SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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INDEX NO. 157803/2014

EDWARD BRUNO, LOUISE BRUNO,

Plaintiff,

- v -

MALL 1-BAY PLAZA, LLC,MACY'S RETAIL HOLDINGS, INC.,AURORA CONTRACTORS, INC.,SCHLINDLER ELEVATOR CORPORATION, J.C. STEEL CORP.,

Defendant.

MOTION DATE 08/15/2019, 08/15/2019, 08/15/2019, 08/15/2019, 08/15/2019

MOTION SEQ. NO. 005 006 007 008 009

DECISION + ORDER ON MOTION

----------X

AURORA CONTRACTORS, INC.

Plaintiff,

-against-

J.C. STEEL CORP.

Defendant.

Third-Party
Index No. 595245/2015

----------X

MACY'S RETAIL HOLDINGS, INC.

Plaintiff,

-against-

RUSCO FIXTURE CO., INC., J.C. STEEL CORP.

Defendant.

Second Third-Party
Index No. 595244/2016

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 261, 269, 274, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 348, 349, 350, 351, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 471, 472, 473, 474, 475, 476, 492, 493

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204,

205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 262, 270, 275, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 336, 337, 338, 339, 340, 354, 355, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 461, 462

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 263, 271, 276, 279, 280, 334, 335, 341, 342, 343, 344, 345, 346, 347, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 463, 464, 465, 466, 467, 477, 478, 479, 480, 481, 482, 483, 484, 485, 489, 490, 491

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 264, 272, 277, 281, 282, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 352, 353, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 468, 469, 470, 486, 487

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 256, 257, 258, 259, 265, 273, 278, 283, 284, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 488

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

HON. PAUL A. GOETZ

This is an action to recover damages for personal injuries allegedly sustained by a carpenter on April 3, 2014, when, while working at a construction site located at 100 Baychester Avenue, Bronx, New York (the Premises), he tripped and fell while walking into a freight elevator.

In motion sequence number 005, defendant/third-party plaintiff Aurora Contractors, Inc. (Aurora) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it and for summary judgment in its favor on its third-party claim for contractual indemnification against defendant/third-party defendant/second third-party defendant J.C. Steel Corp. (JC Steel).

In motion sequence number 006, defendants/second third-party plaintiffs Mall 1-Bay Plaza, LLC (the Mall) and Macy's Retail Holdings, Inc. (Macy's) (together the Macy's

Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them and, in the alternative, summary judgment in their favor on their claims for contribution, common-law indemnification and contractual indemnification against second third-party defendant Rusco Fixture Co., Inc. (Rusco), and their cross-claims for the same against defendants Schindler Elevator Corporation (Schindler) and JC Steel.

In motion sequence number 007, Schindler moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims and counterclaims as alleged against it.

In motion sequence number 008, JC Steel moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, third-party complaint, second third-party complaint and all cross-claims and counterclaims as alleged against it.

In motion sequence number 009, Rusco moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all cross-claims and counterclaims as alleged against it.

The motions are consolidated for disposition.

BACKGROUND

On the day of the accident, the Premises was owned by the Mall, and Macy's was its tenant. Macy's retained Aurora to provide general contracting services for a project at the Premises that entailed building a new structure to house a department store (the Project). Aurora, in turn, subcontracted certain operational engineering duties to JC Steel. In addition to retaining Aurora, Macy's directly hired Schindler to fabricate and install elevators at the Project and Rusco to install ornamental fixtures and woodwork at the Project. Plaintiff was employed by Rusco.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was a union carpenter, employed by Rusco. The Project included the construction of a Macy's store. His work at the Project entailed installing wooden partitions, moldings, mirrors and other fixtures. He was solely directed by "Eric," his foreman, and "Chris," his supervisor, both of whom were Rusco employees (plaintiff's tr at 96).

On the day of the accident, plaintiff and five or six coworkers were expecting a delivery of materials for use at the Project. Once delivered, Rusco workers, working in teams of two, moved the materials from the loading dock to the freight elevator (the Elevator) via hand-trucks and A-frame dollies. Then, they would use the Elevator and offload the materials onto another floor before installing them.

