| **Dias v Hudson Meridian Constr. Group, LLC** |
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| 2019 NY Slip Op 31880(U) |
| July 1, 2019 |
| Supreme Court, Kings County |
| Docket Number: 512165/2014 |
| Judge: Debra Silber |
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of July, 2019.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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ALDAIR DIAS,

Plaintiff,

- against -

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, CASINO DEVELOPMENT GROUP, INC., BROOKLYN BRIDGE PARK DEVELOPMENT CORPORATION, BROOKLYN PIER 1 HOTEL OWNER, L.P., BROOKLYN PIER 1 RESIDENTIAL OWNER, L.P., TOLL BROTHERS, INC., STARWOOD CAPITAL GROUP AND TOLL BROTHERS, INC. AND STARWOOD CAPITAL GROUP, JV,

Defendants.

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**DECISION/ORDER**

Index No. 512165/2014

Motion Seq. Nos. 8, 9, 10

| The following papers numbered 1 to 16 read herein: | Papers Numbered |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 1-3, 4-5, 6-7 |
| Opposing Affidavits (Affirmations) | 8, 9, 10, 11, 12 |
| Reply Affidavits (Affirmations) | 13, 14, 15, 16 |

Upon the foregoing papers, defendants Brooklyn Pier 1 Hotel Owner L.P., Hudson Meridian Construction Group, LLC (Hudson), Brooklyn Pier 1 Residential Owner, L.P. (the "Lessee"), Brooklyn Bridge Park Development Corp. (Development Corp.), Toll Brothers, Inc., Starwood Capital Group and Toll Brothers, Inc. and Starwood Capital Group, JV (Starwood), who are all of the defendants other than defendant Casino (collectively, the

"Owners") move, in motion sequence (MS #) 8, for an order, pursuant to CPLR 3212, granting them: 1) summary judgment dismissing both the complaint of plaintiff, Aldair Dias, as well as all cross claims asserted against them, and 2) partial summary judgment on their cross claims for indemnification against defendant Casino Development Group, Inc. (Casino). Also, defendant Casino moves,[1] in MS# 9, for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint. Lastly, plaintiff cross-moves, in MS# 10, for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1).

***Background***

Plaintiff commenced the instant action by electronically filing a summons and verified complaint on December 23, 2014. The pleadings state that on August 18, 2014, plaintiff, while employed as a carpenter by nonparty GenCon Services, Inc. (GenCon), was injured at a construction site accident at 90 Furman Street in Brooklyn. The subject premises were owned by defendant Development Corp., which leased[2] the land to the Lessee. The Lessee, in turn, entered into written construction agreements with two companies: Hudson, referred to as a construction manager, and Casino, referred to herein as a subcontractor hired to build

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[1] Casino incorrectly labeled its notice of motion as a notice of cross motion. "A cross motion is a motion against a moving party" (*Marc v Kohl*, 13 Misc 3d 1206[A], 2006 NY Slip Op 51700[U], n 3 [Sup Ct, Kings County 2006], citing *Gaines v Shell–Mar Foods, Inc.*, 21 AD2d 986 [2d Dept 2005]; CPLR 2215; *Williams v Sahay*, 12 AD3d 366 [2d Dept 2004]). Casino served and filed its motion after the Owners served and filed theirs. Therefore, the Owners are properly considered a "moving party." However, Casino seeks no relief "against" the Owners. Instead, Casino seeks relief against plaintiff, who had not yet moved for summary judgment when Casino did. Accordingly, Casino's motion is not technically a cross motion.

[2] The subject lease provides that the (ground) Lessee may occupy the premises from 2012 to 2109; a memorandum of the lease has been recorded. The transactions and constructions was apparently completed as part of a New York State urban development project.

the concrete superstructure. Casino, pursuant to a written agreement, hired GenCon to provide labor in connection with the concrete superstructure construction.[3]

The record indicates that at all relevant times, the concrete structure had been completed from the basement level to the fourth floor; concrete work had already commenced on the fifth floor. Plaintiff, stationed on the third floor, was tasked with retrieving sheets of plywood from the third floor and passing them to workers on the fourth floor. He took them one at a time from a pile and carried them to a hole in the ceiling. He would then lift the plywood upwards to workers on the fourth floor, who would take the plywood from plaintiff. Plaintiff testified that the plywood sheets (also referred to as boards or planks) were four feet by eight feet and weighed approximately 40 pounds each; he also testified that the plywood sheet had to be lifted up approximately 10 feet to pass it to the workers above him.

Plaintiff testified that he had been working at this task for about ten minutes when his accident occurred [EBT Tr. Page 98]. He was lifting a plank through the opening and he was holding the plank with two hands as he lifted it. When the plank was above his head (but before it was securely grasped by the workers above), his foot slipped on a puddle on the concrete floor he was standing on. He lost his balance, and, consequently, his grip on the plank. This caused him to sustain a shoulder injury,[4] which, in turn, rendered him unable to bear the weight of the plank. The plank slipped out of his grip, fell, and struck plaintiff in

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[3] Information about the remaining parties is discussed *infra*.

[4] Specifically, he stated that he heard a "pop" in his shoulder.

the arm and knocked him to the floor. Plaintiff sustained injuries to his arm and his back as a result of being struck by the falling plank and then falling backward onto the concrete floor.

The complaint asserts causes of action that allege that defendants are responsible for violations of Labor Law §§ 240 (1), 241 (6) and 200. The complaint also alleges common law negligence. The pleadings further state that the various defendants are owner(s)[5] of the subject premises, contractors hired by the owners, and/or agents of the owners or contractors, as those terms are defined in the Labor Law and interpreted by the courts of this State. Plaintiff also claims that at all relevant times, he was engaged in work within the scope of the Labor Law.[6] As relevant to the instant motions, plaintiff claims that, therefore, the various defendants are subject to vicarious liability, without regard to fault, pursuant to the Labor Law. Plaintiff also contends that defendants breached their common-law duty to maintain a safe workplace. Plaintiff asserts that these violations of the Labor Law and breaches of the common-law duty of care proximately caused his injuries, and plaintiff seeks damages as a consequence.

The various defendants interposed answers; cross claims were also alleged. Discovery and motion practice ensued. On May 29, 2018, plaintiff filed a note of issue with a trial by jury demand, certifying that discovery is complete and that this matter is ready for trial. The instant motions followed.

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[5] Or that they have other relevant real property interests, such as the (ground) Lessee.

[6] Work performed within the scope of the vicarious liability provisions of Labor Law § 240 (1) is commonly referred to as a "protected" activity, task or work. Workers covered by the statute are commonly referred to as "protected" workers.

***Owners' Arguments Supporting Their Summary Judgment Motion (MS 8)***

In support of their motion for an order granting them summary judgment dismissing the complaint, Owners first assert that plaintiff's Labor Law § 240 (1) claim lacks merit. Specifically, Owners note that the accident occurred while plaintiff was standing on the ground and handing plywood up through an opening to a coworker at a higher level. Owners point out that plaintiff was neither working at an elevated work site nor struck by an object that fell from above him. Instead, Owners continue, the accident occurred because plaintiff slipped on pebbles (of concrete) and water which was on the ground. Owners state that the mere fact that plaintiff was lifting plywood when the accident occurred is insufficient to place the accident within the scope of Labor Law § 240 (1). Owners conclude that for these reasons, Labor Law § 240 (1) does not apply here. Accordingly, Owners argue, this court should award them summary judgment dismissing this claim.

