KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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HECTOR PESANTEZ,

Plaintiff,

- v -

NEW YORK UNIVERSITY, ALL STATE INTERIOR DEMOLITION INC., and STRUCTURE TONE, INC.,

Defendants.

INDEX NO. 160868/2013

MOTION DATE 11/07/2018

MOTION SEQ. NO. 004, 005, 006, 007

DECISION AND ORDER

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NEW YORK UNIVERSITY,

Third-Party Plaintiff,

- v -

ALL STATE INTERIOR DEMOLITION INC.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 184, 189, 192, 194, 195, 198, 241, 242, 243, 244, 245, 253, 257, 261, 270, 271, 272, 273, 274, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 185, 190, 193, 196, 197, 199, 236, 237, 238, 239, 240, 254, 255, 256, 258, 262, 275, 276, 277, 278, 279, 291

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 259, 263, 267, 268, 269, 280, 281, 282, 283, 284, 290, 292, 293, 294, 295, 296, 297, 298, 299, 300, 313, 314, 315

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 246, 247, 248, 249, 250, 251, 252, 260, 264, 265, 266, 285, 286, 287, 288, 289, 316, 317, 318, 319, 320, 321, 322, 323

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 004, 005, 006 and 007 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an asbestos abatement worker on July 6, 2013, when a pipe broke free from the ceiling and struck him in the head while he was working at a construction site located at 239 Greene Street in Manhattan (the Premises).

In motion sequence number 004, defendant Structure Tone Inc. (Structure Tone) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against it because it fails to state a cause of action. Structure Tone also moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, as well as granting its cross claims for contractual indemnification and breach of contract for the failure to procure insurance as against defendant/third-party defendant Allstate Interior Demolition Inc. (All State).

In motion sequence number 005, plaintiff Hector Pesantez moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240 (1) and 241 (6) claims against defendant/third-party plaintiff New York University (NYU).

In motion sequence number 006, NYU moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against it. NYU also moves, pursuant to CPLR 3212, for summary judgment in its favor on (1) its cross claims for common-law and contractual indemnification and breach of contract for the failure to procure insurance as against Structure Tone; and (2) its third-party claims for common-law and contractual indemnification and breach of contract for the failure to procure insurance as against All State.

In motion sequence number 007, All State moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party complaint, and all cross claims and counterclaims against it.

BACKGROUND

On the day of the accident, NYU was the owner of the Premises where the accident occurred. NYU hired Structure Tone to serve as the construction manager for a project at the Premises, which entailed its gut renovation (the Project). Structure Tone, in turn, hired All State to perform the demolition work. The Premises was known to contain asbestos, so NYU hired an environmental service contractor, nonparty JVN Restoration, Inc. (JVN), to abate the asbestos. Plaintiff was employed as an asbestos remover by JVN.

The complaint alleges causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) as against defendants NYU, All State and Structure Tone (collectively, defendants). Notably, plaintiff has withdrawn his common-law negligence and Labor Law § 200 claims as against defendant NYU only.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by JVN as an asbestos remover. Plaintiff's work included removing asbestos on the second floor of the Premises. His supervisor, Carlos Riera, was also a JVN employee. JVN supplied him with his asbestos removal clothing and gear, including hard hats. However, on the day of the accident, no hard hats were available.

Plaintiff testified that on the day of the accident, he arrived at work in the morning and put on his protective gear. He and his coworkers were then instructed to collect and dispose of asbestos that was found in vinyl floor tiles on the second floor.

According to plaintiff, there had been walls on the second floor, but they had been demolished prior to the accident, leaving the entire 80-foot by 80-foot area open. In addition, most overhead objects, such as drop ceilings and pipes, had been removed, leaving the ceiling bare concrete. However, in the area where he was assigned to work, a 10-foot long, 6-inch thick pipe (the Pipe) remained. The Pipe was connected to the ceiling by metal bars (the Hangars).

Plaintiff and his co-workers erected a containment/decontamination area (the Containment Area). Plaintiff noted that the Pipe was located above, but not within, the containment area. He explained that if he looked up, he could only see the Containment Area's plastic ceiling, and not the Pipe. At noon, after finishing the abatement procedure, plaintiff, Mr. Riera and another coworker began disassembling the Containment Area and removing debris and garbage. While filling a garbage bag, plaintiff "heard a strange sound," looked up and was struck in the head by the Pipe (Plaintiff tr. at 88).

During his deposition, plaintiff was shown a series of photographs that were taken shortly after the accident. These photographs show plaintiff lying on the ground next to the Pipe. Plaintiff testified that the photographs depicted the area where the Containment Area had been located prior to its disassembly.

Deposition Testimony of Maria Lavin (NYU's Senior Project Manager)

Maria Lavin testified that on the day of the accident, she was an architect employed by NYU as the senior project manager for the Project at the Premises. Her duties included "manag[ing] the vendors" and reviewing invoices and change orders (April 21, 2017 Lavin tr. at 10). She visited the site approximately once per week. As the Project's architect, Ms. Lavin was familiar with its scope, which included the demolition of all drop ceilings and pipes on the second floor.

