SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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THOMAS ARPA,

Plaintiff,

- v -

245 E. 19 REALTY LLC,

Defendant.

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INDEX NO. 161821/2015

MOTION SEQ. NOs. 004 and 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 149, 151, 152, 153, 154, 155, 161, 162, 163, 164, 165, 166, 167

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 150, 156, 157, 158, 159, 160, 168, 169

were read on this motion for SUMMARY JUDGMENT.

Motion sequences 004 and 005 are consolidated for disposition in this action.

In motion sequence 004 of this negligence action commenced by plaintiff Thomas Arpa ("Arpa"), defendant 245 E. 19 Realty LLC ("245 E. 19 Realty") moves, pursuant to CPLR 3212, for summary judgment dismissing Arpa's complaint as well as the counterclaims asserted against it by third-party defendant Schindler Elevator Corporation ("Schindler"). 245 E. 19 Realty also moves, pursuant to CPLR 3212, for summary judgment granting it contractual indemnification against Schindler. Plaintiff and Schindler both oppose the motion in part.

In motion sequence 005, Schindler moves for summary judgment dismissing plaintiff's complaint as well as 245 E. 19 Realty's claims for common law and contractual indemnification. Plaintiff and 245 E. 19 Realty both oppose the motion in part. After oral argument, and after a

review of the parties' papers and the relevant statutes and caselaw, the motions are **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

On November 6, 2015, plaintiff allegedly suffered injuries while he was working as an elevator mechanic at a building owned by defendant 245 E. 19 Realty. (Doc. 101 at 2.) Plaintiff was an employee of third-party defendant Schindler, which had contracted with 245 E. 19 Realty to perform elevator maintenance and repair work at the building. (*See* Docs. 101 at 2; 142.)

245 E. 19th Street is a mixed commercial and residential building with four elevators. (Doc. 128 at 3.) Plaintiff alleges that, on the date of the accident, he received a call to fix the doors of elevator #4. (*Id.*) The power for this elevator had been shut off by the building so that it would be taken out of service until it was repaired. (*See* Doc. 134 at 57.) After realigning the doors, plaintiff attempted to restore power from inside the elevator, but found that the power had been shut off from the main line in the motor room for elevators #3 and #4. (Doc. 128 at 5.) He then went up to the motor room to turn the power back on. (*Id.*)

When he arrived at the motor room, plaintiff noticed a streak of oil on the floor. (Doc. 101 at 4.) He got a rag and cleaned the floor. (*Id.*) After he cleaned the oil, he took one or two steps and then tripped over a pipe which had been cut. (*Id.*) Although he had over thirty years of experience as an elevator mechanic (Doc. 128 at 3), and although he was very familiar with the building (*id.*) and had been in the motor room before (Doc. 101 at 5), plaintiff never noticed the stub before (*id.*).[1] As he fell, his right hand got caught between the ropes and sheave of the motor

[1] Plaintiff stated at his deposition that the first time he saw the stub was in a photograph of the motor room that was taken by another mechanic. (Doc. 101 at 5; *see also* Doc. 104 at 124.)

for the #3 elevator (Doc. 128 at 7), which was running because it was not in need of repair (Doc. 156 at 7). As a result of the accident, portions of his right hand were amputated. (*Id.* at 2.)

Plaintiff commenced the instant action against 245 E. 19 Realty by filing a summons and complaint on November 16, 2015. (Doc. 131 at 2–9.) In the complaint, he asserted causes of action for negligence, violations of New York Labor Law §§ 200, 240, and 241, and violations of the New York State Industrial Code. (*See id.*) On February 19, 2016, 245 E. 19 Realty impleaded Schindler as a third-party defendant in the action, asserting causes of action for negligence, common law and contractual indemnification, and breach of contract to procure insurance. (*Id.* at 51–62.) Schindler filed its answer on April 28, 2016, and asserted a counterclaim against 249 E. 19 Realty for indemnification. (Doc. 102 at 41.)

