As discussed above, a party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant. Here, the Court finds that plaintiff has failed to meet this burden with regard to

that branch of Cedry's motion that seeks summary judgment on plaintiff's Labor Law §§ 240(1) and 241(6) claims inasmuch as it is undisputed that Cedry is the owner of the premises and, as such, would be statutorily liable for a violation of these provisions regardless of fault.

I. Labor Law § 240(1)

Labor Law § 240(1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . 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."

Elevation risks covered by the statute 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 a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In particular, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who are "best situated to bear that responsibility" (*Ross,* 81 NY2d at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985], *rearg denied*

65NY2d 1054 [1985]). "[T]he duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500). Additionally, the absolute liability imposed by Labor Law § 240(1) means that a plaintiff's contributory or comparative negligence is wholly irrelevant in determining liability and does not bar recovery or serve to offset liability (*Stolt v General Foods Corporation*, 81 NY2d 918, 920 [1993]; *Bland v Manocherian*, 66 NY2d 452, 460-461 [1985]).

"'In order to prevail on a claim under Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his or her injuries'" (*King v Villette,* 155 AD3d 619, 621 [2d Dept 2017], quoting *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [2d Dept 1997]). "'Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident'" (*Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1309 [2d Dept 2017], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). Where a "plaintiff's actions [are] the sole proximate cause of his [or her] injuries, . . . liability under Labor Law § 240 (1) [does] not attach" (*Nalepa v South Hill Bus. Campus, LLC*, 123 AD3d 1190, 1191 [3d Dept 2014], quoting *Robinson v East Med. Ctr., LP*, 6 NY3d at 554 [internal quotation marks and citation omitted]; *accord Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Albert v Williams Lubricants, Inc.*, 35 AD3d 1115, 1116 [3d Dept 2006]; *see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Cedry argues that plaintiff's Labor Law § 240(1) claim should be dismissed as there was no height or gravitational risk that proximately caused his accident, and that the work he was performing at the time of the occurrence was wholly unrelated to an elevation related hazard.

In opposition, plaintiff argues that "where, as here, a stairway is being used to facilitate a plaintiff's access to a different elevation level, said stairway qualifies as an elevation device within the meaning of Labor Law 240(1)" as it served as the only safety device that allowed plaintiff and his co-workers to access the lower level of the ground floor.

The Second Department has consistently held that "[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240 (1) can attach" (*Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989 [2d Dept 2005]; *see Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955, 957 [2d Dept 2018] [holding that no liability attaches under Labor Law § 240(1) with regard to the injuries sustained as part of plaintiff's act of descending a permanent stairway]; *Parsuram v I.T.C. Bargain Stores, Inc.*, 16 AD3d 471, 472 [2d Dept 2005]; *Gold v NAB Constr. Corp.*, 288 AD2d 434, 435 [2d Dept 2001]; *Paciente v MBG Dev.*, 276 AD2d 761 [2d Dept 2000]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [2d Dept 1999]; *Barrett v Ellenville Natl. Bank*, 255 AD2d 473 [1998]). Here the record reveals that plaintiff's accident occurred within a permanent stairway in the interior of the building. Accordingly, Cedry has established its entitlement to summary judgment dismissing plaintiff's Labor Law § 240(1) claim.

II. Labor Law § 241(6)

Cedry argues that plaintiff's Labor Law § 241(6) claim should be dismissed as the Industrial Code sections he relies upon in support of his claim are either too general or not applicable to the facts of this case. Labor Law § 241(6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

The statute imposes a nondelegable duty on owners, contractors and their agents to provide

reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2d Dept 2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2d Dept 2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). Thus, Cedry as the owner of the property, had a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish Cedry's liability in relation to a violation of Labor Law § 241(6) (*see St. Louis v Town of North Elba*, 16 NY3d 411 [2011]; *see e.g. Zaino v Rogers*, 153 AD3d 763 [2d Dept 2017]).

"In order to establish liability under Labor Law § 241(6), "'a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" (*Grosskopf v Beechwood Organization*, ____AD3d____, 2018 NY Slip Op 08011 [2d Dept 2018], quoting *Rodriguez v 250 Park Avenue, LLC*, 161 AD3d 906, 908 [2d Dept 2018]); *see Aragona v State*, 147 AD3d 808 [2d Dept 2017]; *Carey v Five Bros., Inc.*, 106 AD3d 938, 940 [2d Dept 2013]). "In order to recover damages on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards" (*Hricus v Aurora Contractors, Inc.*, 63 AD3d 1004, 1005 [2d Dept 2009]; *see Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1223 [2d Dept 2011] ["To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete specifications"]; *see also Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2d Dept 2011] ["the cause of action must be based upon violations of specific codes, rules, or regulations

applicable to the circumstances of the accident"]).