Ms. Lavin testified that NYU hired Structure Tone as the construction manager for the Project, and that Structure Tone hired All State to perform the demolition work. She had no contact with All State and had no control over its work. NYU also hired JVN to perform asbestos abatement.

During her deposition, Ms. Lavin was shown several documents prepared by non-party Consulting & Testing Services Inc. (CTSI), the Project's environmental consultant. CTSI tested for the presence of asbestos at the Premises. According to Ms. Lavin, the documents indicated that CTSI found asbestos containing materials (ACM) in, amongst other things, some of the "pipe insulation" and "floor tile mastic" on the second floor of the Premises (July 19, 2017 Lavin tr. at 31).

When Ms. Lavin was asked if JVN performed any demolition work on any pipes at the Project, she responded "[n]o" (*id.* at 21). She explained that, if any pipes were found to be insulated with ACM, JVN would have removed the insulation before All State demolished the pipes.

Ms. Lavin also testified that if a contractor believed ACM was present in an area slated for demolition, it would stop work and contact her or CTSI to perform additional environmental testing. If ACM was detected, JVN would be called in to abate the condition, and all demolition work would stop. She asserted that while the area was being tested or abated, "there shouldn't be anybody else within that area who's not an abatement contractor" (April 21, 2017 Lavin tr. at 51).

Ms. Lavin recalled that when CTSI performed additional testing on the second floor, it found ACM "under a concrete pad" (July 19, 2017 Lavin tr. at 42). It was this newly discovered ACM that was being abated on the day of the accident.

At her deposition, Ms. Lavin reviewed photographs of the Pipe. She noted that it was wrapped with insulation, but she did not know whether that insulation contained asbestos. She testified that, had All State "identified horizontal piping . . . having suspect insulation," it, or Structure Tone, would have notified her of that problem (*id.* at 117). She did not recall ever receiving such a notification.

Deposition Testimony of Frank Rullo (All State's Comptroller)

Frank Rullo testified that on the day of the accident, he was All State's Comptroller, responsible for reviewing its daily work logs and preparing its weekly payroll. According to his records, no All State employees were present at the Premises on the day of the accident.

Mr. Rullo was unfamiliar with the specifics of All State's work at the Premises. He testified that All State had a safety manager at the Premises, Nick DiLeo, who was responsible for "mak[ing] sure that the area is safe, and people can pass by" (Rullo tr. at 60).

Deposition Testimony of Alan Topel (Structure Tone's Project Manager)

Alan Topel testified that on the day of the accident, he was employed as Structure Tone's project manager for the Project. His duties included overseeing and monitoring the Project's status. He explained that NYU hired Structure Tone as a construction manager. Structure Tone, in turn, hired several subcontractors, including All State, and employed its own superintendents to oversee the Project. The superintendents performed daily walkthroughs of the Project to make sure that the work was being performed timely, safely and properly. The superintendents would only be on site when Structure Tone workers or subcontractors were at the Premises.

Mr. Topel testified that Structure Tone's scope of work included the removal of drop ceilings and ceiling mounted pipes on the second floor. Mr. Topel testified that, if a pipe could not be removed, "we wouldn't leave a hazardous condition, we would safe anything off. And if

the pipes were live, active, we would only remove them when they became inactive" (Topel tr. at 43).

When pipes remained in the ceiling, Structure Tone would "walk through and make sure that the area was safe before anybody entered and/or continued work" (*id.* at 44). He reiterated that if there was an overhead hazard, such as the Pipe, "we would either safe off the area, secure the item, or remove the item" (*id.* at 45). Mr. Topel clarified that "we" included, *inter alia*, Structure Tone's laborers and, if they were not available, Structure Tone's superintendents (*id.* at 45).

Deposition Testimony of Carlos Riera (JVN's Supervisor)

Carlos Riera testified that on the day of the accident, he was employed as JVN's supervisor at the Project. Mr. Riera testified that JVN had completed its initial abatement work at the Premises prior to the start of demolition. However, the mechanical room on the second floor could not be abated until the "machines" inside it had been removed (Riera tr. at 21).

Several weeks later, after demolition had begun, JVN was asked to return to the Premises to perform additional abatement work. At that time, the machines in the mechanical room had been removed and the drop ceiling and the walls had been demolished. Mr. Riera noticed that, although the demolition company had removed most of the pipes, it "didn't remove the [pipes] that were in the mechanical room" where the abatement was taking place (*id.* at 53).

On the day of the accident, JVN was tasked only with "remov[ing] the floor" in the mechanical room (*id.* at 28). To that end, JVN's workers set up the Containment Area there. Part of the Containment Area was located near the Pipe, but its plastic roof was three feet below the Pipe, so that the Pipe was entirely outside of the Containment Area. JVN workers did not perform any abatement work on, or otherwise touch, the Pipe.