Plaintiff described the Elevator as approximately 10- to 12-feet wide and 10-feet tall. Plaintiff testified that the Elevator's doors were constructed in a vertical bi-parting style, with the top half going up and the bottom half going down. On the day of the accident, the Elevator was functional, but it was still under construction and did not have a control panel. Therefore, it had to be manually operated by an engineer. Plaintiff did not know who employed the Elevator's operators.

Plaintiff explained that to close the vertical doors, the elevator operators "would pull down the top gate, and the bottom gate would come up and meet in the middle" (*id.* at 127). Plaintiff further explained that pulling down the top part of the door caused the bottom part to raise up. On a typical day, plaintiff and his coworker would wait for the operators to open the door and say "get on" (*id.* at 137). Then, plaintiff would push his dolly onto the Elevator and

then enter the Elevator himself. Then the operators would close the doors and manually operate the Elevator.

Plaintiff testified that the accident occurred sometime around "9:00 a.m." (*id.* at 107). At that time, plaintiff and a coworker, "George," were loading A-frame dollies onto the Elevator (*id.* at 151). Aside from the dollies, the Elevator contained a welding machine, a chair and a shovel.

Plaintiff explained that, typically, there were two elevator operators assigned to the Elevator. However, on the day of the accident, there was only one operator, whom plaintiff had "[n]ever seen [] before" (*id.* at 156). Plaintiff recalled that the operator was wearing gray pants and a gray shirt.

On the day of the accident, plaintiff used the Elevator to transport materials approximately six times, without incident. Immediately prior to the accident, plaintiff pushed an A-frame dolly into the Elevator without a problem, then assisted a coworker outside of the Elevator who was having trouble moving a dolly. Plaintiff explained:

> "So me and George left the elevator to help the guy get his stuff straightened so it wouldn't fall, and then we went back to go on the elevator, and that's when the [operator] pulled down the door without saying he was closing it, and it came up between my feet and I fell"

(*id.* at 174). Plaintiff further explained that his right foot caught on the lower door as it raised between his feet, causing him to twist and fall sideways, and strike the back of his head on "the welding machine in the back of the elevator" (*id.* at 181).

Deposition Testimony of Marc McCullough (Macy's Project Manager)

McCullough testified that he was employed by Macy's as the Project's project manager. According to McCullough, Macy's hired Aurora to act as the general contractor for the Project. Aurora hired some subcontractors, including JC Steel. However, Macy's also directly hired

independent contractors, including Rusco and Schindler. Schindler built the Elevator and provided its operators.

McCullough was present at the site a few days a week, and he would walk the site once or twice on those days. His primary duties at the Project included overseeing the progress of the Project and approving change orders. During his walkthroughs, if he saw something unsafe, McCullough would contact Aurora's supervisor. He was not present on the day of the accident.

After reviewing several documents, McCullough testified that a Schindler elevator operator was present at the Premises on the day of the accident. He further explained that, per union rules, once the Elevator was installed, Schindler was required to have an operating engineer at the Premises. That engineer would have the keys for the Elevator. McCullough also testified that he did not know whether Schindler's operating engineer physically operated the Elevator.

McCullough also testified that in addition to the Schindler engineer, an additional "house car engineer" – employeed by JC Steel – was assigned to the Project (McCullough tr at 54). According to the paperwork McCullough reviewed, the JC Steel employee was named Anthony Rullo.

Deposition Testimony of Jonathan Groh (Aurora's Project Manager)

Groh testified that on the day of the accident, he was Aurora's project manager at the Project. His duties included negotiating with subcontractors and managing the progress and financials of the Project as a whole. He was present at the Premises every workday.

Groh also testified that Aurora was the general contractor for the Project. As such, Aurora was responsible for subcontracting certain trades within a specific scope of work defined in its contract with Macy's, including, *inter alia*, concrete, steel and electrical installation. It did

not supply any tools, equipment or materials to any worker at the Project. In addition, Aurora did not hire a safety supervisor, but its' "general superintendent would oversee some site safety for our subcontractors and our work" (Groh tr at 23).