In support of his Labor Law § 241(6) claim, plaintiff's verified bill of particulars alleges violations of 12 NYCRR §§ 23-1.5, 23-1.7(d) and (e), 23-1.22, 23-1.30, 23-1.32, 23-1.33, and 23-2.1. As to Industrial Code § 23-1.5, Cedry correctly argues that this provision is not sufficiently specific to form a basis for liability under Labor Law § 241(6) (*see Opalinski v City of New York*, 164 AD3d 1354, 1355 [2d Dept 2018]; *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 937 [2d Dept 2010]).

Cedry also argues that Industrial Code § 23-1.7(d) is not applicable as it relates to slipping hazards due to slippery surfaces. Specifically, section 23-1.7(d) states:

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

In support of its argument that this provision is inapplicable, Cedry notes that plaintiff alleges that he tripped over the electrical cord, and not that he slipped due to a slippery surface. In this regard, Cedry points to plaintiff's own deposition testimony as follows:

> "Q. Did you tell anyone in the emergency room at Bellevue Hospital that your foot slipped and you fell down four steps?
> A. No. No. Because I tripped, not slipped" (Wirkus tr at 21, lines 11-16)

Plaintiff offers no opposition to this branch of Cedry's motion. Accordingly, the Court finds that Cedry has demonstrated that section 23-1.7(d) is not applicable to the facts herein and, thus, cannot support plaintiff's Labor Law § 241(6) claim.

Next, Industrial Code § 23-1.7(e) provides as follows:

> "(e) Tripping and other hazards.
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

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

Cedry maintains that plaintiff has not offered any evidence that there was a sharp projection, or that dirt or debris had any role in the accident. Moreover, Cedry argues that this subsection (e)(1) relates to passageways and that the stairway where plaintiff was injured was an interior staircase where no work was being performed and, therefore, was not a passageway. With regard to subsection (e)(2), which requires that the area where workers are required to pass must be kept clear from scattered tools and materials, Cedry argues that this part is inapplicable because the subject cord was an integral part of, and consistent with, the work being performed. Cedry contends that the cord was intentionally placed there and that it was the only source of power for the grinder that plaintiff was about to use prior to his accident.

In opposition, plaintiff argues that the electrical cord was not an integral part of the work he was performing noting that he testified that he had not seen the cord in use or connected to any tool or machine on either the day of, or the day prior to, his accident. Moreover, plaintiff specifically testified that the cable that he tripped over was 230 volts and that he only needed to use a cable that was 110 volts for his work. Plaintiff further takes issue with Cedry's contention that the electrical cord he tripped on was the only way to get power down to the basement. Plaintiff notes that Cedry's own representative, Mr. Wszeborowski, testified that the most convenient way to get power to the lower levels was to just lower the cord out through the upper floor window and then in through a lower floor window on the outside of the premises. He also testified that he never saw an extension cord on the stairs, and that when a cord was located in that area, it would have been wound or secured around the stair railing (Wszeborowski tr at 90, lines 3-25; at 91, lines 1-9).

Additionally, plaintiff argues that Cedry has failed to demonstrate that there was any

other means for the workers to travel between the different levels of the building and, thus, the staircase was indeed a passageway within the meaning of section 23-1.7(e). Moreover, plaintiff contends this provision was violated when Cedry failed to keep an area where workers were required to pass free from debris or scattered materials, such as the electrical cord. Thus, plaintiff argues that there is a question of fact regarding whether this provision was violated.

Here, the record evidence reveals that the plaintiff's injuries occurred as a result of his tripping over an electrical extension cord in a stairway which served as a passageway at the work site. In this regard, the Court notes that there has been no testimony indicating that there was any other means for the workers to access the higher floors at this work site other than by using the stairway. Under these circumstances, the Court finds that plaintiff has raised an issue of fact regarding the applicability of section 23-1.7(e).