At his deposition, Mr. Riera was shown a photograph depicting an area of the second floor that included a pipe hanging from the ceiling. He confirmed that the photograph depicted the mechanical room and the Pipe, prior to its fall. Mr. Riera maintained that the Pipe did not connect to other pipes or enter a wall, and that "[t]he pipes were cut. You could see it" (*id.* at 133).

Mr. Riera was approximately 30 feet from plaintiff when the Pipe fell. He did not witness the accident but saw the immediate aftermath. He explained that debris from the ceiling – including at least some of the Hangars that had connected the Pipe to the ceiling – had fallen along with the Pipe.

Deposition Testimony of Farhood Selami (CTSI's Project Manager)

Selami was CTSI's project manager on the day of the accident. CTSI was hired by NYU to provide air quality testing and monitoring of the Premises to confirm the removal of asbestos. Mr. Selami's duties included overseeing the CTSI inspectors assigned to the Project. Mr. Selami described, in detail, CTSI's procedure for inspecting and locating ACM at the Project.

At his deposition, Mr. Selami reviewed the daily log for the day of the accident and confirmed that, on that date, JVN only removed floor tiles from the mechanical room on the second floor. Mr. Selami explained that the mechanical room had not been tested for asbestos prior to the initial demolition of the second floor, as NYU did not include that room in CTSI's scope of work. It was not until the demolition workers found suspected ACM in the floor tile that CTSI inspected the area.

Mr. Selami testified that there was documentation annexed to the daily log for the day of the accident showing that the floor tiles contained ACM and were targeted for removal. CTSI only found ACM in the floor tiles. There was "no evidence" that ACM was found elsewhere or

that JVN removed asbestos from anywhere else that day (Selami tr. at 97). Mr. Selami noted that, had JVN removed anything else (such as ACM on a pipe), "there would be [a] sampling protocol diagram" in CTSI's logs reflecting such work because "[b]y law, it has to go on the logbook" (*id.* at 97-98). There was no such diagram in the logbook.

Mr. Selami also reviewed a photograph of the Pipe. He testified that it was covered in "nonasbestos fiberglass" insulation (*id.* at 128). According to Mr. Selami, there was no record that the Pipe – or any horizontal pipe at the Premises – had been insulated with asbestos.

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 004, 005, 006, and 007)

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against NYU. NYU, Structure Tone and All State each move for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use,

or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Preliminary Issues

As the owner of the Premises where the accident occurred, NYU may be liable for plaintiff's accident under Labor Law §§ 240 (1) and 241 (6). That said, it must be determined whether Structure Tone, the construction manager, and All State, the demolition contractor, may also be liable for plaintiff's injuries under the Labor Law, as agents of the owner and/or general contractor.

> "[While] "a construction manager of a work site is generally not responsible for injuries under Labor Law §§ 240 (1) [and 241 (6)], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury."

(*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]);

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, plaintiff was injured when the 10-foot long Pipe that was slated for demolition detached from the ceiling and fell on plaintiff. Structure Tone and All State argue that they are

not proper Labor Law defendants and cannot be liable under Labor Law § 240 (1) as agents of the owner because they did not have the ability to supervise or control plaintiff's work for JVN.

However, the proper inquiry is not whether Structure Tone or All State had the ability to control plaintiff's work, but whether they supervised or controlled the activity which brought about the injury, i.e., the failure to properly secure the Pipe during the demolition process. Here, the record establishes, at a minimum, a question of fact as to whether Structure Tone and All State were responsible for securing the Pipe. Mr. Rullo testified that All State's safety manager was responsible for "mak[ing] sure that the area is safe, and people can pass by" (Rullo tr. at 60). In addition, Mr. Topol testified that Structure Tone was responsible for safety at the Project and that, where pipes remained in the ceiling, Structure Tone would "walk through and make sure that the area was safe before anybody entered and/or continued work," noting that "we wouldn't leave a hazardous condition, we would safe anything off" (Topol tr. at 43-44). Given this testimony, Structure Tone and All State have not established, as a matter of law, that they did not have the ability to supervise the injury producing work.

Thus, as a question of fact exists as to whether Structure Tone and All State are proper Labor Law defendants, they are not entitled to dismissal of the Labor Law § 240 (1) and 241 (6) claims on this ground.

It should be noted that Structure Tone moves to dismiss the complaint, pursuant to CPLR 3211 (a) (7), based entirely on the same argument, i.e. that it could not control or supervise plaintiff's work and is, therefore, not a proper Labor Law defendant. Said argument does not establish that plaintiff failed to allege a valid claim as against Structure Tone (*see Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]). Accordingly, Structure Tone is not entitled to dismissal of the complaint, pursuant to CPLR 3211 (a) (7).

Analysis

Plaintiff argues that he is entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because, while he was working at floor level, the Pipe broke free from the 12-foot high ceiling and fell on him, causing his injuries.