Several individuals were deposed during this action. Plaintiff's supervisor at Schindler, Paul Wigdzinsky ("Wigdzinsky") (Doc. 104 at 179), testified that plaintiff informed him about his accident during a telephone call that morning (Doc. 109 at 19–22). Wigdzinsky produced an accident report reflecting that plaintiff had suffered an injury to his hand. (Doc. 110.) Wigdzinsky, in turn, identified Joseph Gati ("Gati") as his supervisor. (Doc. 109 at 22.) Gati testified that, prior to plaintiff's incident, he was not aware of any violations that were issued to the building by the New York City Department of Buildings ("the DOB"). (Doc. 112 at 59.) Robert Wagner ("Wagner"), Schindler's safety and health manager, testified that he inspected the motor room and did not observe any hazardous conditions therein on the day of the accident. (Docs. 114 at 132–33, 151; 115.)

The following individuals were deposed on behalf of 249 E. 19 Realty: Rafael Rios ("Rios"), the building's superintendent, testified that the pipe stub had been in the motor room for a long time: "[T]hat's been there almost twenty years. Schindler left it like that when they changed

the elevator, never took it away." (Doc. 116 at 62–63.) Ahron Freidus ("Freidus"), the property manager, testified that Schindler—and not the building—was responsible for all work relating to elevator repairs and inspections. (Doc. 117 at 39–40.) William Dorn ("Dorn"), a handyman at the building, testified that he had known about the stub since at least 2007 and had never tripped over it. (Doc. 118 at 32, 35–37.) Dorn also submits an affidavit, in which he states that he measured the pipe stub and that it stands between 3/16ths and 4/16ths of an inch above the floor. (Doc. 120.)

The note of issue was filed on June 15, 2018. (Doc. 103.) 245 E. 19 Realty now moves (motion sequence 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint as well as Schindler's counterclaims. Schindler moves (motion sequence 005), pursuant to the same statute, for summary judgment dismissing plaintiff's complaint, as well as 245 E. 19 Realty's claims for common law and contractual indemnification. In his opposition papers, plaintiff abandons his Labor Law claims, conceding that he "is not pursing any cause of action predicated upon the Labor Law." (Doc. 151 at 2.) Thus, in deciding the instant motions, this Court will consider only the arguments that are pertinent to plaintiff's common law negligence claim as well as 245 E. 19 Realty's indemnification claims against Schindler.

245 E. 19 Realty's Motion for Summary Judgment:

In support of its motion, 245 E. 19 Realty argues that plaintiff's common law negligence claim must be dismissed because it did not control or supervise his work. (Doc. 101 at 26–27.) It further argues that the pipe stub is a trivial defect and thus is not actionable. (*Id.* at 27–30.) Moreover, it asserts that plaintiff's claim that the building should have had extra guards on its elevator motors must be dismissed because this argument is contrary to recent First Department caselaw. (*Id.* at 31–33.) 245 E. 19 Realty further argues that Schindler is required to provide it with

contractual indemnification due to an indemnity provision in the contract between the two entities. (*Id.* at 33–35.)

In opposition, plaintiff maintains that 245 E. 19 Realty is liable because the pipe stub was a defect that the building either created or knew about. (Doc. 151 at 7.) In particular, plaintiff claims that the building had actual notice of the stub because both Rios and Dorn testified that they had known about it for a long time prior to the accident. (*Id.* at 8.) Plaintiff also argues that the stub's "surrounding circumstances"—that is, its location in a motor room with elevator hoists and moving cables—rendered it dangerous and therefore not merely a trivial defect. (*Id.* at 7–8.) With respect to the issue of whether 245 E. 19 Realty was negligent for failing to place an additional guard on the motor, plaintiff relies on a safety code issued by the American National Standards Institute and American Society of Mechanical Engineers ("ANSI/ASME"), which mandates that guards should be placed on motors to protect against accidental contact. (*Id.* at 9.) At his deposition, Wigdzinsky admitted that Schindler was supposed to follow the ANSI/ASME code, but that there were no safety guards in the room. (*Id.* at 9–10.) Plaintiff further relies on an affidavit submitted by William Seymour ("Seymour"), an expert witness on elevator compliance standards. (*Id.* at 10–11.) In his affidavit, Seymour opines that 245 E. 19 Realty violated the relevant ANSI/ASME safety standards by not installing guards on the motors. (Doc. 155.)

Schindler agrees with 245 E. 19 Realty that the complaint should be dismissed. (Doc. 161 at 1.) However, Schindler opposes 245 E. 19 Realty's summary judgment motion insofar as it seeks common law and contractual indemnification. (*Id.*) With respect to common law indemnification, Schindler asserts that the claim must be dismissed because it is barred by New York's Workers' Compensation Law ("WCL") § 11 since plaintiff did not suffer a "grave injury." (*Id.* at 2–4.) With respect to contractual indemnification, Schindler argues that summary judgment

cannot be granted unless and until it is determined by this Court that it was negligent in causing plaintiff's accident. (*Id.* at 4–7.)