Groh was unaware of who operated the Elevator on the day of the accident, and he did not witness the accident. Groh testified that, typically, Schindler operated the Elevator. However, "if Schindler was not on the site that day and Macy's needed to move the materials" then JC Steel would operate it (*id.* at 54). When Groh was presented with daily reports for the date of the accident, he confirmed that both Schindler and JC Steel had elevator operators at the Premises that day.

Deposition Testimony of Eric Wettermark (Schindler's Construction Mechanic)

Wettermark testified that on the day of the accident, he was a construction mechanic for Schindler at the Project. His duties included constructing and operating the Elevator, including opening/closing and locking the doors and moving the Elevator from floor to floor. There were three Schindler mechanics assigned to the Project, however, and only one was at the Project on any given day. Although there was an apprentice assigned to him, the apprentice did not operate the Elevator. Aside from Schindler mechanics, there was only one other person who could operate the Elevator at the Project, but he was unsure of who that person worked for. If they were both at the Premises at the same time, Wettermark would "[p]retty much" have priority to operate the Elevator (Wettermark tr at 72).

Wettermark reviewed his timesheets and confirmed that he was present on the day of the accident, and that he was assigned to the Elevator. Wettermark also testified that he was unaware of the accident and did not recall anyone tripping over the Elevator door. He first learned about the accident from his supervisor several years later.

Deposition Testimony of Kristopher Amplo (JC Steel's Vice President)

Amplo testified that on the day of the accident, he was JC Steel's vice president. His duties included overseeing general business operations and managing field operations. JC Steel was hired by Aurora to provide engineers "to manage and cover certain pieces of equipment" – specifically any equipment with a motor or engine, such as the Elevator (Amplo tr at 12). According to Amplo, the contract between JC Steel and Aurora "did not require JC Steel to perform any work" (*id.* at 15) – i.e. JC Steel did not construct anything at the Project, and no JC Steel worker was at the Premises on a regular basis.

Amplo reviewed a JC Steel invoice and confirmed that JC Steel provided an engineer, Anthony Rullo, at the Project on the day of the accident. Amplo stated that Rullo may not have physically operated any equipment that day, because, even though JC Steel provided Rullo for the Project, the service Rullo performed at the site was "not necessarily the operation of that equipment," but, rather, his presence fulfilled a union requirement that a Local 14 engineer be present to "cover" the equipment (*id.* at 40). Otherwise, JC Steel had no other supervisors at the Project, did not direct any workers and did not perform any inspections or walkthroughs of the Property.

Deposition Testimony of Anthony Rullo (JC Steel's Operating Engineer)

Rullo testified that on the day of the accident, he was a Local 14 operating engineer. That day, he received an assignment from his union to report to the Project on behalf of JC Steel, to operate the Elevator. Rullo testified that he arrived at the site "around nine o'clock or so" (Rullo tr at 10). He spoke with the master mechanic for the Project, who instructed him to operate the Elevator. He could not remember who the master mechanic worked for.

Rullo then made his way to the Elevator and took over for a worker that was "just covering" until Rullo arrived (*id.* at 21). Rullo operated the Elevator until approximately 3:30 p.m. that day. Rullo testified that he did not have any supervisor at the Project. Rullo could not remember what he was wearing on the day of the accident except for a reflective vest that was "orange" "yellow" or "green" and a white helmet with a "Local 14" logo on it. (*id.* at 19-20).

Rullo testified that "in the early afternoon," he "vaguely remember[ed] someone tripping and falling" in the Elevator, but that he "[did not] know how he tripped and fell" (Rullo tr at 31). Then, that person "got up. . . . And that was it, he walked away, and it was uneventful" (*id.*). Rullo could not recall if he was in the process of closing the Elevator door when the person fell. In addition, Rullo testified that the person that fell did not hit his head on anything.

Deposition Testimony of Dennis Freeman (Rusco's Foreman)

Freeman testified that on the day of the accident, he was Rusco's foreman at the Project. He directed Rusco employees at the Premises and he witnessed the accident.