In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, a plaintiff must demonstrate that the object that fell – i.e., Pipe – was in the process of being hoisted or secured at the time of the accident, or that it "was a load that required securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York,* 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *see also Quattrocchi v F.J. Sciame Const. Corp.,* 11 NY3d 757, 758-59 [2008]["falling object" liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured]).

Here, plaintiff has established prima facie entitlement to summary judgment on the Labor Law § 240 (1) claim against NYU, because he has sufficiently established that the Pipe was a "load that required securing" during the demolition process, so that plaintiff could safely work beneath it (*Cammon*, 21 AD3d at 200; see *Zuluaga v P.P.C. Constr., LLC.*, 45 AD3d 479 [1st Dept 2007] [asbestos abatement worker injured by pipe that fell from above was entitled to summary judgment on Labor Law § 240 (1) claim]). In addition, given that the second floor of the Premises was an unfinished demolition zone and that ends of the Pipe had been "cut," additional safety precautions were necessary to protect workers that were required to work beneath the Pipe (Riera tr. at 133).

That the Pipe was held to the ceiling by hangars is of no moment as "[t]he availability of a particular safety device will not preclude liability 'if the device alone is not sufficient to

provide safety without the use of additional precautionary devices or measures'" (*Santos v Condo 124 LLC*, 161 AD3d 650, 658 [1st Dept 2018], quoting *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2016]).

In support of its motion for summary judgment dismissing the section 240 (1) claim, and in opposition to plaintiff's motion, NYU argues that Labor Law § 240 (1) is inapplicable because the Pipe was not a falling object as contemplated by the statute. Specifically, NYU argues that the Pipe did not fall because of the absence or inadequacy of a safety device. Rather, it argues, the Pipe, and the Hangar that supported it, were permanently affixed to the ceiling and, therefore, as it was unforeseeable that a permanent structure might fail, a safety device was not needed or even expected (*see Narducci,* 96 NY2d at 268 [where the plaintiff was injured when struck by falling glass window that was a permanent part of the structure, the Court determined that the subject glass "was not [the kind of] situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"]; *Buckley v Columbia Grammar & Preparatory,* 44 AD3d 263, 267-268 [1st Dept 2007] ["a worker who is . . . injured by the application of an external force is entitled to the protection of (section 240 [1]) only if the application of that force was foreseeable . . . . Thus, the determination of the type of protective device required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed"]).

Here, however, as the area where the Pipe was located was in the process of being demolished, there was a foreseeable risk of harm presented by the nature of the work being performed at the Premises. While it may not have been foreseeable that the Pipe would detach from the ceiling when left alone and untouched, once the gut renovation of the area began and the Pipe was cut, it was foreseeable that, without proper support, the Pipe might fall.

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

Structure Tone and All State argue that they cannot be liable for plaintiff's accident because, as soon as suspected ACM was found at the Premises, they ceased all work and left the area until the asbestos was abated. Therefore, they could not secure the Pipe. This argument is unpersuasive because "there is no proof that [the defendant contractor] was prevented from accessing the site before the asbestos removal" began in order to properly secure the area (*Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 658 [1st Dept 2010] [denying general contractor's summary judgment motion as to § 240 liability for injury to an asbestos worker, where, even though it was not permitted in the abatement area during the abatement project, it could have accessed the area and secured it prior to the start of abatement]).

The court has considered Structure Tone and All State's remaining contentions and has found them to be unavailing.

Thus, Structure Tone and All State are not entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against them.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 004, 005, 006 and 007)

Plaintiff moves for summary judgment in his favor on the Labor Law § 241 (6) claim against NYU. NYU, Structure Tone, and All State each move for summary judgment dismissing said claim against them.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross,* 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross,* 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, with the exception of sections 23-1.7 (a) (1) and (2), 23-1.8 (c) (1), 23-3.2 (a) (3) and 23-3.3 (b) (3), (c) and (g), plaintiff does not move for summary judgment in his favor as to those alleged violations, nor does he oppose their dismissal.[1] In fact, at oral argument on November 7, 2018, plaintiff conceded that the unaddressed Industrial Code provisions do not apply to the facts of this case. Accordingly, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on those abandoned provisions.

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[1] Plaintiff's brief cites to Industrial Code § 23-3.3 (a) (3). There is, however, no such provision. That said, plaintiff is clearly referring to § 23-3.3 (b) (3), and the court will analyze plaintiff's arguments on this section accordingly.

In addition, while plaintiff opposes defendant's motion with respect to the aforementioned Industrial Code sections, he only seeks summary judgment in his favor on the claim predicated on a violation of section 23-1.8 (c) (1).

Initially, Structure Tone and All State fail to make any specific arguments regarding plaintiff's Labor Law § 241 (6) claim, beyond the general argument that the Labor Law does not apply to them because they are not proper Labor Law defendants. As noted above, these defendants are not entitled to dismissal of the Labor Law § 241 (6) claims against them on this ground because question of fact exist as to this issue.