Next, Owners assert that plaintiff's Labor Law § 241 (6) claim also lacks merit. Specifically, Owners point out that a sustainable Labor Law § 241 (6) claim requires that plaintiff pleads (and eventually proves) violations of one or more applicable provisions of the Industrial Code that contain a positive, specific command. Provisions that contain a general safety standard, the Owners continue, are insufficient to support a Labor Law § 241 (6) claim. Here, Owners acknowledge that the pleadings cite several sections of the Industrial Code that purportedly support plaintiff's Labor Law § 241 (6) claims. However, Owners allege, the Industrial Code provisions that plaintiff cites in support of his Labor Law § 241 (6) cause of action either are not applicable to the facts or contain an exception for conditions that were integral to the work being performed in the area.

Specifically, Owners argue that to the extent that plaintiff claims a slipping hazard contributed to the accident, such a slipping hazard was a necessary consequence of the work being performed by plaintiff and the other relevant workers. Additionally, Owners claim, any Industrial Code provision regulating tripping hazards or passageways are immaterial to this case, since plaintiff did not trip and he worked in a large open area. Similarly, the Owners allege that any Industrial Code provision that regulates walkways, stairways or thoroughfares in general are inapplicable. The Owners note that plaintiff cites an Industrial Code provision that establishes stairway requirements during the construction of buildings; however, continue the Owners, this section applies only to accidents where an injured worker fell from a noncompliant stairway. As such, the Owners maintain, stairway regulations are inapplicable here. The Owners also note that plaintiff alleges violations of hoist and crane regulations which are similarly inapplicable. Lastly, the Owners posit that appellate courts have determined that the other Industrial Code provisions cited by plaintiff lack the required specificity to support a Labor Law § 241 (6) claim. In sum, the Owners argue that none of the Industrial Code sections identified by plaintiff properly support his Labor Law § 241 (6) cause of action. Accordingly, the Owners conclude, this court should award them summary judgment dismissing this claim.

Next, the Owners argue that, according to the record, plaintiff has no viable common-law negligence or Labor Law § 200 claims against them. The Owners point out that such claims exist in two categories: those claims where the manner of work employed allegedly led to the accident, and those where a premises condition allegedly led to the accident. To the extent that plaintiff alleges that the slippery wet concrete pebbles and wet floor were a

dangerous condition, the Owners suggest that there should be no liability as it was an open and obvious condition. Specifically, the Owners note plaintiff's testimony that he observed the subject condition, received warnings about it from his coworkers, yet had traversed it numerous times prior to the accident. The Owners claim that premises liability may not stem from such a condition. Alternatively, the Owners argue that they are not subject to a premises liability claim because their agents neither created the wet floor and slippery wet pebbles nor did they have notice of it. The Owners note that premises liability may not be imposed absent either prerequisite. Lastly, the Owners state that their agents neither supervised nor controlled plaintiff's work. In fact, the Owners aver, plaintiff's sworn testimony indicates that he only received instructions from his employer's foreman. Accordingly, the Owners conclude, plaintiff has no viable Labor Law § 200 or common-law negligence claims against them.

Alternatively, the Owners claim that some of the entities sued herein— specifically, Starwood Capital Group and Toll Brothers Inc., Starwood Capital Group, JV and Brooklyn Pier 1 Hotel Owner, L.P. —are not subject to the vicarious liability provisions of Labor Law § 240 (1) and § 241 (6) because they are not owners, contractors or agents of owners or contractors for the purpose of those statutes. First, the Owners state that these three entities do not have any ownership or leasehold interest in 90 Furman Street, the premises where the accident occurred. Next, the Owners assert that these entities neither supervised plaintiff's work nor had the authority to hire contractors. The Owners also allege that these entities were not responsible for hiring subcontractors. For these reasons, the Owners conclude that these three entities are not owners, contractors or agents of owners or contractors and are thus

not subject to the vicarious liability provisions of Labor Law § 240 (1) and § 241 (6). Similarly, the Owners assert that these three entities neither owned nor occupied the premises where plaintiff had his accident. Coupled with the fact that these entities did not supervise any work, provide any equipment or hire any subcontractors, the Owners reason that, therefore, these firms are not subject to either common-law negligence liability or liability pursuant to Labor Law § 200. The Owners conclude that, accordingly, if this court does not dismiss the complaint in its entirety, the court must dismiss all claims against Starwood Capital Group and Toll Brothers, Inc., Starwood Capital Group, JV and Brooklyn Pier 1 Hotel Owner, L.P. for these reasons.

Also alternatively, the Owners assert that plaintiff's claims should be dismissed as against defendant Toll Brothers, Inc.[7] because plaintiff lacks a direct relationship with this corporate defendant. The Owners state that Toll Brothers, Inc. is the parent corporation of Toll Holdings, Inc., which, in turn, is the parent corporation of the corporate partners of the lessee in possession of the subject premises, namely, Brooklyn Pier One Residential Owner, L.P. The Owners argue that Toll Brothers, Inc. is not subject to liability merely because it is the parent of a potentially liable subsidiary. Instead, the owners aver, a plaintiff seeking to impose vicarious liability on a parent company must show both that the parent completely dominated the subsidiary and that such a corporate relationship was used to commit wrongful

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[7]The New York State Department of State, Division of Corporations on-line database indicates that this corporation "surrendered authority" in NY in 1993. It was formed in Delaware. That year, Toll Bros., Inc. was granted authority to do business in New York, and is a Pennsylvania corporation. The affidavit from Tom Dillon, who states he is Director of Development for Toll Bros., Inc., (an exhibit to Owners' MS# 8) annexes an organizational chart which indicates that Toll Brothers, Inc. is a publicly-traded Delaware corporation that is the parent entity of the entities which own one-half of Lessee Brooklyn Pier 1 Residential Owner, LP.

acts. The Owners maintain that plaintiff has not even asserted the necessary facts in the complaint. The Owners also add that the evidence in the record demonstrates that the lessee was in fact an independent firm that, for example, obtained and maintained insurance policies covering the relevant premises. Absent proof (or even pleading) of the facts necessary to pierce a corporate veil, the Owners conclude that plaintiff's claims against Toll Brothers, Inc. must be dismissed.

Lastly, the Owners assert that they are entitled to indemnification from Casino. The Owners claim that there is no serious dispute that the accident arose from the concrete superstructure work performed by Casino. The Owners further maintain that pursuant to the applicable trade subcontract, Casino was required to purchase and maintain a commercial general liability insurance policy that covered the applicable defendants as additional insureds. Moreover, the Owners aver, the subcontract contained a broad defense and indemnity provision that specifies that Casino will hold the applicable parties harmless for all claims that arise from, among other things, work performed by Casino. The Owners also state that the indemnity provision was limited to the extent permitted by law and was in effect at all relevant times. The Owners claim that the debris (the wet concrete pebbles) that caused the accident was a result of the superstructure work, thereby triggering the indemnity provision. Accordingly, the Owners conclude, they have established their right to contractual defense and indemnification against Casino. Alternatively, the Owners assert that the accident occurred because of a hazardous condition in the applicable area, and that Casino was responsible for the safety of that area. Therefore, the Owners reason, Casino was negligent; this negligence has caused plaintiff to assert vicarious liability claims against

them. Thus, the Owners argue, Casino is an actual tortfeasor and, under common-law, they are entitled to indemnification from it. The Owners contend that they are thus entitled to partial summary judgment on the issue of defense and indemnification against Casino. For these reasons, the Owners conclude that their motion should be granted in its entirety.

***Casino's Arguments Supporting Its Summary Judgment Motion (MS 9)***

In support of its summary judgment motion to dismiss the complaint, Casino largely adopts the Owners' arguments against plaintiff. With respect to Labor Law § 240 (1) and § 241 (6), Casino advances arguments identical to those made by the Owners. With respect to Labor Law § 200 and common-law negligence, Casino asks the court to incorporate by reference into their papers all the relevant points the Owners argued. Additionally, Casino claims that the deposition answers given by its principal indicate that 1) only GenCon (and not Casino) employees were performing the relevant work in the relevant area, 2) only GenCon supervised the relevant work, cleaning and maintenance, and 3) Casino neither caused the wet condition that precipitated plaintiff's accident nor did it have notice of any slipping hazard. Casino argues that, therefore, it is not liable pursuant to either the common-law negligence doctrine or Labor Law § 200, whether through supervision of plaintiff's work or through ordinary premises liability principles. For these additional reasons, Casino concludes that this court should grant its motion and award it summary judgment dismissing the complaint.

***Plaintiff's Arguments Supporting His Cross Motion for Partial Summary Judgment***

In support of his partial summary judgment motion on the issue of liability pursuant to Labor Law § 240 (1) against defendants, plaintiff first reiterates that this statute subjects

owners, contractors and their agents to a non-delegable duty to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection is breached, owners, contractors and their agents are vicariously liable for injuries that are proximately caused by the breach. Plaintiff next notes that appellate courts have stated that Labor Law § 240 (1) is to be interpreted as liberally as possible to afford protection to workers. At a minimum, plaintiff continues, the statute requires owners and contractors to furnish to workers adequate safety devices that provide proper protection against elevation-related risks. Also, plaintiff states that adequate protection against elevation-related hazards includes proper hoisting/securing equipment to prevent the risk of materials falling and striking workers.

Here, plaintiff claims, the assigned task required him to lift the heavy plywood planks by hand up through an opening to workers who were approximately ten feet above him. He further claims that the surface where he had to stand was wet, slippery and strewn with debris and concrete pebbles. Plaintiff characterizes this situation as one that presents an elevation-related hazard; accordingly, plaintiff argues, Labor Law § 240 (1) required defendants to provide a hoisting/securing device such as a rope and pulley to assist with lifting and securing the planks. Instead, plaintiff adds, his assigned task required him to act as the hoisting device. Plaintiff argues that this constitutes a violation of Labor Law § 240 (1). Also, plaintiff concludes that the slippery floor coupled with the lack of hoisting or fall-protection safety devices establishes that defendants violated Labor Law § 240 (1). Additionally, plaintiff contends, the failure to provide a proper hoisting/securing device led

to the plank escaping his grasp and striking him, causing injuries. Accordingly, plaintiff reasons, the Labor Law § 240 (1) violation proximately caused his injuries.

Plaintiff concludes that he has thus established prima facie entitlement to judgment as a matter of law on the issue of defendants' liability under Labor Law § 240 (1). Plaintiff acknowledges that his cross motion is untimely; however, plaintiff points out that his arguments are made in a legitimate cross motion against moving parties (namely, the Owners) who timely moved for summary judgment. Plaintiff also notes that his cross motion involves an issue already raised by the Owners. Accordingly, plaintiff concludes that this court should entertain his motion and award him partial summary judgment against defendants on the issue of their liability pursuant to Labor Law § 240 (1).

***Plaintiff's Arguments Opposing the Defendants' Motions***

In opposition to both the Owners' motion and Casino's cross motion, plaintiff first argues that Casino's purported "cross" motion is untimely insofar as it is asserted against him and should thus not be considered by the court. Plaintiff points out that Casino's motion was not filed within 60 days after the filing of the note of issue; the motion is, therefore, prima facie untimely. Plaintiff further contends that Casino has not addressed whether "good cause" (as required by the CPLR and appellate authority) exists for the late motion. Lastly, plaintiff notes that at the time Casino made its motion, the only moving parties were the Owners, and that Casino does not seek relief against the Owners. Accordingly, plaintiff argues that Casino's purported cross motion does not seek relief against a moving party and is, therefore, not a cross motion at all. Plaintiff reasons that since Casino has not provided

this court with "good cause" for a late summary judgment motion against a nonmoving party, the court should deny Casino's motion on that ground.

Next, plaintiff reiterates that he has a valid Labor Law § 240 (1) claim against defendants. Plaintiff points out that his assigned task was to transport and lift heavy sheets of plywood up through an opening toward workers approximately 10 feet above him. Plaintiff reasons that, in essence, he was required to act as a hoist. Plaintiff also notes that the floor which he stood on was wet, slippery and covered in concrete pebbles. Plaintiff argues that since he had to lift heavy materials while standing on a slippery floor, he was subjected to an elevation-related hazard. Plaintiff posits that, therefore, Labor Law § 240 (1) required defendants to furnish him with an adequate hoist, pulley or other similar device to protect him against the hazard. However, plaintiff adds, no safety devices were furnished. In short, plaintiff concludes that since he was struck by materials which were improperly hoisted and/or inadequately secured, defendants violated Labor Law § 240 (1). Accordingly, plaintiff maintains that defendants' motions should be denied insofar as they seek summary judgment dismissing his Labor Law § 240 (1) claim.

Also, plaintiff avers that he has valid Labor Law § 241 (6) claims. Plaintiff identifies various Industrial Code provisions that, he claims, were violated by the subject workplace conditions. For example, plaintiff points out that one of the provisions required defendants to keep passageways, walkways and floors free of slipping and tripping hazards. Plaintiff claims that the water, pebbles and other debris on the floor constituted such hazards and therefore violated the Industrial Code. Plaintiff further points out that the cited Industrial Code provisions have been considered by appellate courts and found to be sufficiently

specific to support Labor Law § 241 (6) claims. Moreover, plaintiff continues, there is no merit to the suggestion that the applicable Industrial Code provisions were not violated because the water and debris were "integral" to the work being performed. To the contrary, his plaintiff argues, the record indicates that the water and debris were on the floor independently of his plywood work. Specifically, plaintiff notes that the testimony indicates that water was unintentionally spilled on the floor before he started his assigned task and that the concrete stripping work which created the pebbles had occurred far away from the subject opening. Further, he claims that he had to walk around building materials and discarded furniture and that there were screws strewn all over the floor [EBT Pages 97, 98, 142]. In sum, plaintiff avers that the record indicates that the water and debris on the floor resulted from unrelated work that had taken place previously. Accordingly, plaintiff concludes that defendants' motions should be denied insofar as they seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claims.

Finally, plaintiff states that defendants have not established their entitlement to judgment as a matter of law with respect to either Labor Law § 200 or common-law negligence. Plaintiff states that some of the defendants, such as Hudson and Casino, had extensive responsibility for site safety and cleaning. Plaintiff adds that the conditions in his work area constituted premises hazards for which the defendants with an ownership interest bear responsibility. Plaintiff also claims that the various defendants have not shown that they lacked actual or constructive notice of the hazardous condition. Indeed, plaintiff continues, the Owners' own site inspector's records indicate that he had observed the relevant area on the morning of plaintiff's accident, not later in the afternoon, which would

have been closer in time to when plaintiff was injured. Plaintiff claims that, therefore, defendants have not established a close-in-time inspection sufficient to establish, prima facie, lack of notice. Lastly, plaintiff argues that defendants' contention about the hazardous floor condition as being "open and obvious" lacks merit, as it, at best, presents an issue of comparative negligence. Plaintiff adds that, since he was required to work in the area, no such issue is relevant here. For these reasons, plaintiff concludes that the court should deny defendants' motions.[8]

***Casino's Arguments in Opposition***

In opposition to plaintiff's cross motion, Casino first argues that plaintiff has failed to demonstrate prima facie entitlement to judgment as a matter of law on the issue of defendants' liability under Labor Law § 240 (1). Specifically, Casino claims that the accident, given plaintiff's present description of it, does not stem from an elevation-related or gravity-related hazard, and thus is not within the scope of Labor Law § 240 (1). Alternatively, Casino contends that plaintiff's description of the accident in the motion differs from descriptions he previously gave, as evidenced by the record. Casino notes that

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[8] Plaintiff also argues that the defendants have not established, as a matter of law, that they are not subject to vicarious liability pursuant to the Labor Law because they are not "owners, contractors or agents" as those terms are used. Plaintiff notes that they merely supply one affidavit (and a chart) to support this contention and he argues that this is insufficient. Furthermore, plaintiff states that counsel for the Owners purport to move on behalf of two named parties—Toll Brothers Inc. and Starwood Capital Group JV—that have not interposed an answer in this matter. The court notes that neither of these parties were served with the summons and complaint. E-file doc. #7 is an affidavit of attempted service which states that these entities could not be served by serving the Secretary of State, as the first had dissolved [sic] and the second was not registered at all, nor would a joint venture be. Thus, jurisdiction was never obtained and the complaint must be dismissed against them. Starwood Capital Group LLC answered the complaint, and is represented by counsel for Owners. The answer states that this entity was incorrectly sued [as "Starwood Capital Group and Toll Brothers, Inc."].

the accident report (which plaintiff dictated to a coworker), plaintiff's medical records and relevant worker's compensation documents do not indicate that plaintiff slipped or fell or that the plywood sheet struck the plaintiff. Instead, Casino continues, those documents in the record merely suggest that plaintiff injured himself while lifting a heavy object. That kind of accident, Casino claims, is not sufficient to trigger Labor Law § 240 (1). Indeed, Casino argues, applicable appellate authority holds that injuries that merely result from lifting heavy objects are not within the scope of Labor Law § 240 (1). Casino contends that any cases cited by plaintiff that suggest the contrary involve falling objects that were transported (or were attempted to be transported) from one height to another and which either struck a worker or caused a worker to fall. Here, Casino claims, neither situation occurred. Casino concludes that since plaintiff was injured while lifting an object, Labor Law § 240 (1) is inapplicable, and plaintiff's motion for partial summary judgment on the issue of liability under § 240(1) should be denied.

In partial opposition to the Owners' motion, Casino first claims that the Owners are not entitled to contractual indemnification. First, Casino points out that only it is a party to a written agreement with the Lessee; indeed, avers Casino, the written agreement specifically disclaims the existence of any third-party beneficiary. Thus, Casino reasons, only the Lessee would have the right to indemnification pursuant to their written agreement. Next, Casino claims that such a claim would be premature. Casino points out that the record contains contradictory descriptions of the accident. Casino suggests that the trier of fact must make a determination before summary judgment on the indemnification issue should be awarded. Moreover, Casino continues, the party that was actively negligent—that is

responsible for the accident—has yet to be determined. Casino notes that Hudson[9] undertook the responsibility for site safety and suggests that Hudson (and not Casino) may be ultimately responsible for plaintiff's accident. For these reasons, Casino concludes that summary judgment against it on the issue of contractual indemnification should be denied as premature.

Lastly, Casino claims that the Owners are not entitled to common-law indemnification. Casino points out that common-law indemnification is only proper if ordered against an active tortfeasor. Here, Casino notes, the record contains no evidence that Casino was an active torfeasor. Casino points out that it neither accessed the area in which plaintiff worked nor controlled the manner in which plaintiff worked. Accordingly, Casino reasons, it owed no duty to plaintiff (and therefore could not breach it). Additionally, Casino reiterates that Hudson undertook the responsibility for site safety and would thus presumably be responsible to the Owners for common law indemnification. For these reasons, Casino concludes that it does not owe common-law indemnification to the Owners, and the branch of the Owners' motion seeking such relief against Casino should thus be denied.

***Owners' Arguments in Opposition***

In opposition to plaintiff's cross motion, the Owners first assert that Labor Law § 240 (1) does not apply to a falling-object accident precipitated by an injured worker who lifted the object while standing on the floor. The Owners state that the fact that plaintiff lifted the plywood upwards through an opening and by hand is fatal to his Labor Law § 240 (1) claim.

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[9] Hudson was the construction manager, pursuant to the contract annexed to MS # 8 (E-file Doc. 120) with Brooklyn Pier 1 Residential Owner, L.P. Hudson subcontracted with another entity, a non-party, for site safety (E-file Doc # 121).

The Owners claim that the appellate cases cited by plaintiff involved injuries which were caused by significant elevation differentials and are distinguishable from the instant case, where plaintiff stood on the ground and lifted a piece of plywood. Thus, the Owners reason, Labor Law § 240 (1) does not apply here.

Alternatively, the Owners claim that plaintiff is not entitled to partial summary judgment on the issue of Labor Law § 240 (1) liability because his statements concerning the accident are contradictory. The Owners note that the earliest of plaintiff's statements are contained in an accident report, which indicates only that plaintiff injured a muscle while carrying plywood. The Owners suggest that this report is admissible, or at least sufficient, to oppose summary judgment. Accordingly, the Owners claim that an issue exists as to plaintiff's credibility, and such an issue precludes granting summary judgment to plaintiff.

Again, alternatively, the Owners reiterate that Starwood Capital Group, Starwood Capital Group JV and Brooklyn Pier 1 Hotel Owner, L.P. are not subject to the vicarious liability provisions of the Labor Law because they are not owners, contractors or agents of owners or contractors, nor are they subject to the doctrine of common law negligence involving premises liability, because these firms had no ownership interests in the subject building. More specifically, the Owners state that the record establishes that these firms did not hire any contractors in connection with the subject project. The Owners further claim that these firms did not supervise or control plaintiff's work. The Owners restate that plaintiff's own deposition testimony establishes that he only received direction from a GenCon foreman. Absent an ownership/leasehold interest, supervision of work and/or hiring of

contractors, the Owners reason, these firms cannot be held liable for violations of the Labor Law or for any hazardous condition at the premises.

Moreover, the Owners note that Toll Brothers, Inc. is not a proper defendant as it is merely the parent corporation of certain partners of the Lessee, a limited partnership.[10] The Owners claim that plaintiff's attempt to recover against Toll Brothers, Inc.—which also: 1) had no property interest in the premises; 2) hired no contractors; and 3) supervised no work—is an impermissible attempt to pierce the corporate veil. The Owners argue that Toll Brothers, Inc. is entitled to the limited liability protections of a parent company unless plaintiff can demonstrate (among other points) corporate malfeasance. Here, the Owners continue, the pleadings do not even allege such claims. For these reasons, the Owners conclude that Toll Brothers, Inc. is not subject to liability in this action; accordingly, the Owners ask this court to dismiss the action against Toll Brothers, Inc.[11]

Lastly, the Owners partially oppose[12] Casino's "cross motion." First, the Owners note, as plaintiff did, that the purported cross motion is untimely by more than two months. The Owners also claim that the purported cross motion is not a true cross motion and should thus not be accepted as an untimely cross motion in response to a timely motion. The Owners conclude that Casino's motion should be denied on this ground. Alternatively, the

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[10]In New York, a corporation is permitted to be, *inter alia*, a general or limited partner of a partnership, a member or managing member of an LLC, or a joint venturer. BCL § 202(a)(15).

[11]Counsel for the Owners do not seem to be aware that Toll Brothers, Inc. was never served with the summons and complaint, nor did it answer the complaint.

[12] Casino notes that it is *not* seeking summary judgment dismissing the cross claims. The opposition papers submitted by the Owners appear to assume that Casino would attempt to press such arguments in their reply papers.

Owners suggest that Casino should not be awarded summary judgment dismissing their cross claims for contribution and indemnity. The Owners reiterate that an enforceable contractual indemnification provision between Casino and Owners is applicable. Moreover, the Owners repeat their view that Casino, which undertook site safety responsibility by engaging a safety manager, is an actual tortfeasor from which the Owners' alleged vicarious liability stems. The Owners thus reason that Casino is not entitled to summary judgment dismissing the cross claims for contribution and indemnity, and to the extent Casino's motion seeks the same, it should be denied.

***Discussion***

***Summary Judgment Standard***

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]).

If a movant meets the initial burden, the court must then evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]); *see also Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]).

Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574, 575 [2d Dept 1999]). More specifically, "averments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, a trial court should summarily decide the issues raised in a motion for summary judgment (*Andre*, 35 NY2d at 364).

***Timeliness of Casino's Cross Motion***

This court notes that Casino's so-called "cross motion"[13] is prima facie untimely. The applicable rule (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 [formerly Rule 13]), states that:

> "[i]n cases where the City of New York is a defendant and is represented by the Tort Division of the Corporation Counsel's office, summary judgment motions may be made no later than 120 days after the filing of a Note of Issue. In all other matters, including third party actions, motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue. In both instances the above time limitation may only be extended by the Court upon good cause shown. See CPLR 3212(a)."

In this action, plaintiff filed a note of issue and certificate of readiness on May 29, 2018. Therefore, Casino had until July 30, 2018[14] to timely move for summary judgment. Nevertheless, Casino did not file its summary judgment motion until October 8, 2018; Casino's motion is thus untimely. Generally, the court should not entertain Casino's motion absent Casino's showing of "good cause" for the delay (*see* CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *First Union Auto Fin., Inc. v Donat*, 16 AD3d 372 [2d Dept 2005]; *Breiding v Giladi*, 15 AD3d 435 [2d Dept 2005]). The requisite "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for

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[13] Casino, as mentioned in n 1, incorrectly terms its motion as a cross motion. "A cross motion is a motion against a moving party" (*Marc,* 2006 NY Slip Op 51700[U], n 3, citing *Gaines,* 21 AD2d 986; CPLR 2215; *Williams,* 12 AD3d 366). Casino seeks summary judgment against plaintiff, who had not yet moved for summary judgment when Casino did; only the Owners had a pending summary judgment motion when Casino made its motion, and Casino does not seek relief against the Owners.

[14] The sixtieth day is actually July 28, 2018, which is a Saturday.

the untimeliness— rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill*, 2 NY3d at 652).

However, "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007], citing *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment*, 298 AD2d 540 [2d Dept 2002]; *Miranda v Devlin*, 260 AD2d 451 [2d Dept 1999]). The Owners' motion seeks summary judgment dismissing plaintiff's complaint based on arguments about the Labor Law and principles of premises liability; Casino's motion seeks the same. In fact, the only difference between the Owners' motion and Casino's motion is that the Owners seek relief against Casino as well. However, with respect to plaintiff, the grounds for both motions are nearly identical, and "the nearly identical nature of the grounds may provide the requisite good cause" (*id.* at 592). Accordingly, despite the fact that Casino's motion is untimely, good cause for the lateness exists, and not withstanding the arguments raised by the Owners and plaintiff, this court will therefore consider Casino's untimely motion (*id.*; *see also Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]).

***Labor Law § 240 (1)***

Next, the court considers Labor Law § 240 (1), which states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct

> or control the work, in the erection, demolition, repairing, 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 . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]).

A successful cause of action pursuant to Labor Law § 240 (1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate

cause of his injuries" (*Skalko v Marshall 's Inc.*, 229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d at 524]). Lastly, this statute "is to be construed as liberally as may be" to protect workers from injury (*Zimmer*, 65 NY2d at 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] ["a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability"]).

First, the court considers the defendants' motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. In doing so, the court must view the record in the manner most favorable to plaintiff (*Pierre-Louis,* 66 AD3d at 862 ). Given this standard, the court rejects defendants' arguments concerning Labor Law § 240 (1).

Defendants argue that the accident[15] does not implicate Labor Law § 240 (1) because plaintiff neither fell nor was struck by a falling object; rather, he slipped on a wet floor and lost his grip on something he was carrying. Defendants state that Labor Law § 240 (1) thus does not apply. However, as stated above, the statute applies to all injuries stemming from the application of the force of gravity (*Gasques*, 15 NY3d 869) and should be interpreted as liberally as possible to protect workers (*Zimmer*, 65 NY2d at 520-521). In one example, Labor Law § 240 (1) claims have been found applicable to a worker who did not fall and was

[15] To reiterate, in considering plaintiff's opposition to summary judgment, this court views the recitation of facts as plaintiff's testimony indicates. Specifically, for the purpose of opposing summary judgment, plaintiff was struck by a falling sheet of plywood that he was lifting up through an opening to workers one story above him.

not struck by a falling object, but was injured while attempting to lift equipment (*Vislocky,* 62 AD3d 785, et seq.).[16] Indeed, the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603).[17] Here, again viewing the record in the manner most favorable to plaintiff, as the court must (*Pierre-Louis*, 66 AD3d at 862), plaintiff was injured when a piece of plywood he was lifting became unsecured, fell, and struck him (*cf. Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017] [" '[F]alling 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"]). The plaintiff's claim that an adequately placed hoist or pulley—two devices explicitly identified in Labor Law § 240 (1)—would have protected him must be taken seriously given *Runner*'s test. Arguably, the plywood was a "falling object [that] required

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[16] The Appellate Division described the accident as follows:

> "The plaintiff was injured as he worked on a one-foot-wide concrete pedestal at a height approximately 20 feet above subway train tracks. His work involved using a 75- to 80-pound hydraulic jack to stress rebars that had been installed through the center of the pedestal and that extended approximately 5- to 5½-feet above the pedestal. The plaintiff 'wrenched his back' and 'ripped his stomach' when, while holding the jack and wrapping his leg around a rebar, he 'twist[ed]' his body and reached across to apply the jack to another rebar about two feet away." (*id.* at 785-786).

The court added that the "fact that the plaintiff did not actually fall from the [pedestal] is irrelevant as long as the harm directly flow[ed] from the application of the force of gravity to [his] person" (*id.* at 786 [internal quotation marks omitted], quoting *Lacey,* 275 AD2d at 735, and *Ross,* 81 NY2d at 501).

[17] The accident described in *Runner* also did not involve a falling worker or falling object, that is, it "did not involve the traversal of an elevation differential either by plaintiff or an object that hit him" (*Runner*, supra, 13 NY3d at 604).

securing for the purposes of the undertaking" (*Banscher v Actus Lend Lease, LLC*, 103 AD3d 823, 824 [2d Dept 2013]). Since summary judgment must be denied if the existence of such an issue is even arguable (*Terranova v Emil*, 20 NY2d 493, 496 [1967] ["Our sole duty, as well as the limit of our competence, is to determine whether a bona fide issue is presented on this question"]), defendants' motions are denied with respect to Labor Law § 240 (1).

However, the court must also deny plaintiff's cross motion for the same reason. Assuming arguendo that plaintiff has demonstrated his prima facie entitlement to judgment as a matter of law with respect to Labor Law § 240 (1), defendants have raised at least one triable issue of fact. In considering his motion for partial summary judgment on the issue of liability, the record must be viewed in the light most favorable to the opponents of summary judgment (*see, e.g., Santelises v Town of Huntington*, 124 AD3d 863, 865 [2d Dept 2015]). Here, the record indicates an issue of fact with respect to plaintiff's credibility. Plaintiff's earlier statements, contained in his medical records, workers' compensation documents, as well as the accident report he completed (E-file Doc. 160), indicate that he had reported, on more than one occasion, that he had merely sustained an injury to his shoulder, which occurred while he was carrying a piece of plywood. The description of the accident contained in those documents do not implicate any gravity-related risks; indeed, an injury caused by an object carried by hand (as opposed to one being lifted or hoisted) does not implicate the special protections afforded by Labor Law § 240 (1) (*see e.g. Carroll v Timko Contr. Corp.*, 264 AD2d 706 [2d Dept 1999]). Again, viewing the record in the light most favorable to the opponents of plaintiff's motion (*Santelises*, 124 AD3d at 865), plaintiff has not demonstrated prima facie entitlement to judgment as a matter of law on this issue.

The fact that plaintiff's deposition testimony[18] and his present contentions regarding how the accident and his injuries occurred differ from the description included in his medical records, workers' compensation documents and accident report presents an issue of fact as to his credibility, which cannot be summarily resolved. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.* , 477 US 242, 255 [1986]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["[i]t is not the court's function on a motion for summary judgment to assess credibility"]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). "The credibility of the witnesses, the truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of facts" (*Sorokin v Food Fair Stores*, 51 AD2d 592, 593 [2d Dept 1976]). Lastly, a plaintiff's medical records containing a plaintiff's description of an accident (that contradicts another description) to medical personnel is properly considered in opposition to a plaintiff's summary judgment motion (*see e.g. Symonds v 1114 Ave. of Ams., LLC*, 7 Misc 3d 1008[A], 2005 NY Slip Op 50501[U] [Sup Ct, NY County 2005]; *see also Silva v 81st Street & Avenue A Corp.*, 169 AD2d 402, 404 [1st Dept 1991], *lv denied* 77 NY2d 810 [1991]). For these reasons, the court cannot find that, as a matter of law, plaintiff was not provided with adequate safety devices; accordingly, plaintiff's motion for partial summary judgment against defendants on the issue of Labor Law § 240 (1) liability is denied.

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[18]E-file Doc. 98, taken March 6, 2017.

***Labor Law § 241 (6)***

Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *Ross,* 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]). The vicarious liability provisions of Labor Law § 241 (6) apply to owners, contractors, and their agents (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]), which are subject to Labor Law § 241 (6) liability irrespective of fault or negligence (*Rizzuto,* 91 NY2d at 349-350 [owner or contractor is liable without regard to fault if Labor Law § 241 (6) violation is established]).

A sustainable Labor Law § 241 (6) claim requires the allegation that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross,* 81 NY2d 494 [1993]) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto,* 91 NY2d at 351). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross,* 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

To successfully move for summary judgment dismissing a plaintiff's Labor Law § 241 (6) claims, a defendant must demonstrate "that the Industrial Code provisions cited were inapplicable to the facts, or that the alleged violation of the same was not a proximate cause of the damages alleged" (*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009], citing *Ross,* 81 NY2d 494; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550 [2d Dept 2007]; *Rivera v Santos*, 35 AD3d 700 [2d Dept 2006]). In order to successfully oppose a motion for summary judgment dismissing Labor Law § 241 (6) claims, a plaintiff is required to cite a violation of an applicable provision of the Industrial Code that contains concrete specifications with which owners and contractors must comply (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [2d Dept 1996]; *see also Ross,* 81 NY2d 494). Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine

the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "where such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the work site was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]).

Here, plaintiff claims that violations of Industrial Code § 23-1.7 ("Protection from General Hazards") occurred; that provision states, in applicable part, as follows:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris

and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Appellate courts have stated that these provisions are sufficiently specific to support a claim pursuant to Labor Law § 241(6) (*see e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450-451 [1st Dept 2013]; *McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395 [2d Dept 2004]; *Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000]; *Fox v Westchester Resco*, 229 AD2d 466 [2d Dept 1996]; *Ciraolo v Melville Ct. Assocs.*, 221 AD2d 582 [2d Dept 1995]; *Colucci v Equitable Life Assur. Socy.*, 218 AD2d 513 [1st Dept 1995]; *Hammond v International Paper Co.*, 178 AD2d 798 [3d Dept 1991]) and plaintiff 's Labor Law § 241 (6) cause of action here is thus adequately supported (*see, e.g., Rivera*, 35 AD3d at 702). Moreover, in light of plaintiff's sworn (EBT) description of the hazards on the floor immediately preceding the accident,[19] these provisions are certainly applicable and were arguably violated (*see, e.g., Thompson v 1241 PVR, LLC*, 104 AD3d 1298 [4th Dept 2013]). Accordingly, plaintiff has asserted sustainable Labor Law § 241 (6) claims against defendants.

Defendants' arguments to the contrary lack merit. The court notes that defendants challenge whether these provisions, by their terms, apply to the location of plaintiff's accident. However, even assuming that the unfinished floor upon which plaintiff walked and stood was not a "passageway" or "walkway" for the purposes of Industrial Code § 23-1.7, the court notes that Industrial Code § 23-1.7 (e) (2) applies to "[w]orking areas" and "floors"

[19] Plaintiff testified that the area he had to traverse while carrying the sheets of plywood was "filled with stuff, wood, crap, dismantled table" [Page 139] which he had to navigate around, as well as spilled water [Page 140] and concrete pebbles.

as well as passageways and other thoroughfares. Since there is no serious dispute that plaintiff's accident occurred in a work area, on the floor, Industrial Code § 23-1.7 (e) (2) applies here. Moreover, defendants misstate the law concerning exceptions to erstwhile violations of Industrial Code § 23-1.7 (e) relevant to "integral" parts of work performed. Specifically, and as defendants correctly note, Industrial Code § 23-1.7 (e) (1) and (2) are not applicable to accidents caused by "an object that was an integral part of the work being performed at the site of his accident" (*Dubin v S. DiFazio & Sons Constr.*, 34 AD3d 626 [2d Dept 2006]). However, this rule does not seem to apply to debris or building materials, which can be cleared away from passageways and working areas. So-called "integral" objects include objects protruding from a work site floor (*O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]) and an adhesive applied to a work site floor (*Moses v Pinazo*, 265 AD2d 391, 392 [2d Dept 1999] ["Since spreading the glue on the floor was an integral part of the re-tiling process, it cannot be said that the plaintiff was injured by debris or other obstruction as defined in Industrial Code [§] 23-1.7 (e)"]). Indeed, since Industrial Code § 23-1.7 (e) requires passageways and work areas to be free of "debris," "materials" and "any other obstructions or conditions which could cause tripping," it would frustrate the purpose of that provision for this court to find that a wet and slippery floor constituted an integral part of plaintiff's work of moving plywood. In any event, plaintiff testified that the concrete work that had caused the hazardous wet and slippery condition had been completed before he commenced his work. Viewing the record in the manner most favorable to plaintiff (*Pierre-Louis,* 66 AD3d at 862), this court cannot state as a matter of law that water and concrete pebbles on the floor were "integral" to

plaintiff's work. Accordingly, defendants' motions are denied insofar as they seek summary judgment dismissing plaintiff's Labor Law

§ 241 (6) claims.

***Labor Law § 200 and Common-Law Negligence***

The court grants defendants' motions insofar as they seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Labor Law § 200 states, in applicable 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 protections to such persons."

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto,* 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi,* 80 NY2d at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great*

*Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, there is no indication that any defendant supervised or controlled (or had the right to do supervise or control) plaintiff's work (*cf. Aranda v Park East Constr.*, 4 AD3d 315, 316 [2d Dept 2004] [discussing Labor Law § 200 liability based on supervision and control], citing *Lombardi,* 80 NY2d at 295). At his deposition, plaintiff testified that he received directions only from his GenCon foreman; evidence that plaintiff had any interaction with agents of any of the defendants is lacking. The record thus establishes that a nonparty directed plaintiff's work (*see, e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]). Accordingly, plaintiff's Labor Law § 200 claims are sustainable only if they are viably based on premises liability principles (*cf. Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007] ["Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner [or its agent] may be held liable in common-law negligence and under Labor Law § 200 . . ." Such liability occurs if [the owner or its agent] "had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident"]).

Here, there is no indication that any defendant created the alleged hazardous condition; to the contrary, the record suggests that GenCon employees and possibly other subcontractors were responsible for the debris, pebbles and water on the floor. Similarly, there is no indication that any defendant had actual notice of the condition. The record indicates that plaintiff complained to GenCon employees concerning the hazards, but, as noted above, the record lacks any indication that notice of the same was given to any agent of any defendant. Lastly, defendants did not have constructive notice of the same. Assuming that the debris and water on the floor were noticeable, the record does not establish that this condition was visible for any appreciable length of time; accordingly, there is no evidence that any defendant had constructive notice of the allegedly dangerous condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"]). Accordingly, plaintiff has no viable Labor Law § 200 or common-law negligence claims against any of the defendants.

The plaintiff's arguments to the contrary lack merit. As stated above, a defendant is not subject to Labor Law § 200 or common-law negligence liability unless the defendant either exercised supervisory control over the work performed or had notice of the allegedly dangerous condition (*Sprague*, 240 AD2d at 394). The fact that agents of defendants either had a duty to inspect the site or actually did inspect the site is insufficient to demonstrate an issue of fact as to the requisite supervision and control (*Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]; *see also Comes,*

82 NY2d at 877; *Enos v Werlatone, Inc.*, 68 AD3d 712, 713 [2d Dept 2009]; *Loiacono v Lehrer, Mcgovern, Bovis, Inc.*, 270 AD2d 464 [2d Dept 2000]; *Richichi v Constr. Mgt. Tech.*, 244 AD2d 540, 542 [2d Dept 1997]). More specifically, "the right to generally supervise the work, stop a contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or common-law negligence" (*Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2d Dept 2012], quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2d Dept 2010]; *see also Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004] ["The retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability"], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]).

Lastly, evidence of notice of a hazard must be specific in order to create an issue of fact; general awareness of the danger of a particular condition is legally insufficient to constitute constructive notice (*see e.g. Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]), as is vague testimony that does not establish the length of time an allegedly hazardous condition existed before the subject accident (*see e.g. Kobiashvilli v Hill*, 34 AD3d 747, 747-748 [2d Dept 2006]). In sum, since plaintiff has not demonstrated that defendants had any notice of the subject hazardous condition, and since defendants did not create the condition, defendants are thus entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims (*see e.g. Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553 [2d Dept 2007]).

***Vicarious Liability Pursuant to The Labor Law***

The duties imposed by Labor Law §§ 240 (1) and 241 (6) on owners, contractors and their agents are non-delegable—in other words, property owners, construction contractors and agents of owners and contractors are subject to absolute liability for violations of these provisions without regard to fault (*see generally Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012] [vicarious liability provisions of Labor Law §§ 240 (1) and 241 (6) apply to owners, contractors, and their agents]). The record in this action suggests that defendants Brooklyn Pier 1 Hotel Owner, L.P., Starwood Capital Group and Toll Brothers, Inc. and Starwood Capital Group, JV are not owners, contractors or their agents. The plaintiff's action, now consisting of plaintiff's surviving Labor Law § 240 (1) and § 241 (6) claims, must be dismissed as against these defendants. Furthermore, the latter two defendants were never served with process and the complaint must be dismissed as against them.

The plaintiff's arguments to the contrary lack merit. First, since the record shows that Development Corp. is the fee owner of the subject premises,[20] and also that the Lessee is the sole tenant,[21] the remaining defendants are not "owners" for Labor Law purposes. The record also indicates that other than Hudson and Casino, no defendant is a "contractor" for the same purposes. Lastly, these defendants had no control over either the relevant work or

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[20] The court notes that defendant Brooklyn Pier 1 Hotel Owner, L.P. has property interests in 60 and 130 Furman Street, but not in 90 Furman Street, where the accident occurred.

[21] The Lessee is subject to absolute vicarious liability pursuant to the Labor Law because it hired construction contractors (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008] [tenant subject to Labor Law § 240 (1) and § 241 (6) liability when it fulfils role of owner by contracting to have work performed on tenant's benefit]). Further, it is a ground lessee under a lease for more than eighty years.

the subject area; therefore, these defendants are not "agents" of an owner or contractor (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2d Dept 2011] ["A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the 'ability to control the activity which brought about the injury'"], quoting *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Russin,* 54 NY2d at 317-318; *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 99 [1st Dept 1999]). Accordingly, since plaintiff's remaining claims are limited to Labor Law § 240 (1) and Labor Law § 241 (6), these claims are properly dismissed against defendants Brooklyn Pier 1 Hotel Owner, L.P., Starwood Capital Group and Toll Brothers, Inc. and Starwood Capital Group, JV.

***Parent Company Liability***

The court grants the branch of Owners' motion asking that the action be dismissed as against defendant Toll Brothers, Inc. As noted above, the vicarious liability provisions of the Labor Law apply to owners, contractors and their agents (*Alfonso*, 101 AD3d at 770). Moreover, liability based on negligence depends on either control over the work performed or an ownership/possessory interest in the premises (*see e.g. Sprague*, 240 AD2d at 394). Here, the record indicates that Toll Brothers, Inc. is not an owner of the premises, a contractor hired to perform work on the premises, or an agent of either an owner or a contractor. Also, the record indicates that, unlike the Lessee, Toll Brothers, Inc. does not have a possessory or other property interest in the premises. The Owners have established that the involvement of Toll Brothers, Inc. in this project is limited to the ownership of a subsidiary entity or entities who are the Lessee's partner(s). "A parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises

complete dominion and control over the subsidiary" (*Serrano v New York Times Co., Inc.*, 19 AD3d 577, 577 [2d Dept 2005], citing *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]; *Potash v Port Auth. of N.Y. & N.J.*, 279 AD2d 562 [2d Dept 2001]). Moreover, the court notes that the standard for piercing the corporate veil, as was described in *Prichard v 164 Ludlow Corp.* (14 Misc 3d 1202 [A], 2006 NY Slip Op 52381[U], *5 [Sup Ct NY County 2006]) is as follows:

> "[i]t is well established that those seeking to pierce the corporate veil bear a heavy burden (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Under New York law, to pierce the corporate veil, the plaintiff must prove that: '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff, which resulted in plaintiff's injury' (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Bowles v Errico,* 163 AD2d 771 [3d Dept 1990])."

Here, not only is the record lacking any such justification for piercing the corporate veil, but plaintiff does not allege any of the necessary facts. For these reasons, and since defendant Toll Brothers, Inc.'s connection to this project appears limited to owning a subsidiary entity or entities who are the Lessee's partners, the court dismisses the action as against defendant Toll Brothers, Inc.[22]

***Indemnification***

The court rejects the Owners' arguments concerning their claim for common-law indemnification against Casino. To be sure, one who has an interest in real property and who

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[22]It is further noted that this defendant was never served with the summons and complaint, has not answered the complaint and has no counsel who has appeared in this action, although perhaps counsel intended the motion to be a "special appearance" in order to obtain an order of dismissal.

establishes that its liability is purely vicarious is entitled to common-law indemnity from the actual tortfeasor (*see e.g. Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d 394, 395-396 [2d Dept 2008]; *Cunha v City of New York*, 45 AD3d 624, 625-626 [2d Dept 2007]; *Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691 [2006]; *Berenson v Jericho Water Dist.*, 33 AD3d 574 [2d Dept 2006]; *Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575, 577 [2d Dept 2003]). However, and contrary to the Owners' contention, nothing in the record indicates that Casino was, as a matter of law, an "actual tortfeasor." To the extent that workplace conditions contributed to the accident, such conditions could equally reasonably be attributed to GenCon or its employees, and not Casino. Moreover, and as noted above, the fact that Casino had general supervisory responsibility over the subject area is insufficient to impose liability (*Austin,* 79 AD3d at 684). Since there is no indication that Casino breached any duty, through act or omission, this court cannot conclude that Casino is an "actual tortfeasor" as a matter of law. For that reason, the Owners' motion is denied insofar as it seeks summary judgment with respect to common-law indemnity.

However, two defendants—the Lessee and the construction manager/general contractor Hudson Meridian Construction Group, LLC—are entitled to contractual defense and indemnification from Casino. "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., Inc.*, 70 NY2d 774, 777 [1987]). Here, the Lessee has submitted a copy of an executed agreement between it and Casino, and the agreement, at

Exhibit E, "General Conditions,"Article 8,[23] requires Casino to indemnify "Owner, Contractor and Architect,"(¶8A) as applicable here, Lessee (Pier 1 Residential Owner LP) and general contractor/construction manager (Hudson Meridian), for all claims related to the superstructure work (*cf. Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989] [promise to indemnify must be clearly implied in agreement]). There is no serious dispute that plaintiff's claims are related to the superstructure work. There is also no serious dispute that the agreement was in effect at all relevant times. Also, since the indemnity provision states "[t]o the fullest extent permitted by applicable law, Subcontractor [Casino] shall indemnify," the provision is enforceable (*cf.* General Obligations Law § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]). Casino's argument that its contract with Lessee states at Article 16 that it "shall not in any way inure to the benefit to any third party" is unavailing. Article 16 is about the consequences to Casino for construction delays, and does not supercede a clear indemnification clause. Moreover, the indication is that the Lessee and Hudson Meridian's liability, if any, is purely vicarious, and that there is no indication that either of them are seeking indemnification for its own negligent acts or omissions; accordingly, the provision is enforceable (*see e.g. Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). Lastly, given the facts that the Lessee and Hudson Meridian are subject merely to vicarious liability, and that Casino agreed to indemnify them for all claims arising from superstructure work, it is irrelevant if Casino is actually negligent in this matter (*see e.g. Velez v Tishman Foley Partners*, 245 AD2d 155, 156-157 [1st Dept 1997] [indemnity provision applicable to

[23]Exhibit L to motion Sequence 8, E-file Doc. 104, at Page 125.

accident allows owner indemnitee to recover from contractor indemnitor irrespective of whether or not indemnitor was negligent], citing *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178-179 [1990]; *Walsh v Morse Diesel,* 143 AD2d 653, 655-656 [2d Dept 1988]). For these reasons, the court awards the Lessee (Brooklyn Pier 1 Residential Owner, L.P.) and the construction manager (Hudson Meridian Construction Group, LLC) summary judgment on their claim for contractual indemnification against Casino.

Accordingly, it is

**ORDERED** that the motion of defendants Brooklyn Pier 1 Hotel Owner, L.P., Hudson Meridian Construction Group, LLC, Brooklyn Pier 1 Residential Owner, L.P., Brooklyn Bridge Park Development Corp., Toll Brothers, Inc., Starwood Capital Group and Toll Brothers, Inc. and Starwood Capital Group, JV, (MS# 8), is granted solely to the extent that: 1) all claims as well as any cross claims against defendants Brooklyn Pier 1 Hotel Owner, L.P., Toll Brothers, Inc., Starwood Capital Group and Toll Brothers, Inc. and Starwood Capital Group, JV are dismissed; 2) the Labor Law § 200 and common-law negligence claims asserted by plaintiff Aldair Dias are dismissed as against all movants; and 3) defendants Brooklyn Pier 1 Residential Owner, L.P. and Hudson Meridian Construction Group, LLC are entitled to a judgment declaring that Casino Development Group, Inc. is obligated to provide them with both a defense and contractual indemnification, and the motion is otherwise denied; and it is further

**ORDERED** that the motion of defendant Casino Development Group, Inc., (MS# 9), is granted solely to the extent that plaintiff's Labor Law § 200 and common-law negligence claims are dismissed, and is otherwise denied; and it is further

**ORDERED** that plaintiff's cross motion (MS# 10), is denied.

The foregoing constitutes the decision, order and judgment of the court.

**E N T E R,**

**Hon. Debra Silber, J.S.C.**

Hon. Debra Silber
Justice Supreme Court