Next, Cedry correctly argues that Industrial Code § 23-1.22, which deals with structural ramps, is not applicable to the interior staircase where plaintiff was injured and, thus, cannot support his Labor Law § 241(6) claim. Cedry also correctly contends that § 23-1.30 is inapplicable inasmuch as it relates to lighting and plaintiff does not attribute his accident to inadequate lighting in either his bill of particulars or in his deposition testimony. Industrial Code § 23-1.32 is also inapplicable. This code provision relates to a contractor's responsibility to prevent the entry of its workers into unsafe areas to which the contractor has been given written notice of a particular danger. Here, there is nothing in the record indicating that Cedry received written notice of potential dangers in the stairway. Thus, this provision is inapplicable (*see Mancini v Pedra Constr.*, 293 AD2d 453 [2d Dept 2002]; *Paszek v Covanta Energy*,__Misc3d__, 2018 NY Slip Op 31934[U] [Sup Ct, Suffolk County 2018]).

Additionally, Industrial Code § 23-1.33 is not applicable as it applies solely to people passing by construction sites and not to the actual workers (*see Mancini*, 293 AD2d at 454). Moreover, the Court notes that this provision cannot support plaintiff's Labor Law § 241(6) claim

inasmuch as, pursuant to § 241(8) of the Labor Law, this section does not apply to any city in the State of New York having a population of one million or more persons, which includes the City of New York (*see* 12 NYCRR § 23-1.33; *Almodovar v Gannon Contr., LLC*, 20 Misc 3d 1143[A], 2008 NY Slip Op 51836[U] [Sup Ct, NY County 2008]; *Cunha v City of New York*, 18 Misc 3d 1104[A], 2007 NY Slip Op 52404[U] [Sup Ct, NY County 2007]).

Finally, Cedry argues that Industrial Code § 2.1 is not applicable to the facts of this case. This provision provides as follows:

> "(a) Storage of material or equipment.
> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
>
> (2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.
>
> (b) Disposal of debris.
> Debris shall 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."

At the outset, the Court notes that 12 NYCRR 23–2.1(a) is not applicable, as the plaintiff's injury did not occur as a result of improperly stored building material or equipment (*see Moisa v Atlantic Collaborative Constr. Co., Inc.*, 83 AD3d 675, 677 [2d Dept 2011]). Additionally, subsection (b), referable to the disposal of debris, is not applicable to the facts herein. There were no allegations regarding the improper disposal or storage of debris or of heavy materials, nor was there an allegation that the accident occurred because material was placed close to the edge of a floor, platform or scaffold that resulted in danger to a person

beneath such edge.

Based upon the foregoing, that branch of Cedry's motion seeking dismissal of plaintiff's Labor Law § 241(6) claim to the extent it is based upon alleged violations of Industrial Code §§ 23-1.5, 23-1.7(d), 23-1.22, 23-1.30, 23-1.32, 23-1.33 and 23-2.1 is granted. However, that branch of Cedry's motion seeking dismissal of plaintiff's Labor Law § 241(6) claim as based upon a violation of Industrial Code 23-1.7(e) is denied.

III. Labor Law § 200/Common-Law Negligence

Section 200 of the Labor Law statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363 [2d Dept 2006]). "This provision applies to owners, contractors, or their agents, who 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Simmons v City of New York*, 165 AD3d 725, 727 [2d Dept 2018], quoting *Paladino v Society of New York Hosp.*, 307 AD2d 343, 344-345 [2d Dept 2003]).

"Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *see Simmons*, 165 AD3d at 727-728; *Poulin v Ultimate Homes, Inc.*, ___AD3d___, 2018 NY Slip Op 07468 [2d Dept 2018]). Where a premise condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see Koffour v Whitestone Constr. Corp.*, 94 AD3d 706 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007]). Where "a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some

supervisory control over the operation" (*Poulin*, 2018 NY Slip Op 07468 * 3, quoting *Ross*, 81 NY2d at 505).

Cedry argues that plaintiff's Labor Law § 200 claim must be dismissed since there is no evidence that it supervised or controlled plaintiff's work, or had actual or constructive notice of the alleged dangerous condition. Cedry points to section 9.2.1 of its contract with Dyr-Ex, plaintiff's employer, which provides that Dyr-Ex was responsible for supervising and directing plaintiff's work and had sole responsibility for, and control over, the construction means, methods and techniques utilized in the provision of the work. Cedry further argues that the electrical cord that plaintiff claims to have tripped over was in the area as part of the ongoing work that was being performed, and provided an electrical source for workers on the lower floors of the building. Moreover, Cedry contends that the cord was readily observable and an open and obvious condition at the work site. Further, Cedry maintains that there is no evidence that it created or had notice of the cord causing a dangerous premises condition. Cedry notes that its witness testified that he never observed the electrical cord on the stairs, but claimed they were usually wound or secured to the stair railing.