Thus, Structure Tone and All State are not entitled to summary judgment on that part of their motions that seek dismissal of the non-abandoned part of the Labor Law §241 (6) claim as against them.

Industrial Code 12 NYCRR 23-1.7 (a) (1) and (2)

Section 23-1.7 (a) (1) and (a) (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Murtha v Integral Constr. Corp.*, 253 AD2d 637, 639 [1st Dept 1998] [subsection (a) (1)]; *Griffin v Clinton Green S., LLC*, 98 AD3d 41, 49 [1st Dept 2012] [subsection (a) (2)]).

Section 23-1.7 (a) (1) provides, in pertinent part, the following:

> "(a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks . . . .
>
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

"[W]here an object unexpectedly falls on a worker in an area not normally exposed to such hazards, [section 23-1.7 (a) (1)] does not apply" (*Buckley v Columbia Grammar &*

Preparatory, 44 AD3d 263, 271 [1st Dept 2007]). Here, as NYU sets forth, while there is evidence that a single object fell in the work area, there is no evidence that the work area was "normally exposed to falling materials." In opposition, plaintiff fails to raise a question of fact as to whether the area, in fact, was normally exposed to falling materials.

Section 23-1.7 (a) (2), which governs protections from falling materials or objects in areas where "employees are not required to work or pass" is inapplicable to the facts of this case. While plaintiff was lawfully frequenting the area, it is undisputed that he was required to work in the area.

Thus, NYU is entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim premised on alleged violations of Industrial Code §§ 23-1.7 (a) (1) and (a) (2) as against it.

Industrial Code 12 NYCRR 23-1.8 (c) (1)

Section 23-1.8 (c) (1), known as the "safety hat provision," is "sufficiently concrete and specific in its mandate to support [a] plaintiff's Labor Law § 241 (6) claim" (*Singh v 106-108 Bayard St. Corp.*, 300 AD2d 31, 31 [1st Dept 2002]). It provides, in pertinent part, the following:

> "Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat."

Here, there is conflicting testimony as to whether hard hats were required and whether they were provided. Plaintiff testified that "[t]hey didn't have hard hats that day" (Plaintiff tr. at 107). In contract, Mr. Riera testified that hard hats were available and that he instructed his workers, including plaintiff, to use one, noting that "[y]ou are required to wear a hard hat in all construction areas" (Riera tr. at 173).

Accordingly, a question of fact exists as to whether plaintiff was provided with a safety hat. Thus, plaintiff is not entitled to summary judgment in his favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.8 (c) (1), and NYU is not entitled to summary judgment dismissing same.

Industrial Code 12 NYCRR 23-3.2 (a) (3)

Initially, section 23-3.2 (a) (3) is sufficiently specific to sustain a claim for liability under Labor Law § 241 (6) (*see Fenty v City of New York,* 71 AD3d 459, 460 [1st Dept 2010]). Section 23-3.2 (a) (3) provides, in pertinent part, as follows:

> "Where it is necessary to maintain any gas, electric, water, steam or other supply line during the demolition operations, such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person."

Here, the record reflects that the ends of the Pipe were cut and otherwise unconnected to other pipes or walls. Therefore, the Pipe was not being used to "maintain . . . a supply line during the demolition operations." Accordingly, section 27-3.2 (a) (3) is inapplicable to the facts of this case.

To the extent that it is argued that the Pipe could have been an active supply line at some time in the past, such argument is based on nothing but conjecture.

Thus, NYU is entitled to summary judgment dismissing that part of the section 241 (6) claim premised upon a violation of section 27-3.2 (a) (3).

Industrial Code § 23-3.3 (b) (3)

Section 23-3.3 (b) (3) is sufficiently specific to sustain a claim for liability under Labor Law § 241 (6) (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 12 [2011]). Section 23-3.3 governs demolition by hand.

Section 23-3.3 (b) (3) provides as follows:

> "(b) Demolition of walls and partitions
>
> * * *
>
> (3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration."

Here, the record does not sufficiently establish whether the Pipe had been supported in part by a wall or partition that was demolished by hand, or whether such demolition left the pipe in an "unguarded" condition. Accordingly, questions of fact remain with respect to whether section 23-3.3 (b) (3) applies to the facts of this case.

Thus, NYU is not entitled to summary judgment dismissing section 23-3.3 (b) (3).

Industrial Code 12 NYCRR 23-3.3 (c)

Section 23-3.3 (c) is sufficiently specific to sustain a claim for liability under Labor Law § 241 (6) (*see Willinski,* 18 NY3d at 12). Section 23-3.3 (c) provides, as follows:

> "(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

"The thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work" (*Willinski,* 18 NY3d at 12 [internal quotation marks and citation omitted]).

NYU argues that this provision cannot apply because plaintiff was performing asbestos removal work, and not demolition work. "Demolition" is defined in the Industrial Code as

"work incidental to or associated with the total or partial dismantling or razing of a building . . ." (Industrial Code § 23-1.4 [b] [16]).