Freeman testified that there were six other people on the Elevator at the time of the accident, including the Elevator's operator, who was wearing a gray hardhat, tan pants and shirt, as well as a coat that had green stripes and a "Schindler Elevators" patch on it (Freeman tr at 26). Freeman described the accident as follows:

> "Me and Eric, Chris and all of us got back on the elevator, and we were standing against the side, waiting on [plaintiff] to get on. [Plaintiff] came around the corner, and about the time [plaintiff] went to step in the elevator, [the operator] pushed the close door button . . . And when he pushed the close button, the door started coming down and [plaintiff] tripped over the door"

(*id.* at 28). Freeman testified that plaintiff fell down face first. He did not recall plaintiff hitting his head.

DISCUSSION

"The 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 eliminate any material issues of fact from the case" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*O'Brien v Port Authority N.Y. & N.J.*, 29 NY3d 27, 37 [2017]).

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 005, 006, 007 and 008)

The Macy's Defendants, Aurora, Schindler, and JC Steel (collectively, defendants) move for summary judgment dismissing the Labor Law § 240 (1) claim as against them, on the ground that plaintiff's accident did not involve an elevation related hazard as required under Labor Law § 240 (1). Plaintiff does not oppose the dismissal of this claim, therefore it is deemed abandoned (*Burgos v Premiere Props., Inc.*, 145 AD3d 506, 508 [1st Dept 2016]). Accordingly, defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against them.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 005, 006, 007 and 008)

In their separate motions, defendants also move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them.

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

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a duty upon owners, contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]). The injury also must have occurred "in an area in which construction, excavation or demolition work is being performed" (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [internal quotation marks omitted]).

While plaintiffs have alleged multiple Industrial Code violations in their bill of particulars, plaintiffs only oppose the parts of defendants' motions which seek dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-7.1 (c) and 23-7.3 (e). Accordingly, the unaddressed Industrial Code provisions are deemed abandoned, and defendants are entitled to summary judgment dismissing those abandoned provisions (*Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-7.1 (c)

Section 23-7 is entitled "Personnel Hoists." Section 23-7.1 sets forth general requirements. Subsection (c) provides the following:

> "Operation. Only trained, designated persons shall operate personnel hoists and such hoists shall be operated in a safe manner at all times."

Industrial Code section 23-7.1 is not sufficiently specific to support a claim under Labor Law § 241 (6) (*Wade v Bovis Lend Lease LMB, Inc.*, 102 AD3d 476, 477 [1st Dept 2013] ["12 NYCRR 23-7.1 is not sufficiently specific to support the claim"]; *see also Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089 [2d Dept 2019] [holding that section 23-7.1 was not sufficiently specific to support a claim for a violation under Labor Law § 241 (6) where plaintiff was injured when a vertical style bi-parting freight elevator door came down on his head]).

Accordingly, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code section 23-7.1 (c).

Industrial Code 12 NYCRR 23-7.3 (e)

Industrial Code 12 NYCRR 23-7.3, titled "Temporary use of permanent elevators" provides, in pertinent part, as follows:

> "(a) Temporary use permitted. Passenger or freight elevators being installed in buildings or other structures for permanent use may be used before completion of the building or other structure during construction to carry persons or material, or both, provided such elevators conform to the following requirements
>
> * * *
>
> "(e) Elevator operators. Such elevator cars shall be operated only by competent, trained, designated persons."

Initially, there is no definitive determination as to whether section 23-7.3 (e) is sufficiently specific to support a claim under Labor Law § 241 (6) (*see Butts v Granite Park, LLC*, 2004 WL 5916066 [Sup Ct, NY County, November 30, 2004] ["Subsection 23-7.3 (e) requires elevator operators to be 'competent, trained, designated persons,' without giving specific details elucidating, among other things, what training an elevator operator must undergo. The subsection is too general to support a section 241 (6) claim"]; *but see Smith v Extell W. 45th LLC,* 2015 WL 2280654 [Sup Ct, NY County, May 6, 2015]; *mod on other grounds* 143 AD3d 647 [1st Dept 2016] [denying summary judgment dismissing the section 23-7.3 (e) claim, noting that "[s]ince plaintiff alleges that the elevator was not operated . . . this regulation may have been violated"]).

Nevertheless, the language of section 23-7.3 (e) is nearly identical to the language of 23-7.1 (c) – which, as noted above, has been found to be too general to support a section 241 (6) claim. In addition, several other Industrial Code sections with similar language have been found to contain only "a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under the statute" (*Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st

Dept 2012] [provision requiring certain equipment to be "operated only by trained, designated persons and such equipment shall be operated in a safe manner at all times" found to be a general safety standard]; *Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 1285 [3d Dept 2007], *affd* 10 NY3d 902 [2008] [provision requiring equipment to be "operated only by trained, designated persons and all such equipment shall be operated in a safe manner at all times" held to be "no more than a restatement of common-law requirements and [] insufficient to establish a nondelegable duty under Labor Law § 241 (6)"]; *see also Wade*, 102 AD3d at 477, *Robles,* 173 AD3d at 1089).

Since section 23-7.3 (e), merely requires that the Elevator "shall be operated only by competent, trained, designated persons" it is only a general restatement of a common-law requirement. As such, section 23-7.3 (e) is insufficient to establish a duty under Labor Law § 241 (6).

Accordingly, defendants are entitled to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code section 23-7.3 (e).

The Common-Law Negligence and Labor Law § 200 Claims Against All Defendants

In their separate motions, defendants further move for summary judgment in their favor as to liability on the common-law negligence and Labor Law § 200 claims as against them. Labor Law § 200 (1) states, in pertinent part, as follows:

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

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], *citing Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

As noted previously, the accident was caused when an elevator operator improperly closed the Elevator's doors, causing plaintiff to trip – i.e. human error. Therefore, the cause of the accident was the means and methods of the operator's work.

Initially, JC Steel argues that it is entitled to dismissal of these claims because it had no control over plaintiff's carpentry work. However, the proper standard to apply in a means and methods analysis is whether JC Steel supervised and controlled the injury-producing work, i.e. the proper operation of the Elevator's door (*see Villanueva*, 162 AD3d at 407).

Here, the record establishes that there is a question of fact with respect to whether Schindler or JC Steel was responsible for operating the Elevator at the time of plaintiff's accident. Both Schindler and JC Steel acknowledge that they had elevator operating engineers present at the Premises on the day of the accident. In addition, both Wittermark (for Schindler) and Rullo (for JC Steel) testified that, based on their recollections and documentary evidence, they were present at the Premises and working on the day of the accident, and they both claim that they were operating the Elevator that day.

It should also be noted that Freeman's testimony that the Elevator operator at the time of the accident wore a jacket bearing Schindler's logo is insufficient to establish, as a matter of law, that a Schindler operator was manning the Elevator at the time of the accident, given the conflicting testimony from plaintiff, Rullo, Wittermark and Freeman regarding the operator's uniform and/or clothing that day.

Accordingly, since a question of fact exists as to who operated the Elevator at the time of plaintiff's accident, those parts of JC Steel and Schindler's motions for summary judgment dismissing the common-law negligence and Labor Law § 200 claim as against them must be denied.

Notwithstanding that there is a factual dispute as to whether JC Steel or Schindler operated the Elevator, Aurora and the Macy's Defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them. The record is devoid of any evidence establishing that these defendants exercised any control over the manner and means of the injury producing work – i.e. the operation of the Elevator (*Villanueva*, 162 AD3d at 407).

While plaintiff argues that Aurora and the Macy's Defendants had general control over the Project and had the authority to establish general safety precautions, such general supervisory control is insufficient to establish liability under Labor Law § 200. "[T]he mere fact that a general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] [internal quotation marks omitted]; *see also Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where a defendant "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200"]; *Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210 [1st Dept 1998] [section 200 properly dismissed where owner had no control "over the manner in which the work in question was done . . . [or] supervised the use of the machine whose negligent alteration and operation is said to have caused plaintiff's injury"]; *accord O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2005]).

Accordingly, given the foregoing, Aurora and the Macy's Defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

Aurora's Third-Party Claim for Contractual Indemnification Against JC Steel (Motion Sequence Numbers 005 and 008)

Aurora moves for summary judgment in its favor on its third-party claim for contractual indemnification as against JC Steel. JC Steel moves for summary judgment dismissing the same claim.

Additional Facts Relevant to this Issue

The Aurora/JC Steel Purchase Order

The Aurora/JC Steel Purchase Order, dated February 27, 2014 (the Purchase Order), governs JC Steel's work on the Project. The scope of work set forth in the Purchase Order is as follows:

> "JC Steel is to provide payroll for operating engineers on the temporary heat units on a weekly basis"

(Malino aff in support, exhibit H, at 1[the Purchase Order]).

The Purchase Order contains an indemnification provision that provides, in pertinent part, as follows:

> "To the fullest extent permitted by law [JC Steel] shall defend, indemnify and hold harmless Aurora from and against all liability . . . resulting from any claim . . . arising from or in connection with [JC Steel's] performance hereunder.

(Malino aff in support, exhibit H, ¶ 7 [the Purchase Order]).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d

774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). In addition, indemnification provisions "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

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

Here, the contractual scope of JC Steel's work, as delineated in the Purchase Order, is limited to "provid[ing] payroll for operating engineers" (Malino aff in support, exhibit H, at 1 [the Purchase Order]). The indemnification provision is limited to claims "arising from or in connection with" JC Steel's work pursuant to the Purchase Order (*id.* at ¶ 7). Therefore, according to the plain language of the Purchase Order, JC Steel agreed only to indemnify Aurora for claims arising from its provision of payroll for operating engineers. As such, whether JC Steel provided the operating engineer that operated the Elevator is of no moment with respect to the scope of the subject indemnification provision.

Accordingly, JC Steel is entitled to summary judgment dismissing Aurora's third-party contractual indemnification claim as against it, and Aurora is not entitled to summary judgment in its favor on the same claim.

The Macy's Defendants Claims for Contractual Indemnification Against Aurora and Schindler (Motion Sequence Number 006 and 007)

The Macy's Defendants move for summary judgment in their favor on their cross-claims for contractual indemnification as against Aurora and Schindler. Schindler moves for summary judgment dismissing that same claim.

Additional Facts Relevant to this Issue

Macy's and Aurora entered into a "General Contractor / Construction Manager Contract" dated June 3, 2013, for the construction of the Premises (the Macy's/Aurora Contract) (Macy's notice of motion, exhibit BB). The Macy's/Aurora Contract contains an indemnification provision that provides the following, in pertinent part:

> "To the fullest extent permitted by law, [Aurora] agrees to defend, indemnify and hold harmless Macy's, Inc. . . . from and against any and all liabilities, losses, claims . . . arising out of or related to this Contract and/or the Work performed hereunder . . . which are in any manner directly or indirectly caused . . . in whole or in part, to any negligence or willful misconduct, whether active or passive, of [Aurora], anyone for whose acts [Aurora] may be liable in connection with or incident to this Contract and/or the Work or services performed . . . even though the same may have resulted from the joint, concurring, or contributory negligence of anyone or all of the indemnitees or any other person or persons, unless the same be caused by the sole negligence or willful misconduct of anyone or all of the indemnitees"

(Macy's notice of motion, exhibit BB, ¶ 14).

In sum, the Macy's/Aurora indemnification provision requires Aurora to indemnify Macy's for any claim arising out of or related to work performed in a negligent manner by Aurora or any of its' subcontractors, such as JC Steel.

In addition, Macy's and Schindler entered into a "Fixture Contract," dated August 7, 2013, for the "[d]esign, manufacture, delivery, installation, startup and testing" of the Elevator (the Macy's/Schindler Contract) (Macy's notice of motion, exhibit CC, Article 1). This contract

contains an indemnification provision that is identical in form to the Macy's/Aurora indemnification provision (*id.*, exhibit CC, sub-exhibit A, § 30).

In sum, the Macy's/Schindler indemnification provision requires Schindler to indemnify Macy's for any claim arising out of or relating to work Schindler performed in a negligent manner.

As discussed above, a question of fact exists as to whether the engineer who operated the Elevator at the time of plaintiff's accident was provided by Schindler or Aurora's subcontractor, JC Steel. Given this dispute, it cannot be determined at this time whether plaintiff's accident arose, directly or indirectly, from the "negligence or willful misconduct" (if any) of Aurora/JC Steel, or Schindler. Therefore, a question of fact exists as to whether the Macy's/Aurora indemnification provision or the Macy's/Schindler indemnification provision (if any) has been triggered.

Macy's argument that Aurora and Schindler each agreed to indemnify Macy's for any and all work-related accidents at the Premises is unpersuasive, as such a position expands the scope of the indemnification provisions beyond their written limitations (*see. e.g.. 905 5th Assoc., Inc.*, 85 AD3d at 668).

Accordingly, Macy's is not entitled to summary judgment in its favor on its claim for contractual indemnification as against Aurora and Schindler, and Schindler is not entitled to summary judgment dismissing that same claim.

The Macy's Defendants' Claims for Contractual Indemnification Against Rusco (Motion Sequence Numbers 006 and 009)

The Macy's Defendants move for summary judgment in their favor on their second-third party claim for contractual indemnification against Rusco. Rusco moves for summary judgment dismissing that claim.

Additional Facts Relevant to this Issue

Macy's and Rusco entered into a "Fixture Contract" dated September 3, 2013, wherein Rusco agreed to "furnish and install Perimeter Fixturing and Fitting Rooms" (the Macy's/Rusco Contract) (Macy's notice of motion, exhibit DD, Article 1). Exhibit A to the Macy's/Rusco Contract contains an indemnification provision that is identical in form to the Macy's/Aurora and Macy's/Schindler indemnification provisions (*id.*, exhibit DD, sub-exhibit A, § 30).

Therefore, the Macy's/Rusco Contract's indemnification provision is limited to claims arising out of or related to Rusco's work at the Premises wherein Rusco's negligence caused the accident.

Here, pursuant to the Macy's/Rusco Contract, Rusco's work on the Project was limited to installing fixtures at the Premises. The sole alleged instrumentality of plaintiff's accident was the negligent operation of the Elevator. The record is clear that Rusco had no control over the operation of the Elevator (*see, id.*, Article 1), nor is there any testimony or evidence in the record that would support an argument that Rusco was operating the Elevator at the time of the accident.

Accordingly, as plaintiff's accident did not arise from Rusco's work at the Premises, the Macy's Defendants are not entitled to summary judgment in their favor on their contractual indemnification claim as against Rusco, and Rusco is entitled to summary judgment dismissing that claim as against it.

The Macy's Defendants Claim for Contractual Indemnification Against JC Steel (Motion Sequence Number 008)

JC Steel moves for summary judgment dismissing the Macy's Defendants second third-party claim for contractual indemnification as against it.

Significantly, there is no contract between Macy's (or the Mall) and JC Steel pertaining to the subject Project at the Premises. In addition, while the Purchase Order between Aurora and JC Steel incorporates the Macy's/Aurora Contract's provisions,[1] such incorporation is insufficient to establish a duty to indemnify running from JC Steel to Macy's. "Under New York Law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]; *accord Goncalves v 515 Park Ave. Condominium,* 39 AD3d 262, 262 [1st Dept 2007]).

Accordingly, JC Steel is entitled to summary judgment dismissing the Macy's Defendants second third-party claim for contractual indemnification as against it.

The Macy's Defendants Claim for Common-Law Indemnification Against JC Steel, Schindler and Rusco (Motion Sequence Numbers 006, 007, 008 and 009)

The Macy's Defendants move for summary judgment in their favor on their second third-party claims for common-law indemnification as against JC Steel and Schindler. JC Steel and Schindler each move for summary judgment dismissing the claims.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the

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[1] The Purchase Order contains the following language:

> "The contract documents for the [Project] are incorporated herein by reference. The Contract Documents include this Purchase Order . . . [and] the Prime Contract between [Macy's] and Aurora"

(JC Steel's notice of motion, exhibit T, ¶ 3 [the Purchase Order]).

causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

Here, because all claims that would give rise to vicarious liability against the Macy's Defendants have been dismissed, the Macy's Defendants' common-law indemnification claims are dismissed as against these parties as moot.

Accordingly, the Macy's Defendants are not entitled to summary judgment in their favor on their common-law indemnification claims as against JC Steel, Schindler and Rusco, and JC Steel, Schindler and Rusco are entitled to summary judgment dismissing those claims as against them.

The Macy's Defendants Claim for Breach of Contract for the Failure to Procure Insurance Against Rusco (Motion Sequence Number 009)

Rusco moves for summary judgment dismissing the Macy's Defendants second third-party claim for breach of contract for the failure to procure insurance. Notably, Rusco provides copies of the relevant insurance policies it procured pursuant to the Macy's/Rusco agreement (*see* Rusco's notice of motion, exhibit A and B). Moreover, the Macy's Defendants do not contest this branch of Rusco's motion.

Accordingly, Rusco is entitled to summary judgment dismissing the Macy's Defendants second third-party claim for breach of contract for the failure to procure insurance as against it.

Aurora's Claim for Breach of Contract for the Failure to Procure Insurance Against JC Steel (Motion Sequence Number 008)

JC Steel moves for summary judgment dismissing Aurora's third party claim against it for breach of contract for the failure to procure insurance.

Additional Facts Relevant to This Issue

The Purchase Order required that JC Steel procure the following insurance:

> "If [JC Steel], or its employees or agents come onto [the Premises] in connection with this Purchase Order, [JC Steel] agrees to carry [i] Comprehensive General Liability Insurance . . . in the amount of $5,000,000 per occurrence . . . . [JC Steel] shall also carry any and all additional insurance coverage and limits required by the Contract Documents . . ."

(JC Steel's notice of motion, exhibit T, ¶ 18 [the Purchase Order]).

In support of its position that it procured the requisite insurance, JC Steel annexes a "CGL Insurance Binder" cover page for a policy, bearing policy number CTM1300636, with per occurrence limits of $2,000,000 (the Policy) (*id.*, exhibit U).

Here, as the Policy's limits fall short of the Purchase Order's $5,000,000 per occurrence requirement, JC Steel has failed to meet its burden to establish that it procured the requisite insurance. While JC Steel's counsel argues that JC Steel procured excess coverage in the amount of $5,000,000 per occurrence, there is no such evidence of this policy in the record.

Accordingly, JC Steel is not entitled to summary judgment dismissing Aurora's breach of contract claim for the failure to procure insurance.

Finally, while JC Steel moves to dismiss all cross-claims against it, JC Steel does not address any cross-claims in its motion papers. Accordingly, JC Steel is not entitled to such a dismissal.

The parties remaining arguments on all their claims have been considered and have been found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant/third-party plaintiff Aurora Contractors, Inc.'s (Aurora) motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted and the complaint is dismissed as against Aurora, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the part of Aurora's motion, pursuant to CPLR 3212, for summary judgment in its favor on its third-party claims against defendant/third-party defendant/second third-party defendant J.C. Steel Corp. (JC Steel) is denied; and it is further

ORDERED that the part of defendant/second third-party plaintiffs Mall 1-Bay Plaza, LLC (the Mall) and Macy's Retail Holdings, Inc. (Macy's) (together, the Macy's Defendants) motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted and the complaint is dismissed as against the Macy's Defendants, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly, and the motion is otherwise denied, and it is further

ORDERED that Schindler's motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted to the extent of dismissing the Labor Law §§ 240 (1) and 241 (6) claims, and the Macy's

Defendants common-law indemnification claim as against it, and the motion is otherwise denied; and it is further

ORDERED that JC Steel's motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint, and the second third-party complaint against it is granted to the extent of dismissing the Labor Law §§ 240 (1) and 241 (6) claims as against it, dismissing Aurora's contractual indemnification claim as against it, and dismissing the Macy's Defendants common-law and contractual indemnification claim as against it; and the motion is otherwise denied; and it is further

ORDERED that Rusco's motion (motion sequence number 009), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint is granted, and the second third-party complaint is dismissed as to Rusco with costs and disbursements as taxed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

11/26/2019
DATE

PAUL A. GOETZ, J.S.C.

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