In opposition, plaintiff argues that Cedry has failed to establish that it did not exercise supervision or control over the work being performed or that it lacked notice of the defective condition that caused plaintiff's injuries. Plaintiff notes that Cedry's owner testified that he visited the premises every day after 4 p.m. Plaintiff testified that he had observed the subject cable hanging in the stairwell on the day of and the day prior to his accident. Thus, plaintiff argues that Mr. Wszeborowski should have observed this dangerous condition when he visited the site after 4 p.m. on the day prior to the accident.

Here, Cedry has established through the contract documents, as well as plaintiff's own testimony that plaintiff received his instructions solely from Dyr-Ex employee, Andrzej Andrzejewski, and that Cedry did not exercise supervision or control over the work that plaintiff

was performing.

"The proponent of a Labor Law § 200 claim must demonstrate that the defendant had actual or constructive notice of the allegedly unsafe condition that caused the accident. The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v N.Y. Univ.*, 12 AD3d 200 [1st Dept 2004]; see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Canning v Barneys N.Y.*, 289 AD2d 32, 33 [1st Dept 2001]; *Dasilva v Nussdorf*, 146 AD3d 859, 861 [2d Dept 2017]). Here, Mr. Wszeborowski testified that he never observed an extension cord on the stairs, but if one had been in that area, it would have been wound or secured to the railing. He further testified that the cords were often tossed out the window and then run through a lower floor window to allow for power access to the lower floors. Thus, the Court finds that this merely provides general notice of a potential condition, which is insufficient to demonstrate Cedry's Labor Law § 200 or common law negligence liability (*see Dasilva*, 146 AD3d at 861).

Accordingly, that branch of Cedry's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted and said claims are dismissed as asserted against Cedry.

IV. Cedry's Indemnification Cross-Claims Against Most

Cedry also seeks summary judgment on its contractual and common law indemnification cross-claims against Most. Cedry argues that it may be entitled to common-law indemnification and attorneys' fees if Most is found to be the entity responsible for placing the subject cord on the staircase. In opposition, Most argues that Cedry has failed to produce any evidence that Most was negligent or supervised, directed or controlled plaintiff's activities on the day of the accident and thus, Cedry is not entitled to common-law indemnification from Most.

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to

the injured party" (*Poalacin v Mall Props., Inc.*, 155 AD3d 900, 909 [2d Dept 2017], quoting *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008]; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 929 [2d Dept 2009]). Accordingly, "[t]o establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Here, Cedry has failed to establish prima facie that any negligence on the part of Most caused or contributed to plaintiff's accident. Issues of fact preclude summary judgment in Cedry's favor. Accordingly, that branch of Cedry's motion seeking summary judgment on its cross-claim for common-law indemnification as against Most is denied.

As to Cedry's contractual indemnity cross-claim against Most, the Court notes that there is no contract between Cedry and Most, and more importantly, Cedry has failed to advance any arguments with respect to this claim. Accordingly, this branch of Cedry's cross-motion seeking summary judgment on its cross-claim for contractual indemnification against Most is denied.

V. Cedry's Third-Party Claims Against Dyr-Ex

Turning to that branch of Cedry's motion seeking contractual indemnification and defense from Dyr-Ex, Cedry submits a copy of its contract with Dyr-Ex, which provides, in pertinent part, as follows:

> "§ 9.15.1 To the fullest extent permitted by law, the Contractor (Dyr-Ex) shall indemnify and hold harmless the Owner (Cedry) . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performances of the Work, provided that such

> claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death . . . but only to the extent caused by the negligent acts or omission of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expenses is caused in part by a party indemnified hereunder . . .” (Notice of Motion, exhibit F).

It is well settled that “[t]he party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability” (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 [2d Dept 2016], quoting *Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]). The indemnification provision in the contract between Cedry and Dyr-Ex here clearly requires Dyr-Ex to indemnify Cedry for all claims “arising out of, or resulting from the performance of the Work . . . but only to the extent caused by the negligent acts or omissions of Contractor [Dyr-Ex], a Subcontractor [Most], or anyone directly or indirectly employed by them . . .”

Here, Cedry has demonstrated that it was free from any negligence in the happening of the accident, and that it may be held liable solely by virtue of statutory liability. However, there has been no finding that Dyr-Ex, or its subcontractor [Most] was negligent or that such negligence proximately caused plaintiff's accident. Indeed, based upon a review of the record, issues of fact exist as to whose negligence, if any, caused the plaintiff's accident. Therefore, that branch of Cedry’s motion for contractual indemnification against Dyr-Ex is premature (*see Mohammed v Silverstein Props., Inc.*, 74 AD3d 453, 454 [1st Dept 2010] [contractual indemnification correctly denied where contract required indemnitor to indemnify indemnitee for its negligent performance under contract, and there was no finding that indemnitor was negligent]; *George*, 61 AD3d at 930). Where a question of fact exists regarding the contractor's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-09 [2d Dept 2009]). Accordingly, that branch of Cedry’s motion seeking a conditional order of

summary judgment on its third-party claim for contractual indemnification from Dyr-Ex is denied as premature.

Cedry also seeks summary judgment in its favor on its claim alleging that Dyr-Ex failed to procure insurance as required pursuant to its contract. The first rider to the contract between Cedry and Dyr-Ex, dated May 23, 2013, states, in pertinent part, that:

> "(2) . . . Contractor (Dyr-Ex) shall, at its own cost and expense, maintain in full force and effect the following insurance: worker's compensation, general comprehensive liability or manufacturer's product and contractor's liability naming the Owner (Cedry) , as additional insured parties, in such companies and on forms of policies acceptable to owner. (3) Unless higher amounts are required by other documents appended to the Agreement, the said public liability insurance shall be in limits of at least $1,000,000.00 for any injury to one person and $2,000,000.00 aggregate for any single occurrence . . ."

Cedry argues that Dyr-Ex materially breached this provision by failing to procure insurance that would defend and indemnify Cedry for plaintiff's accident. In support of this argument, Cedry submits a copy of a letter from Dyr-Ex's insurance carrier to Cedry denying coverage for this accident.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2d Dept 2016]; *DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2d Dept 2003]).

Here, Cedry has demonstrated that Dyr-Ex was contractually obligated to procure insurance naming it as an additional insured and that Dyr-Ex's insurer denied any obligation to Cedry in relation to plaintiff's claims. Dyr-Ex has failed to submit any evidence demonstrating that it complied with this obligation and, in fact, has offered no opposition to Cedry's motion.

Based upon the foregoing, that branch of Cedry's motion seeking summary judgment on its third-party claim against Dyr-Ex for breach of contract for failure to procure insurance is granted.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that the branch of Most's motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims as asserted against it is granted and said claims are hereby dismissed as against Most; and it is further,

ORDERED that the branch of Most's motion seeking to dismiss plaintiff's claim sounding in common law negligence is denied; and it is further,

ORDERED that the remainder of Most's motion for relief including its request for sanctions, costs and attorneys' fees is denied in its entirety; and it is further,

ORDERED that those branches of Cedry's motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240(1), 200 and common-law negligence claims are granted and said claims are hereby dismissed; and it is further,

ORDERED that the branch of Cedry's motion seeking dismissal of plaintiff's Labor Law § 241(6) claim to the extent it is based upon alleged violations of Industrial Code §§ 23-1.5, 23-1.7(d), 23-1.22, 23-1.30, 23-1.32, 23-1.33 and 23-2.1 is granted; and it is further,

ORDERED that the branch of Cedry's motion seeking dismissal of plaintiff's Labor Law § 241(6) claim as based upon a violation of Industrial Code 23-1.7(e) is denied; and it is further,

ORDERED that the branch of Cedry's motion seeking summary judgment on its cross-claim for contractual and common law indemnification as against Most is denied; and it is further,

ORDERED that the branch of Cedry's motion seeking summary judgment on its claim against Dyr-Ex for failure to procure insurance naming it as an additional insured is granted;

and it is further,

ORDERED that the branch of Cedry's motion seeking a conditional order of summary judgment on its third-party claim for contractual indemnification from Dyr-Ex is denied as premature; and it is further,

ORDERED that Oliwa's cross-motion seeking summary judgment dismissing plaintiff's complaint and any cross-claims asserted against it is granted and said claims are hereby dismissed as against Oliwa, and the caption of this matter shall be amended to reflect that Oliwa is no longer a party to this action; and it is further,

ORDERED that counsel for Most shall serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who shall enter judgment and amend the caption accordingly.

This constitutes the Decision and Order of the Court.

Dated: January 4, 2019

PAUL WOOTEN *J.S.C.*

KINGS COUNTY CLERK
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