Here, the removal of asbestos at the Premises was incidental to or associated with the overall demolition and gut renovation project (*see Medina v City of New York,* 87 AD3d 907, 909 [1st Dept 2011] [finding question of fact as to whether plaintiff's work was related to demolition due to the "general context of the work" and the project as a whole]). Accordingly, this provision may apply to plaintiff's accident.

The record supports the position that the Pipe had been cut as a part of the demolition work. Based on this, the Pipe was "loosened material," a type of hazard contemplated by section 23-3.3 (c). That said, the record is not clear as to whether "continuing inspections" of the type mandated by the provision took place, or whether the failure to inspect was a proximate cause of the accident.

Thus, NYU is not entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon an alleged violation of section 23-3.3 (c).

Industrial Code § 23-3.3 (g)

Section 23-3.3 (g) is sufficiently specific to support a Labor Law § 241 (6) claim (*Zuluaga v P.P.C. Constr., LLC,* 45 AD3d 479, 480 [1st Dept 2007]). Section 23-3.3 (g) provides, in pertinent part, as follows:

> "Every floor or equivalent area within the building or other structure that is subject to the hazard of falling debris or materials from above shall be boarded up to prevent the passage of any person through such area, or shall be fenced off by a substantial safety railing . . . or such area shall be provided with overhead protection in the form of tight planking at least two inches thick . . ."

Here, NYU only argues that this provision applies to areas subject to falling debris generated by workers situated above the area and, because there were no workers above plaintiff,

this provision cannot apply. However, the text of section 23-3.3 (g) does not limit its scope in such a way, and NYU cites no case law that has interpreted such a limitation into this provision.

Thus, NYU has failed to establish its prima facie entitlement to summary judgment dismissing that part of the § 241 (6) claim that is predicated on a violation of section 23-3.3 (g).

The Common-Law Negligence and Labor Law § 200 Claim (Motion Sequence Numbers 004, 006, and 007)

NYU, Structure Tone and All State each move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

Initially, as plaintiff has withdrawn his common law negligence and Labor Law § 200 claim as against NYU, that portion of NYU's motion that seeks summary judgment on those claims is moot and dismissed as academic.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus*

Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, as discussed previously, plaintiff was injured when an insufficiently secured 10-foot long section of pipe detached from the ceiling and fell on him. Therefore, plaintiff's accident arose from the means and methods of work performed at the Premises – i.e. the securing of the Pipe during demolition.

Notably, in their motions, Structure Tone and All State merely reiterate that they are entitled to dismissal of these claims because they had no control over plaintiff's work. However, the proper standard to apply in a means and methods analysis is whether defendants supervised and controlled the injury producing work, i.e. the proper securing of the Pipe during demolition. Here, the record establishes, at a minimum, a question of fact as to whether Structure Tone and

All State supervised the securing of the Pipe. As to All State, Mr. Rullo testified that it was responsible for its own work and employed its own safety supervisor. As to Structure Tone, Mr. Topol testified that it employed superintendents who specifically walked the floor, noting that Structure Tone would "walk through and make sure that the area was safe before anybody entered and/or continued work" (Topol tr. at 30). Mr. Topol also testified that Structure Tone's own laborers and superintendents would "safe off" any hazardous condition, such as the Pipe, if necessary (*id.* at 43-44).

Structure Tone and All State's additional arguments – that they were required to immediately stop work upon finding the suspected asbestos floor tiles, even if such stoppage would leave a partially-demolished pipe unsecured – are also insufficient, as a matter of law, to establish their freedom from liability under Labor Law § 200. Here, the record does not sufficiently establish that an immediate stop-work requirement existed or that, if it did, it would obviate either parties' Labor Law § 200 duty to "provide reasonable and adequate protection to the lives, health and safety of all persons employed" on the Project, such as plaintiff (Labor Law § 200; *see Moracho,* 74 AD3d at 658 [discussed above]).

Thus, Structure Tone and All State are not entitled to summary judgment dismissing the common-law negligence or Labor Law § 200 claims against them.

Structure Tone's Cross Claim for Contractual Indemnification Against All State (Motion Sequence Number 004 and 007)

Structure Tone moves for summary judgment in its favor on its cross claim for contractual indemnification as against All State. All State moves for summary judgment dismissing said cross claim against it.

Additional Facts Relevant to This Issue

The Structure Tone-All State Subcontract

The Structure Tone-All State subcontract, dated 3/20/12 (the Subcontract), governs All State's demolition work on the Project. The Subcontract contains an indemnification provision that provides, in pertinent part, as follows:

> "11. The insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by [All State], the terms of which are incorporated herein. . . ."

(Structure Tone's Notice of Motion, Exhibit H, at 2 [the Subcontract]).

