SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DOMINGO ARMENTAL, JOY ARMENTAL,

Plaintiffs,

- v -

401 PARK AVENUE SOUTH ASSOCIATES, LLC, *et al.*,

Defendants.

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INDEX NO. 151083/2015

MOTION DATE

MOTION SEQ. NO. 008, 009, 010, 011

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 008) 222 - 237, 309, 313 - 322, 348 - 358, 381 - 439, 620, 623, 624, 625, 626, 631, 637, 642, 650

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 256 - 278, 310, 337, - 347, 440, 442 - 500, 619, 627, 638, 643

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 238 - 255, 279, 311, 323 - 333, 359 - 369, 441 - 559, 621, 622, 628, 634, 639, 644

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 280 - 308, 312, 334, 335, 336, 370 - 380, 560 - 618, 629, 632, 633, 635, 636, 640, 641, 645 - 648

were read on this motion to/for summary judgment.

By notice of motion, defendant Intel Plumbing and Heating, LLC moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross claims against it. Defendants (collectively, 401 defendants) and third-party plaintiff United Alliance Enterprises, Inc. oppose, as does third-party defendant Alliance Building Systems, LLC d/b/a Elite Glass (Elite). Plaintiffs also oppose and, by notice of cross motion, move for an order granting them summary judgment

on their Labor Law and common law negligence claims. Intel, Elite, and United Alliance oppose the cross motion. (Mot. seq. eight).

By notice of motion, 401 defendants move pursuant to CPLR 3212 for an order: (1) dismissing plaintiffs' Labor Law § 240(1) claim; (2) dismissing plaintiffs' claims against defendant Meringoff Properties, Inc.; (3) granting them common law indemnification from defendants United Alliance, Elite, Independent Mechanical, Inc., and Intel; (4) granting defendant WeWork Companies, Inc. contractual indemnification; and (5) granting defendant WW 401 Park Avenue LLC contractual and/or common law indemnification from Elite. Plaintiffs oppose, and Elite and Intel partially oppose. (Mot. seq. nine).

By notice of motion, Independent moves for summary dismissal of the complaint and all cross claims against it. Plaintiffs, Elite, and United Alliance oppose, and 401 defendants partially oppose. (Mot. seq. 10).

By notice of motion, United Alliance moves pursuant to CPLR 3212 for an order summarily dismissing plaintiffs' claims against it and granting it indemnification against certain defendants. Plaintiffs and Elite oppose, and 401 defendants and Independent partially oppose. (Mot. seq. 11).

I. BACKGROUND

A. Plaintiffs' pleadings (NYSCEF 28, 291)

In their third amended complaint, plaintiffs allege that on May 5, 2014, plaintiff Domingo Armental, Jr. was injured while working for Elite at a construction project at premises located at 401 Park Avenue South in Manhattan. They contend that Domingo fell as a result of a dangerous and hazardous tripping condition, including "scattered construction pipes and rods, tools, equipment and material, and accumulations of dirt and debris, and obstructions and conditions."

They state in their bill of particulars, that Domingo's foot rolled on a loose pipe as he stepped down from a pile of pipes, causing him to fall.

B. The parties

Defendant 401 Park Avenue South Associates, LLC owns the premises, and WW 401 Park Avenue South, LLC leased from it the eighth, ninth, and tenth floors. Several defendants, including WeWork, own undivided percentages in the premises' fee ownership. WeWork was to be the tenant of the three floors. It hired United Alliance as the general contractor to renovate them. United Alliance hired Independent to install a fire protection sprinkler system, Intel to perform plumbing work, and Elite to install glass partition walls.

C. Pertinent deposition testimony

1. Domingo (NYSCEF 227, 228)

Domingo worked for Elite as foreperson for the project. He reported and took directions from Elite's owner only. Elite reported to United Alliance which was in charge of overall site safety and trash removal. Safety meetings were held weekly, and occasionally a WeWork representative would attend them.

About four to five weeks before his accident, Domingo complained to a United Alliance foreman that he could not install certain doors on the tenth floor because there was black pipe in his way. The pipe and other pipes had been there for at least two months prior thereto. He did not know which contractor was responsible for the black pipe, but he believed that the pipes were sprinkler pipes, having seen them used on the ninth floor as well. While the foreperson said he would take care of it, the black pipe was shifted to another side of the room. As the pipes were in the way, Domingo would take a different way to avoid them. A week before the accident, he

lodged another complaint with the United Alliance foreperson about the pipes and asked him to move them so that Elite could perform its work.

On the date of his accident, Domingo ascended a staircase from the eighth floor to retrieve his toolbox on the tenth floor. The box was in a hallway office reached through a doorway that was then blocked by the 12-foot long pipes which were stacked or piled in a two-foot high and four-foot wide pyramid on the ground. The pile blocked the doorway and was parallel to it. The distance from the staircase to the doorway was 30 to 40 feet.

When Domingo entered the tenth floor, he noticed that 30 to 40 dumpsters blocked his way to the hallway, but for a two-foot wide path between them that led to the doorway and the pipes. As there was no other way for him to access the hallway, Domingo followed the path and stepped onto the pipes to get over them. He went through the doorway and entered the hallway into the room. The pipes neither shifted nor moved when he first stepped on them. He then received a telephone call about a problem on the ninth floor, so he proceeded there, retracing his steps and walking over the pipes. There was no need for him to rush or run to the ninth floor. As he stepped down from the pile of pipes, one "rolled out from under [his] foot." Unable to balance himself, he fell down.

Domingo stated that he fell when, while walking over the pipes, one of them rolled from under his foot. While he could not characterize the accident as a "slip," he denied having tripped over the pipes. He also denied having fallen from a height or that any item of safety equipment could have been offered on the date of his accident that would have prevented his fall, admitting that the presence or absence of a ladder, sling, hammer, block, pulley, brace, iron, rope, or other loose tool had nothing to do with his accident, and that he had never before complained that the pipes were a tripping hazard, and that no one had tripped on them before his accident.

2. United Alliance (NYSCEF 234)

a. Site superintendent

United Alliance's site superintendent for the project described the room on the tenth floor where Domingo had fallen as an area outside a freight elevator where deliveries were stored and materials taken by contractors as needed. The pipes were also stored there. He oversaw the construction and ensured that the contractors were properly performing their work. United Alliance was also in charge of safety management, including directing the workers to organize materials, sweep the floors, and keep the place clean. If workers were directed by United Alliance to move their equipment and failed to do so, United Alliance would do it.

The superintendent did not recall receiving complaints about pipes on the floor.

United Alliance was also responsible for the removal of debris, which would be loaded in the dumpsters. Typically, eight dumpsters were placed on each floor, and emptied and moved every or every other day as they filled up.

From plaintiffs' photograph of the pipes on which Domingo fell, the superintendent identified the pipes as sprinkler pipes, and not plumbing pipes. He had instructed the sprinkler contractor to place the pipes for storage in the open area on the tenth floor. If the pipes were in the way of work to be done, he may have instructed the contractors to move them, and if they did not, he would have done so. Nonetheless, he did not believe that workers had to climb on or over the pipes to get into the hallway given the availability of three other hallways and as the hallway at issue "was not a means of egress at [that] stage of construction," so that "traffic was diverted to an alternate corridor." He directed that the pipes be placed in front of the doorway to create space to do other work on the floor, and the area with the pipes was closed or sealed off, and "nobody was to be walking through while that work was taking place."

b. Project manager (NYSCEF 320)

United Alliance's project manager coordinated with the contractors but did not manage their day-to-day work. According to him, the pipes used by Independent on the job were black sprinkler pipes, as depicted in a photograph furnished by plaintiff that also showed equipment used by a sprinkler contractor. He believed that the pipes on which Domingo fell belonged to Independent and/or Denko. Most of the pipes used by Intel on the job were copper. Besides Intel, Denko Mechanical, Inc. also performed plumbing work on the project, and he witnessed Denko bringing sprinkler pipes to the site. Independent and Denko were owned by the same person, and both worked on the project.

During weekly meetings, the project manager coordinated the delivery of materials and instructed the contractors on where to place them; the contractors were responsible for the removal of materials, while United Alliance controlled the placement and removal of dumpsters at the site. The project manager was also in charge of addressing safety issues, and the site superintendent reported to him. If a safety issue was raised during a meeting, the project manager decided how to address it. He received no complaints related to pipes. There was no safety consultant employed on the project. Rather, each contractor was responsible for its own employees, equipment, material, and safety issues.

The project manager believed that sprinkler pipes were delivered to the tenth floor on the day of Domingo's accident, and he did not tell the contractors where to place the pipes. Had he seen pipes located in an improper or unsafe area, he would have told the contractor's foreperson about it.

At the weekly meeting held before Domingo's accident, the contractors were told that no one was to use the hallway behind the doorway or work in the area where Domingo subsequently

fell. He was surprised to see Domingo there.

II. APPLICABLE LAW

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

III. INTEL'S MOTION

Domingo and other witnesses to his accident identified the pipes on which he fell as black pipes, and Intel's witness testified that he stacked the black pipes he used while working for Intel on the project in piles on the tenth floor. Thus, even if Intel establishes, *prima facie*, that the pipes on which Domingo had tripped did not belong to it, triable issues of fact exist as to the pipes' ownership given the other parties' submissions. (*See e.g., Morales v 320 E. 176th St., LLC*, AD3d , 2019 NY Slip Op 01711 [1st Dept 2019] [party's challenge to credibility of plaintiff's evidence is for trier of fact]; *S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, AD3d , 2019 NY Slip Op 01706 [1st Dept 2019] ["(w)here two different conclusions may reasonably be reached from the evidence, a motion for summary judgment should be denied"]).

However, Intel alleges that it may not be held liable under Labor Law §§ 240(1) or

241(6) as it was not an owner, contractor or agent under those laws. Plaintiffs assert that a subcontractor may be held liable if it supervises the work from which the accident arose.

A subcontractor may be held liable if it has the authority to supervise and control the work which leads to the injury. (*Van Blerkom v Am. Painting, LLC*, 120 AD3d 660 [2d Dept 2014]). Here, plaintiff was on his way to retrieve his toolbox when he stepped on the pipes and fell. There is no allegation or evidence that Intel had the authority to supervise and control Domingo's work. Intel's alleged supervision and control of the placement of the pipes is insufficient. (*See Iveson v Sweet Assocs., Inc*., 203 AD2d 741, 742 [3d Dept 1994] ["the determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed"]; *see also Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586 [1st Dept 2013] [no evidence that subcontractor was delegated authority to control and supervise work site, including plaintiff's work, or undertook overall responsibility for ensuring safety]; *Serpe v Eyris Prods., Inc*., 243 AD2d 375 [1st Dept 1997] [no evidence that subcontractor controlled work area or had authority to insist that safety precautions be taken regarding plaintiff's work]; *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034 [4th Dept 1997] [fact that subcontractor owned and assembled scaffold from which plaintiff fell did not establish control over work being performed and authority regarding safety practices]).

Intel thus establishes that it may not be held liable pursuant to Labor Law §§ 240(1) or 241(6), and plaintiffs raise no triable issue in opposition.

IV. PLAINTIFFS' CROSS MOTION AND DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' CLAIMS

A. Timeliness of cross motion

Intel contends that plaintiffs' cross motion is untimely, having been filed 109 days after

they filed their note of issue in violation of my part rules requiring that summary judgment motions be filed within 60 days after the note of issue is filed. It observes that plaintiffs do not even mention that the motion is untimely or offer an excuse for it. (NYSCEF 623).

There is no dispute that the cross motion is untimely and plaintiffs offer no good cause for the delay. (*Muqattash v Choice One Pharmacy Corp*., 162 AD3d 499 [1st Dept 2018]). Moreover, Intel moved for dismissal of all of plaintiffs' Labor Law claims (NYSCEF 223), whereas plaintiffs in their cross motion move for judgment on the same claims but do so against all defendants. Consequently, it is not a proper cross motion. (*Id.* at 500). However, plaintiffs filed the identical cross motion in response to all four summary judgment motions filed by defendants in this matter. Thus, while the cross motion as against Intel's motion may not raise issues nearly identical to those raised by Intel, the cross motion raises issues that are nearly identical to those raised by the other defendants, and thus may be considered on its merits.

B. Labor Law § 240(1)

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

The statute imposes absolute liability on building owners and their agents for workplace injuries. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). Its purpose "is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), and even if they exercise no supervision or control over

the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Labor Law § 240(1) "was designed 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). It protects workers against "'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured," and the hazards are "limited to 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*, 81 NY2d at 501, quoting *Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991]). The "special hazards . . . do not encompass *any and all perils* that may be connected in some tangential way with the effects of gravity." (*Ross,* 81 NY3d at 501 [emphasis in original]).

It is undisputed that Domingo's work site was neither elevated nor positioned below materials or a load being hoisted or secured. He concedes that he did not fall from a height, nor was he struck by a falling object. Plaintiffs' assertion that Domingo's accident was gravity-related wrongly presupposes that whenever a worker climbs onto an object placed on a floor and then slips and falls from it, the accident is gravity-related. Such a finding would be antithetical to the aim of the statute, which is meant to apply in limited situations. Thus, in *Rocovich*, the Court held that a worker's slip and fall into a trough was not covered by the Labor Law § 240, as the worker's proximity to the trough did not entail "an elevation-related risk which called for any of

the protective devices of the type listed in" the statute. (78 NY2d at 514-515; *see also Torkel v NYU Hosps. Ctr.*, 65 AD3d 587 [1st Dept 2009] ["hazards that warrant protection contemplated by the statute are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level"]).

Here, plaintiffs do not establish that the accident is elevation-related. The height of the pile of pipes does not make it so absent any allegation that the accident was caused by or related to the force of gravity on him. Rather, he claims that he slipped when a loose pipe rolled under his foot. (*See e.g., German v Antonio Dev., LLC*, 128 AD3d 579, 579 [1st Dept 2015] [accident not covered by § 240(1) as plaintiff "not struck by any object, elevated or otherwise; rather, he slipped on a wet steel grate, and thus, the impetus for his fall was his slipping, not the direct consequence of gravity"]; *Mitchell v County of Jefferson*, 226 AD2d 1109 [4th Dept 1996], *lv denied* 91 NY2d 801 [1997] [injury not related to effects of gravity where plaintiff fell three to four feet after stepping on and falling off of pile of debris]).

In *Arrasti v HRH Constr. LLC*, the Court held that a ramp from which the plaintiff had fallen was a device used to protect against an elevation-related risk and thus should have been equipped with safety devices. (60 AD3d 582 [1st Dept 2009]). Here, by contrast, there is no evidence, nor even an allegation, that the pile of pipes or the surface of the tenth floor constituted a device used to protect against an elevation-related risk. (*See Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 [2008] [where plaintiff stood atop bundles of trusses some 10 feet above ground and another bundle began to roll over on top of him, and he climbed onto bundle which then collapsed and injured him, plaintiff did not provide evidence that fall resulted from lack of safety device, even if his work was elevated]; *see also Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425 [4th Dept 2011] [plaintiff stood on four-foot pile of rebar when pile shifted, striking his foot and

throwing him to ground; Labor Law § 240(1) not implicated as he was not struck by falling object and rebar did not fall while being hoisted or secured]).

Domingo also testified that there was no safety equipment with which he could have been provided, thereby further demonstrating that his claim is not covered by Labor Law 240(1), which requires a showing that either safety equipment was provided but it was defective or that no equipment was provided but should have been. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish that there is safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] ["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"]).

Plaintiffs thus fail to establish that Domingo's accident is covered by Labor Law § 240(1). (*See e.g., Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015] [where plaintiff slipped on ice on floor while wearing stilts, accident not gravity-related as injuries were not direct consequence of elevation-related risk, but "separate or ordinary tripping or slipping hazard"]; *Grabar v Nichols, Long & Moore Constr. Corp.*, 147 AD3d 1489 [4th Dept 2017], *lv denied* 29 NY3d 909 [where plaintiff fell from trailer 20 inches above ground, accident not covered by Labor Law § 240(1) as work on trailer not elevation-related risk contemplated by statute]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214 [2d Dept 2017] [where plaintiff slipped and fell on unsecured paper placed on staircase step, injuries were not direct consequence of application of force of gravity to object or person]).

As the other defendants also move for dismissal of this claim on their motions, it is dismissed.

C. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendants violated a regulation setting forth a specific standard of conduct.

I address the Industrial Code sections cited by plaintiffs in their cross motion. Code violations not cited therein were withdrawn by plaintiffs' counsel at oral argument. (NYSCEF 650).

1. Industrial Code § 23-1.5(a)

Section 23-1.5(a) is insufficiently specific to support a Labor Law violation. (*McLean v Tishman Constr. Corp*., 144 AD3d 534 [1st Dept 2016]; *Kochman v City of New York*, 110 AD3d 477 [1st Dept 2013]).

2. Industrial Code § 23-1.7(e)
(tripping hazards in passageways)

Having characterized his fall in his bill of particulars as resulting from his foot "rolling" on a pipe that had gotten underneath his foot, denied that he tripped over the pipes, and asserted that he walked over them and a pipe rolled from under this foot (NYSCEF 226, 227), this section is inapplicable. (*See Costa v State of New York*, 123 AD3d 648 [2d Dept 2014] [tripping hazard section of Code did not apply as plaintiff did not trip, but instead he stepped onto three to four-feet high stack of wood that gave way, causing him to fall; moreover, wood stack could not be considered tripping hazard]; *Stier v One Bryant Park LLC*, 113 AD3d 551 [1st Dept 2014] [plaintiff did not trip but slipped on unsecured piece of Masonite, which was not tripping hazard]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541 [1st Dept 2013] [as plaintiff slipped and fell on debris, Code section dealing with tripping hazards inapplicable]; *Purcell v Metlife Inc*.,

108 AD3d 431 [1st Dept 2013] [no evidence plaintiff tripped, but rather he slipped on wet plywood]).

3. Industrial Code § 23-2.1(a)(1)
(all building materials shall be stored in a safe and orderly manner, and material piles shall be stable under all conditions and located so that they do not obstruct passageways, walkways, stairways, or other thoroughfare)

Given the evidence that the staircase from the eighth floor led Domingo to the open work area on the tenth floor, that there were dumpsters throughout the open area, that the pipes were blocking a doorway which led to a hallway, and that the accident occurred in front of the doorway, while the pipes may have obstructed access to the entrance of the hallway, they did not obstruct the hallway. (*See e.g., Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018] [term "passageway" synonymous with corridor or hallway, and "pertains to an interior or internal way of passage inside a building"]; *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408 [1st Dept 2013] [Industrial Code section inapplicable as plaintiff did not allege that accident occurred in passageway, walkway, stairway, or other thoroughfare]).

Thus, this section of the Code is inapplicable. (*Purcell*, 108 AD3d at 432 [plaintiff not injured in "passageway" but rather open-work area of work site]; *Guallpa v Leon D. DeMatteis Constr. Corp*., 121 AD3d 416 [1st Dept 2014] [accident did not occur in passageway or walkway]; *Rodriguez v Dormitory Auth. of State*, 104 AD3d 529 [1st Dept 2013] [Code section inapplicable as accident occurred in open work area near passageway, "rather than in the passageway itself"]).

Even if the area constituted a passageway or other thoroughfare, various defendants testified that the area was closed off to workers, that they had been told to avoid the area, and that Domingo's presence there on the date of his accident was unauthorized. Thus, even if the

doorway led to a hallway, it was not then being used as a means of ingress or egress, but as a storage area.

4. Industrial Code § 23-2.1(b)
(debris shall be handled and disposed of by methods that will not endanger persons employed in the area of the disposal or any person lawfully frequenting it)

This section of the Code has been held insufficiently specific to support a Labor Law § 241(6) violation. (*Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338 [1st Dept 2007]; *Quinlan v City of New York*, 293 AD2d 262 [1st Dept 2002]).

In any event, to establish a violation of Labor Law § 241(6) based on a violation of an Industrial Code section, the violation must have been the proximate cause of the plaintiff's injury. (*Yaucan v Hawtorne Vil., LLC*, 155 AD3d 924 [2d Dept 2017]). Plaintiffs contend that the placement of 30 to 40 debris-filled dumpsters in the middle of the tenth floor created an unsafe condition, as it required Domingo to climb over the loose pipes to retrieve his toolbox. However, plaintiffs do not establish that the dumpsters proximately caused Domingo's fall. Rather, he testified that the pipe caused his fall. At most, the placement of the dumpsters may have furnished the occasion or condition which allegedly forced him to walk over the pipes.

Similarly, in *Madir v 21-23 Maiden Lane Realty, LLC*, the plaintiff was attempting to perform work on a designated section of a floor, which was obstructed by a long heavy metal object on the floor. When the plaintiff and his coworker attempted to move the object, it fell on his foot, injuring him. The Court held that even if one of the contractors was negligent in failing to remove the object, the failure was not a proximate cause of the plaintiff's injuries, as a matter of law, as it merely furnished the occasion for the plaintiff's subsequent intervening action in attempting to move it. (9 AD3d 450, 452 [2d Dept 2004]; *see also Torres v Hallen Constr. Corp.*, 226 AD2d 364 [2d Dept 1996] [any negligence by defendant in leaving steel plates at

construction site only furnished occasion for subsequent acts of plaintiff's coworkers in moving plates and driving vehicle over them, causing plate to move and strike plaintiff]).

Therefore, the four predicate alleged violations of the Industrial Code relied on by plaintiffs are inapplicable.

D. Labor Law § 200 and common law negligence

Pursuant to Labor Law § 200, an owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it actually exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). Alternatively, an owner may be held liable for a dangerous premises condition if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546 [1st Dept 2018]).

Plaintiffs argue that the placement of the pipes and dumpsters constituted a dangerous condition, and that it is irrelevant whether defendants supervised or controlled Domingo's work.

The improper placement of pipes may constitute a dangerous condition. (*See Quigley v Port Auth. of New York*, 168 AD3d 65 [1st Dept 2018] [dangerous condition created by pipes placed near shanty on which plaintiff slipped]; *Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017] [plaintiff injured when he slipped on loose piece of pipe lying on floor; loose pipe not condition created by manner in which plaintiff's work performed but existed before plaintiff's arrival that day]).

Here, plaintiffs claim that it was the placement of the piles of pipes and dumpsters that caused a dangerous condition as it required Domingo to walk on the pipes to bypass them, which implicates the means and methods of the work involved in Domingo's decision to walk over

them. (*See generally, Cappabianca*, 99 AD3d at 144 [liability for dangerous condition on premises generally pertains to "a defect inherent in the property," not to manner in which work performed]; *Villanueva v 114 Fifth Ave. Assocs. LLC*, 162 AD3d 404 [1st Dept 2018] [no evidence that Labor Law § 200 claim arose from alleged defect or dangerous condition on premises; "(w)here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises."]).

Gargan v Palatella Saros Bldrs. Group, Inc. is directly on point. (162 AD3d 988 [2d Dept 2018]). There, the plaintiff was attempting to deliver materials to a site but his path was blocked by a dumpster and stack of empty pallets. He decided to move the pallets by flipping them, and as he did so, he lost his footing and the pallet started to fall back on him. He injured his arm in attempting to break the fall. The Court held that the plaintiff's injury did not result from a "physical defect at the site" but "solely from the manner in which the injured plaintiff chose to deliver" his materials. (*Id.* at 988; *see also Anderson v Ntl. Grid USA Svce. Co*., 166 AD3d 1513 [4th Dept 2018] [wires hanging above garage roof did not constitute tripping and walking hazard but rather defect arose from plaintiff's "method of performing the work by foregoing appropriate, authorized means of obtaining access to the utility pole and deciding to traverse the pitched roof of the garage over which the wires hung"]; *Thompson v BFP 300 Madison II, LLC*, 95 AD3d 543 [1st Dept 2012] [where plaintiff injured while moving large box without assistance, injury not caused by dangerous condition but by manner in which he chose to accomplish task of moving box]; *Pilato v 866 U.N. Plaza Assocs., LLC*, 77 AD3d 644 [2d Dept 2010] [plaintiff's injury did not result from defective condition inherent on property but rather as result of allegedly defective means used by him to perform work]).

Thus, under the circumstances, plaintiffs must establish that defendants exercised sufficient supervision and control over the injury-causing work, here Domingo's attempt to retrieve his toolbox. It is undisputed that Domingo took directions about his work only from his employer, and there is no evidence that United Alliance, Independent, or WeWork controlled or supervised the means and methods of his work. (*Moura v City of New York*, 165 AD3d 434 [1st Dept 2018] [claims could not be imposed on defendant premised on means and methods of work as it exercised general supervisory authority over plaintiff's work, and did not provide actual supervision or direction over work]). There is also no proof to support plaintiffs' claim that WeWork directed Domingo to retrieve his toolbox that day or any other day on the project.

The authority to inspect work and to stop unsafe work practices does not constitute supervision and contro to establish liability under this statute. (*Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.*, AD3d , 2019 NY Slip Op 01838 [1st Dept 2019] [general responsibility for site safety does not rise to level of supervisory control]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [regular inspection of work to ensure it was proceeding according to schedule and authority to stop unsafe work insufficient]).

As plaintiffs allege only that that United Alliance, Independent, and Wework may be held liable pursuant to Labor Law § 200 and common law negligence, plaintiffs are deemed to have waived those claims against the other defendants.

E. Sole proximate cause

Even if plaintiffs establish a *prima facie* case, defendants maintain they are not entitled to summary judgment as triable issues of fact remain as to whether Domingo was the sole proximate cause of his accident.

Liability under Labor Law § 240(1) may not be found absent violation of the statute and

where the plaintiff's actions were the sole proximate cause of the accident. (*Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35 [2004]). The same is true for claims under Labor Law § 241(6) (*Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]), and Labor Law § 200 and for common law negligence (*Dos Anjos v Palagonia*, 165 AD3d 626 [2d Dept 2018]).

Here, defendants establish that the pipes were open and obvious, and that Domingo was aware of their presence and that they were unsecured. They also submit evidence that the area where he fell was closed off to workers and that there were other routes available to him. They thus prove that Domingo's decision to step on a two-feet high pile of unsecured pipes in a closed-off work area was the sole proximate cause of his accident. (*See Montgomery v Fed. Express Corp.*, 4 NY3d 805 [2005] [plaintiff's choice to use bucket to climb on roof and to then jump down from roof, after he saw that stairs leading to roof had been removed, was sole proximate cause of his injuries, as he could have used available ladders instead]; *Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16 [2d Dept 2016], *lv denied* 29 NY3d 913 [2017] [plaintiff's decision to ride in back of truck on top of grate lying on open tailgate was sole proximate cause of accident]; *Lin v City of New York*, 117 AD3d 913 [2d Dept 2014] [sole proximate cause of accident was plaintiff's act of climbing over railing and walking on narrow beam in dark area outside of assigned work area]; *Serrano v Popovic*, 91 AD3d 626 [2d Dept 2012] [plaintiff's decision to climb onto roof which had no safety equipment on it, despite being told not to work on roof, was sole proximate cause]).

In *Bombero v NAB Constr. Corp.*, the plaintiff was injured when he walked over a rebar that should have been covered by planking but was not that day, and he knew that the planking could be put back and that walking on the exposed rebar could be dangerous. The Court dismissed his claim, finding that the alleged hazard was part of the plaintiff's job and was readily

observable, and that "[w]hen a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources . . . to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself." (10 AD3d 170 [1st Dept 2004], *quoting Marin v San Martin Rest., Inc.*, 287 AD2d 441 [2d Dept 2001]).

And in *Bodtman v Living Manor Love, Inc.*, where the plaintiff chose to walk up a smooth portion of a sloped roof rather than a corrugated portion of it, resulting in his injury, the Court dismissed his Labor Law § 200 and common law negligence claims, finding that his actions constituted the sole proximate cause of his accident. (105 AD3d 434 [1st Dept 2013]).

Plaintiffs here do not establish that Domingo's only choice was to walk on the pipes, rather than attempting to move them or secure them before stepping on them. (*See Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018] [plaintiff was sole proximate cause of accident where he chose to step on unsecured plank that had placed on beam, rather than secured planking available to him]).

Thus, even if plaintiffs established, *prima facie*, that defendants violated the Labor Law, defendants demonstrate that Domingo's actions were the sole proximate cause of his accident

V. REMAINING MOTIONS

The remaining motions are addressed solely as to issues not raised and decided on Intel's motion and plaintiffs' cross motion.

A. 401 defendants' motion (mot. seq. nine)

1. Dismissal of claims against defendant Meringoff

Absent any dispute that Meringoff was the managing agent of the property and played no role in controlling and supervising any work on the project, plaintiffs' claims against it are

dismissed. (*Pilato v 866 U.N. Plaza Assocs., LLC*, 77 AD3d 644 [2d Dept 2010]).

2. Common law indemnification

As United Alliance did not supervise and control Domingo's work (*see supra*, IV.D.), 401 defendants are not entitled to common law indemnity from it. (*See Padilla v Park Plaza Owners Corp.*, 165 AD3d 1272 [2d Dept 2018] [as defendants did not establish, *prima facie*, that contractor exercised actual supervision over plaintiff's work, they were not entitled to judgment on their common law indemnification claim against it]; *Marquez v L&M Dev. Partners, Inc.,* 141 AD3d 694 [2d Dept 2016] [as contractor did not direct or supervise injury-producing work, it was entitled to dismissal of common-law indemnification claims asserted against it]).

Absent *prima facie* evidence that the pipes on which Domingo fell were owned by Intel or Independent, 401 defendants also fail to show that either one owes it common law indemnity.

In any event, absent proof that 401 defendants may be held liable to plaintiffs here, their claims for common law indemnity against other defendants are academic. (*See Canty v 133 E. 79th St., LLC*, 167 AD3d 548 [1st Dept 2018] [as defendant could not be held liable to plaintiff for negligence or Labor Law violations, its cross claims for contribution and common law indemnification denied as moot]).

3. Contractual indemnification

For the same reason set forth above (*supra*, V.A.2.), 401 defendants are not entitled to contractual indemnity from any other defendants.

4. Elite's failure to procure insurance

As 401 defendants do not address this claim in their reply papers, they are deemed to have waived opposition thereto. (NYSCEF 634).

B. Independent's motion (mot. seq. 10)

All of the issues raised in Independent's motion have been addressed in relation to the other motions.

C. United Alliance's motion (mot. seq. 11)

United Alliance's contractual indemnification claims against other defendants are dismissed as academic, given the dismissal of all of plaintiffs' claims against it.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that Intel Plumbing and Heating, LLC's motion for summary judgment (mot. seq. eight) is granted, and the complaint and all cross claims are dismissed and severed as against it, with costs and disbursements to defendant upon submission of an appropriate bill of costs; it is further

ORDERED, that plaintiffs' cross motion for summary judgment is denied in its entirety; it is further

ORDERED, that the motion of defendants 401 Park Avenue South Associates, LLC, Meringoff Properties, Inc., WeWork Companies, Inc., WW 401 Park Avenue South, LLC, Schwartz 395-401 Park Avenue, LLC, Janet Goldman, Catherine Lipkin Schwartz, Peter Schwartz and Margaret Schwartz Salzman, as Executors under the Last Will and Testament of James Schwartz a/k/a James H. Schwartz, M.D. late of New York County on 3/13/2006, Index No. 1156-2006, R. Anthony Goldman, Edith Charlotte Landau, ELL-401 LLC, The Max Rosenfeld Foundation, Inc., The Max and Morton M. Rosenfeld Foundation, Inc., The Seed Moon Foundation, I Dream a World Foundation, Inc., John Herring, Paul Herring, Daniel Lehmann and Laura M. Twomey, as Trustees of the Suzanne Irene Lehman 2012 Property Trust,

Michael Rosenfeld, Hal Patterson, as Trustee of the Credit Shelter Trust under Article 6 of Last Will and Testament of Judith S. Saphir, Michael Rosenfeld, as Trustee of the Maxim R. Sclar Irrevocable Trust under Agreement dated 5/5/1998, Mia Alexander Rosenfeld, and Robbyco Holdings, LLC, for summary judgment (motion sequence nine) is granted to the extent that the complaint and all cross claims are dismissed and severed as against these defendants, with costs and disbursements to them upon submission of an appropriate bill of costs, and the motion is otherwise denied; it is further

ORDERED, that defendant Independent Mechanical, Inc.'s motion for summary judgment (mot. seq. 10) is granted, and the complaint is dismissed and severed as against it, with costs and disbursements to defendant upon submission of an appropriate bill of costs; and it is further

ORDERED, that defendant/third-party plaintiff United Alliance Enterprises, Inc.'s motion for summary judgment (mot. seq. 11) is granted to the extent that the complaint and all cross claims are dismissed and severed as against it, with costs and disbursements to defendant upon submission of an appropriate bill of costs, and it is otherwise denied; and it is further

ORDERED, that in light of the all of the above, the third-party complaint is dismissed in its entirety.

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3/22/2019
DATE

BARBARA JAFFE, J.S.C.

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