Schindler's Motion for Summary Judgment:

In its motion, Schindler substantially adopts the arguments made by 245 E. 19 Realty regarding why the complaint should be dismissed. (Doc. 128 at 7–15.) However, Schindler makes an additional argument: Because it was tasked with elevator maintenance and repair pursuant to its contract with 245 E. 19 Realty, Schindler reviewed every violation issued by the DOB between August 24, 1995, and November 6, 2015—the day of plaintiff's accident—and found no violations relating to a failure to guard the elevator motors. (*Id.* at 12.) Thus, Schindler argues that it was not negligent because it did not have notice of any allegedly defective condition regarding the motor. (*Id.* at 13.) It also relies on the affidavit of expert witness Jon Halpern ("Halpern"), a licensed professional engineer, who opines, based on a review of the evidence as well as his own inspection of the area, that the motor room's condition complied with the applicable codes and standards at the time of the accident. (Doc. 129 at 5.)

With respect to 245 E. 19 Realty's third-party claim for contractual indemnification, Schindler admits that its workers cut the pipe in 1995 in order to modernize the building's elevators. (Doc. 128 at 15–16.) Because any negligence that might have occurred would have been related to the contract to modernize the elevators, as opposed to the current contract to maintain and repair the elevators, Schindler argues that 245 E. 19 Realty is not entitled to contractual indemnification. (*Id.* at 15–16.) Schindler also reiterates its argument that 245 E. 19 Realty's claim for common law indemnification is barred by WCL § 11. (*Id.* at 16.)

In opposition, 245 E. 19 Realty argues that Schindler "misunderstands" its claim for contractual indemnification. (Doc. 147 at 4.) It maintains that, pursuant to the indemnification provision, "[e]ven if this Court dismisses plaintiff's case . . . 245 E. 19 [Realty] has incurred expenses including attorney[s'] fees that Schindler must reimburse." (*Id.*) Further, 245 E. 19 Realty argues that Schindler was negligent in removing the pipe and in inspecting the premises prior to plaintiff's accident, and that it is therefore entitled to contractual indemnification. (*Id.* at 8.) 245 E. 19 Realty maintains that the branch of Schindler's motion for summary judgment dismissing the common law indemnification claim is premature. Although Schindler submits an affidavit by Alamgir Isani ("Dr. Isani"), a doctor who examined plaintiff and concluded that he did not suffer total loss of use of his hand (*see* Doc. 144), 245 E. 19 Realty argues that whether plaintiff suffered a grave injury should be left to the trier of fact.[2] (Doc. 147 at 11.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then

[2] Plaintiff's arguments for this motion are identical to its arguments in motion sequence 004. (Doc. 156.)

summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. 245 E. 19 Realty's Motion for Summary Judgment (Motion Sequence 004).

In motion sequence 004, 245 E. 19 Realty first moves for summary judgment dismissing the complaint. (Doc. 100.) Because plaintiff has abandoned his Labor Law causes of action (Doc. 151 at 2), the only cause of action against 245 E. 19 Realty that is left for this Court to consider is plaintiff's common law negligence claim. Plaintiff's negligence claim is premised on (1) the remnant of the pipe stub and (2) the failure to place a guard over the elevator motor. (Doc. 151 at 6.) Thus, this Court must consider whether the movant met its prima facie case in regard to either one.

It is well established that, in tort cases based on premises liability, "owners and lessees have a duty to maintain their property in a reasonably safe condition." (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012].) "A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition." (*Id.*) An underlying assumption in the standard set forth in *Langer* is that the plaintiff, suing on the theory of premises liability, was injured by a defective condition. Only when the defendant demonstrates that it neither created nor had notice of the defect will a court grant summary judgment in the defendant's favor. (*See id.*) Here, however, plaintiff has not shown the existence of a dangerous condition that caused him to fall.

In fact, caselaw establishes just the opposite. With respect to the pipe stub, Dorn submitted an affidavit stating that he measured the pipe and found that it "extends above the floor for one eighth to one quarter of an inch." (Doc. 120 at 3.) A color photograph of the stub—submitted as

NYSCEF Document 119—shows that, at its highest, the stub rises just over one-eighth of an inch above the ground. (Doc. 119 at 4.) While there is no bright line test for when a stub or a hole is considered defective, numerous cases, both from the Court of Appeals and the First and Second Departments, have held that height differentials of less than one inch are not actionable. (*See, e.g.*, *Scally v State of New York*, 24 NY2d 747, 748 [1969] (affirming an Appellate Division finding that a protrusion of "about three-quarters of an inch" above a sidewalk was a trivial defect); *see also Thomas v Dever Props. LLC*, 115 AD3d 459, 460 [1st Dept 2014] (concluding that a slight bowl-shaped depression of less than one eighth of an inch was not actionable); *Martin v Lafayette Morrison Hous. Corp.*, 31 AD3d 300, 301 [1st Dept 2006] (finding that a height differential of approximately one-half inch did not constitute a trap or snare); *Trincere v County of Suffolk*, 232 AD2d 400, 400 [2d Dept 1996] ("The caselaw reflects a prevailing view to the effect that differences in elevation of about one inch, without more, . . . [are] nonactionable.") (internal quotations omitted).)

Plaintiff's arguments to the contrary are not persuasive. Plaintiff maintains that the pipe stub is actionable as a defective condition because the surrounding circumstances—such as the nearby elevator hoists and moving cables—"greatly magnified the danger presented by a tripping hazard." (Doc. 151 at 8.) While it is true that this Court must consider "all the facts and circumstances presented" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77–78 [2015]), plaintiff has not shown, such as by an expert affidavit, how the elevator hoists and cables magnified his chances of tripping over the pipe stub.[3] Plaintiff relies on *Hutchinson*, which holds that "physically small defects [may] be actionable when their surrounding circumstances or intrinsic

[3] In his affidavit, Seymour, plaintiff's expert witness, opines that 245 E. 19 Realty violated the relevant ANSI/ASME standards by not putting guards over the elevator motors, but he does not explain how the pipe stub—or anything surrounding it—constituted a tripping hazard to plaintiff. (*See* Doc. 155.)

characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot." (*Id.* at 79.) This Court fails to see how the one-eighth inch pipe stub, even in light of the surrounding circumstances, made plaintiff's path across the motor room more difficult. Thus, the fact that employees of 245 E. 19 Realty had notice of the stub[4] makes no difference, since the circumstances here do not make it an actionable defect as a matter of law.

This Court further determines that the failure to place a guard on the elevator motor is not an actionable defective condition under the circumstances herein. Plaintiff does not allege that 245 E. 19 Realty created or installed the elevator motor, so the issue is whether 245 E. 19 Realty had notice that the lack of a motor guard created an alleged defective condition. (*See Langer*, 92 AD3d at 598 ("A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition.").)

Here, it can only be concluded that there was no notice of a lack of a motor guard. Of particular importance, none of the violations issued by the DOB from August of 1995 to November of 2015 pertained to a lack of guards over the elevator motors. (Doc. 128 at 12.) Moreover, although plaintiff relies on the ANSI/ASME standards to argue that defendant was negligent, the First Department recently observed that "ANSI . . . has not been adopted by or incorporated into New York City's elevator code and ANSI itself is not a statute, ordinance or regulation." (*Bradley v. HWA 1290 III LLC*, 157 AD3d 627, 633 [1st Dept 2018] ("ANSI standards do not constitute statutes, ordinances, or regulations and are not proper evidentiarily in determining proper standard of care.") (internal citation omitted).) Therefore, this Court finds that plaintiff may not maintain a

[4] As noted above, Rios and Dorn, both employees of the building, testified that they had known about the stub since at least 2007. (Docs. 116 at 62–63; 118 at 32, 35–37.) Further, the other ground for holding a defendant liable in a premises liability action—that the defendant created the defective condition—is simply inapplicable to 245 E. 19 Realty with respect to the stub, since Schindler admits that its workers cut the pipe in 1995. (Doc. 128 at 15.)

cause of action for negligence against 245 E. 19 Realty based on the absence of guards over the elevator motors.

The only branch remaining of 245 E. 19 Realty's summary judgment motion is whether it is entitled to contractual indemnification from Schindler. The indemnification provision in the contract between 245 E. 19 Realty and Schindler provides:

> To the fullest extent permitted by law, the Contractor [Schindler] shall indemnify and hold harmless the Owner [245 E. 19 Realty] . . . from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor [Schindler] . . . .

(Doc. 122 at 3.) Thus, the language of the contract clearly provides that 245 E. 19 Realty is entitled to indemnification when it has suffered damages as a result of Schindler's own negligence. (*Id.*) However, this Court finds that Schindler was not negligent for the following reasons: Even though Schindler admits that its workers cut the pipe in 1995 (Doc. 128 at 15–16) and even though Wigdzinsky acknowledged that Schindler was supposed to follow the ANSI/ASME code (Doc. 151 at 9–10), the foregoing discussion establishes that neither is an actionable defect, since the pipe stub was *de minimis* and since ANSI/ASMI has not been incorporated into New York City's elevator code. This branch of the motion is therefore denied.

b. Schindler's Motion for Summary Judgment (Motion Sequence 005).

In motion sequence 005, Schindler moves for summary judgment dismissing the complaint as well as 245 E. 19 Realty's claim for common law indemnification. The first branch of the motion is moot by virtue of the previous discussion for motion sequence 004.

However, Schindler has established its prima facie case for dismissal of 245 E. 19 Realty's claim for common law indemnification. Plaintiff was employed by Schindler. (*See* Docs. 101 at 2; 142.) Under WCL § 11, "grave injury" is defined as:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

The Court of Appeals has given this statutory list a strict construction. In *Castro v. United Container Mach. Group*, 96 NY2d 398, 401 (2001), the Court held that "the term 'loss of multiple fingers' cannot sensibly be read to mean partial loss of multiple fingers." Likewise, in *Meis v ELO Org.*, 97 NY2d 714, 716 (2002), the Court found that the loss of a thumb did not render a plaintiff's hand totally useless (*id.*), and thus that it did not qualify as a "grave injury" within the meaning of the statute (*id.*).

The medical examination conducted by Dr. Isani showed that plaintiff has lost significant use of his right hand—specifically, that his right index and middle fingers now have minimal motion (Doc. 144 at 5) and that his grip strength for the right hand is fourteen pounds compared to ninety-two pounds for the left hand (*id.* at 6)—but it did not conclude that plaintiff suffered total loss or use of it (*see* Doc. 144). Moreover, page 5 of NYSCEF Document 144 shows the range of motion in each of plaintiff's fingers, and page 3 of NYSCEF Document 144 indicates that there was a partial amputation of the index finger, but, under a strict reading of § 11, neither a loss of range in the fingers nor the partial amputation of the index finger qualifies as a "grave injury." Thus, plaintiff's injury does not fall within WCL § 11. (*See Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 501 [1st Dept 2015] (First Department held that, where defendant failed to show that

the plaintiff was no longer employable in any capacity, plaintiff's injury did not constitute a grave injury within the scope of WCL § 11).) Thus, 245 E. 19 Realty's argument that such a finding must be decided by the trier of fact is without merit.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant 245 E. 19 Realty LLC for summary judgment (motion sequence 004) dismissing plaintiff's complaint is granted to the extent of dismissing plaintiff's common law negligence claim, and is otherwise denied as moot in that plaintiff has voluntarily withdrawn his causes of action pursuant to the Labor Law; and it is further

ORDERED that the branch of the motion by defendant 245 E. 19 Realty LLC for summary judgment (motion sequence 004) seeking contractual indemnification from third-party defendant Schindler Elevator Corporation denied; and it is further

ORDERED that the branch of the motion by third-party defendant Schindler Elevator Corporation for summary judgment (motion sequence 005) dismissing the complaint of plaintiff Thomas Arpa is denied as academic; and it is further

ORDERED that the branch of the motion by third-party defendant Schindler Elevator Corporation for summary judgment (motion sequence 005) dismissing defendant/third-party plaintiff 245 E. 19 Realty LLC's cause of action for common law indemnification is granted; and it is further

ORDERED that 245 E. 19 Realty LLC's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 30 days after the entry of this order onto NYSCEF, and that the Clerk is directed to enter judgment in favor of defendants 245 E. 19 Realty LLC and Schindler Elevator Corporation; and it is further

ORDERED that this constitutes the decision and order of this Court.

05/14/2019
DATE

KATHRYN E. FREED, 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