The Blanket Insurance/Indemnity Agreement (the Structure Tone-All State Indemnity Agreement) provides, in pertinent part, the following:

> "6. To the fullest extent permitted by law, and except to the extent of [Structure Tone's] and owner's negligence, [All State] agrees to hold [Structure Tone] and owner . . . harmless against any claims . . . incurred because of the injury to or death of any person . . . or any other claim arising out of or in connection with or as a consequence of the performance of the work under this agreement..."

(Structure Tone's Notice of Motion, Exhibit I, at 5). The Structure Tone-All State Indemnity Agreement also expressly contemplates "partial contractual indemnification for any percentage of fault or negligence not attributable to [Structure Tone]" (*id.* at 6).

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

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Here, the indemnification provision applies to plaintiff's accident because the accident arose from, or was connected to, All State's demolition work. However, because issues of fact remain as to Structure Tone's active negligence with respect to securing the Pipe, Structure Tone is not entitled to full contractual indemnification at this time. That said, the indemnification provision clearly contains the appropriate limiting language, as required by General Obligations Law § 5-322.1 and allows Structure to obtain partial indemnification from All State for that part of plaintiff's accident that is not attributable to Structure Tone's negligence.

Accordingly, Structure Tone is entitled to conditional summary judgment on its claim for contractual indemnification against All State, and All State is not entitled to summary judgment dismissing the same. The extent of Structure Tone's indemnification will depend on "the extent to which any negligence on its part is found to have contributed to the accident" (*Cuomo v 53rd and 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013]; *see also Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007] [conditional summary judgment may be granted where "it serves the interest of justice and judicial economy in affording the indemnitee 'the earliest possible determination as to the extent to which he may be expected to be reimbursed'"]).

Structure Tone's Cross Claim for Breach of Contract for the Failure to Procure Insurance Against All State (Motion Sequence Number 004 and 007)

Structure Tone moves for summary judgment in its favor on its cross claim against All State for breach of contract for the failure to procure insurance. All State moves for summary judgment dismissing same.

In its motion, Structure Tone notes that All State "procur[ed] insurance as mandated" (Joyce affirmation in support, ¶ 67). Thus, as Structure Tone acknowledges that All State procured insurance, Structure Tone is not entitled to summary judgment in its favor on its cross-claim against All State for breach of contract for the failure to procure said insurance.

Similarly, given that All State's insurance policy and a certificate of insurance are contained in the record, All State is entitled to summary judgment dismissing this claim.

NYU's Cross Claim for Contractual Indemnification Against Structure Tone (Motion Sequence Number 006)

Additional Facts Relevant to This Issue

The NYU-Structure Tone contract (the NYU-Structure Tone Contract) consists of two components; the Master Construction Management Agreement, dated December 12, 2007 (the MCMA) and the AIA Standard Form of Agreement Between Owner and Contractor (the SFA) (NYU's notice of motion, exhibits P and Q, respectively). The SFA explicitly adopts and incorporates the entirety of the MCMA.

In addition, the SFA's scope of work is defined as the "Steinhardt School Phase I Interior Renovations & Infrastructure Upgrades" (*id.*, exhibit Q, ¶ 1). At her deposition, Ms. Lavin confirmed that that "the Steinhardt School renovation project" included the Project at the Premises. In addition, Ms. Lavin confirmed that the SFA was the contract for the Project (Lavin tr. at 10).

The NYU-Structure Tone Contract contains an indemnification provision that provides, in pertinent part, as follows:

> "SECTION 12. Indemnification (a) Indemnification against Death, Injury or Damage. [Structure Tone] shall, and shall cause all Subcontractors . . . to indemnify and hold harmless, NYU . . . from and against any and all claims . . . arising out of injuries to or death of any person(s) . . . caused by, resulting from, incident to, connected with, or growing out of the acts or omissions of [Structure Tone], or any Subcontractor, or any tier of Sub-subcontractor in connection with the Work.

(NYU's notice of motion, exhibit P at 39-40, the MCMA).

Here, as discussed above, the accident occurred when the Pipe fell from the ceiling and struck plaintiff. The record establishes that (1) the demolition of the Pipe was within the scope of Structure Tone's work, (2) Structure Tone subcontracted the demolition work to All State, and (3) both Structure Tone and All State had contractual safety responsibilities with respect to the Pipe.

Accordingly, the accident was caused by or grew out of the acts or omissions of Structure Tone and/or All State. Therefore, the indemnification provision is triggered, and Structure Tone is required to indemnify NYU for plaintiff's accident. In addition, because NYU's liability in this action is based solely on statutory liability under the Labor Law, it is entitled to full contractual indemnification from Structure Tone (*Correia v Professional Data Mgt.*, 259 AD2d at 65).

In opposition, Structure Tone raises no questions of fact as to the validity of the NYU-Structure Tone Contract or its applicability to the Project or to plaintiff's accident.

Thus, NYU is entitled to summary judgment in its favor on its cross claim for contractual indemnification as against Structure Tone.

NYU's Third-Party Claim for Contractual Indemnification Against All State (Motion Sequence Number 006 and 007)

NYU moves for summary judgment in its favor on its third-party claim for contractual indemnification against All State. All State moves for summary judgment dismissing same.

NYU relies on the language in the Structure Tone-All State Indemnity Agreement, discussed *supra*, to establish that All State also owes it direct indemnification in this action. The indemnification provision in the Structure Tone-All State Indemnity Agreement requires All State to indemnify not only Structure Tone, but also "the owner" (Structure's Notice of Motion, Exhibit H, at 5). It is uncontested that NYU is the owner of the Premises. In addition, as discussed above, plaintiff's accident arose "out of or in connection with or as a consequence" of All State's demolition work at the Premises (*id.*). Accordingly, NYU is entitled to indemnification from All State.

In opposition, All State fails to raise a question of fact as to the applicability of the indemnity provision.

Thus, NYU is entitled to summary judgment in its favor on its third-party claim for contractual indemnification as against All State and All State is not entitled to summary judgment dismissing same.

NYU's Claims for Breach of Contract for the Failure to Procure Insurance (Motion Sequence Number 006 and 007)

NYU moves for summary judgment in its favor on its cross claim for breach of contract for the failure to procure insurance as against Structure Tone. In addition, NYU moves for summary judgment in its favor on its third-party claim for the same as against All State. All State moves for summary judgment dismissing the claim as against it.

Notably, All State does not address NYU's failure to procure insurance claim in its own motion. Accordingly, because it raises no argument, All State has not met its prima facie burden and this part of its motion for summary judgment is denied.

NYU argues that Structure Tone and All State's policies fail to name NYU as an additional insured. However, Structure Tone and All State's policies both contain broad form additional insured endorsements that provide additional insured status when required by contract, as is the case here. Whether those additional insured endorsements apply or trigger, or whether some exclusion or exception applies are not at issue before this court.

Accordingly, NYU has failed to establish as a matter of law that Structure Tone or All State failed to procure insurance. Thus, NYU is not entitled to summary judgment in its favor on its claims for breach of contract for the failure to procure insurance as against Structure Tone and All State.

NYU's Cross Claims and Third-Party Claims for Common-Law Indemnification (Motion Sequence Number 006 and 007)

NYU moves for summary judgment in its favor on its cross claim for common-law indemnification as against Structure Tone and on its third-party claim for the same as against All State. All State moves for summary judgment dismissing same.

"To 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 at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

As discussed above, a question of fact exists as to whether the proposed indemnitors – i.e. Structure Tone or All State – were guilty of any negligence (rather than a statutory violation) that contributed to plaintiff's accident. Thus, NYU is not entitled to summary judgment in its favor on its common-law indemnification claims as against Structure Tone and All State, and All State is not entitled to summary judgment dismissing same.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant Structure Tone Inc.'s (Structure Tone) motion (motion sequence 004), pursuant to CPLR 3211 to dismiss the complaint and all cross claims as against it is denied; and it is further

ORDERED that the part of Structure Tone's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent of dismissing the Labor Law § 241 (6) claim as against it with respect to those claims abandoned by plaintiff, and that part of Structure Tone's motion is otherwise denied; and it is further

ORDERED that the part of Structure Tone's motion, pursuant to CPLR 3212, for summary judgment in its favor on its cross claims against defendant/third-party defendant All State Interior Demolition Inc. (All State) is granted to the extent that it is awarded conditional summary judgment for contractional indemnification against All State in the event that All State is found liable for plaintiff's injuries, and the motion is otherwise denied; and it is further

ORDERED that the part of plaintiff Hector Pesantez's motion (motion sequence 005), pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor

Law § 240 (1) claim against defendant New York University (NYU) is granted, and the motion is otherwise denied; and it is further

ORDERED that the part of NYU's motion (motion sequence 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent of dismissing the Labor Law § 241 (6) claim as against it with respect to those claims abandoned by plaintiff, and those claims predicated upon violations of Industrial Code §§ 23-1.7 (a) (1) and (2), and 23-3.2 (a) (3), and that part of NYU's motion is otherwise denied; and it is further

ORDERED that the part of NYU's motion, pursuant to CPLR 3212, for summary judgment in its favor on its cross claims against Structure is granted as to the contractual indemnification claim only, and is otherwise denied; and it is further

ORDERED that the part of NYU's motion, pursuant to CPLR 3212, for summary judgment in its favor on its third-party claims against All State is granted as to the contractual indemnification claim only, and is otherwise denied; and it is further

ORDERED that the part of All State's motion (motion sequence 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted to the extent of dismissing the Labor Law § 241 (6) claim as against it with respect to those claims abandoned by plaintiff, and that part of All State's motion is otherwise denied; and it is further

ORDERED that the part of All State's motion, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, and all cross claims against is granted to the extent that Structure Tone's cross claim for breach of contract for the failure to procure insurance is dismissed; and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

2/14/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE