

<b>Mustafa v 1221 Ave. Holdings LLC</b>
2020 NY Slip Op 30757(U)
February 24, 2020
Supreme Court, New York County
Docket Number: 157718/2014
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM**

*Justice*

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ADZERE MUSTAFA,

Plaintiff,

- v -

1221 AVENUE HOLDINGS LLC, SIRIUS XM RADIO INC.,  
ROCKEFELLER GROUP DEVELOPMENT  
CORPORATION, CROSS CONSULTING, INC. D/B/A  
CROSS NY, JK MOVING SERVICES, CLANCY-CULLEN  
STORAGE CO., INC. D/B/A CLANCY-CULLEN MOVING &  
STORAGE COMPANY, INC.,

Defendants.

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SIRIUS XM RADIO INC.,

Plaintiff,

-against-

RD WEIS COMPANIES, PRITCHARD INDUSTRIES,

Defendants.

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INDEX NO. 157718/2014  
MOTION DATE 09/24/19  
MOTION SEQ. NO. 006 007 008  
009 010  
011 012

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595549/2014

The following e-filed documents, listed by NYSCEF document number (Motion 006) 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, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 362, 363, 364, 367, 368, 372, 391, 392, 393, 399, 412, 413, 425, 426, 433, 442, 443

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 377, 394, 395, 396, 397, 400, 422, 423, 424

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 008) 245, 246, 247, 248, 249, 250, 251, 252, 378, 389, 390, 401, 437, 438, 439, 440, 441

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 009) 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 373, 402, 406, 407, 408, 417, 418, 429, 430, 431, 432

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 010) 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 371, 381, 382, 403, 414, 415, 419, 420, 421, 444, 446, 447, 448

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 011) 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 374, 383, 384, 385, 404, 416, 427, 428, 445

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 012) 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 375, 386, 387, 388, 405, 409, 410, 411, 434, 435, 436

were read on this motion to/for

SUMMARY JUDGMENT

*Jaroslawicz & Jaros, LLC*, New York, NY (Stephen Jacobson of counsel), for plaintiff.  
*Tarshis & Hammerman, LLP*, New York, NY (Elysa B. Wolfe of counsel), for defendants 1221 Avenue Holdings, LLC, and Rockefeller Group Development Corporation.  
*Malapero & Prisco, LLP*, New York, NY (Michael J. Driscoll of counsel), for defendant Cross Consulting, Inc..  
*Shein & Associates, P.C.*, New York, NY (Jeffery Parker of counsel), for defendant JK Moving Services.  
*Cartafalsa, Slattery, Turpin & Lenoff*, New York, NY (Brian Dalton of counsel), for defendant Clancy-Cullen Storage Co., Inc..  
*Shafer Glazer, LLP*, New York, NY (Nicole M. Snyder of counsel), for defendant Sirius XM Radio Inc..  
*Russo & Toner, LLP*, New York, NY (Marie A. Castronuovo of counsel), for defendant Pritchard Industries, Inc..  
*Law Office of Brian Rayhill*, New York, NY (Renaud T. Bleecker of counsel), for defendant RD Weis Companies.

Gerald Lebovits, J.:

This case is a personal-injury action arising from an accident that occurred on the 37th floor of an office building located at 1221 Avenue of the Americas in New York County (the Premises). Plaintiff, Adzere Mustafa, a cleaner, was injured when she tripped and fell on Masonite boards used to protect newly installed carpet in the area of the 37th floor where she was cleaning. In this action, brought by Mustafa to recover for her injuries, 10 parties have been named as defendants or third-party defendants.

This decision addresses motions for summary judgment brought by each defendant or third-party defendant, except for defendant Bolcor Commercial Flooring and third-party

defendant DC Tile & Marble LLC.<sup>1</sup> Motion sequences 006, 007, 008, 009, 010, 011, and 012 are consolidated for disposition.

### BACKGROUND

At the time of the accident, plaintiff was a 66-six-year-old cleaning lady employed by third-party defendant Pritchard Industries (Pritchard), a cleaning company, to work on the Premises. Her responsibilities include vacuuming, dusting, and disposing of office garbage such as wastebasket trash and empty cardboard boxes. Around 9:00 pm on November 21, 2013, three hours into her shift, plaintiff tripped on Masonite boards on the Premises and sustained injuries, including injury to her back, knees, and other parts of her body. (Plaintiff's Verified Bill of Particulars, NYSCEF No. 198, at 5.) Plaintiff's medical expenses have been partially reimbursed by her compensation carrier, the New York State Insurance Fund. (*Id.* at 8.) Her injuries prevented her from working and allegedly caused a loss to her of \$150,000 by January 2017, when the Verified Bill of Particulars were filed, and were estimated to cost her \$250,000 in future earnings. (*Id.* at 7-8.) Plaintiff seeks to recover damages from the defendants.

The accident occurred on the 37th floor of the building located at 1221 Avenue of Americas. The building was owned at the time by 1221 Avenue Holdings LLC (1221 Avenue) and managed by Rockefeller Group Development Corporation. The Premises was leased to Sirius XM Radio Inc., a satellite-radio broadcaster that occupied the building's 19th, 36th, and 37th floorst.

According to the deposition of Julio Mata, Sirius's facilities project manager, the 37th floor consisted of offices and cubicles designated for Sirius's finance department, sports department, and talk departments. (*See* J. Mata's Deposition, NYSCEF No. 212, at 14-15.) Because the old carpet on the floors had been worn down by mid-2013, Sirius started a project to replace the carpets and flooring. (*Id.* at 30.) The carpet and floor replacement project took place from Thursdays to Sundays. On those days, Sirius would ask their employees to leave and use a lift system for the cubicle areas and for the wooden furniture in the offices. (*Id.* at 31.) The carpet replacement work was subcontracted to defendant/third-party defendant RD Weis Company; the furniture lifting and moving work was subcontracted to defendant/second third-party defendant JK Moving Services.<sup>2</sup>

RD Weis further subcontracted the carpet and flooring installing work to DC Tile and Bolcor. DC Tile was to install stone flooring in the elevator area, and Bolcor was to install carpet tiles in the office area. (*Id.* at 39, 50-53.) Because the stone installing work was still ongoing after the carpet was fully installed, Masonite boards allegedly were to have been used to protect

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<sup>1</sup> This court previously granted a default judgment against Bolcor in motion sequence 001 and granted DC Tile's motion to dismiss in motion sequence 005. (*See* NYSCEF Nos. 61 [Bolcor], 277 [DC Tile].)

<sup>2</sup> The caption of the case, and this company's contract with Sirius, refers to the company as "RD Weis." The company's moving papers (motion sequence 012) instead refer to the company as "RD Weiss." For simplicity, this court refers to the company throughout as "RD Weis."

the newly installed carpet. JK Moving subcontracted its furniture moving work to defendant Clancy-Cullen Moving & Storage Company, Inc. (Clancy-Cullen).

Plaintiff testified that at the time of the incident she was carrying three empty cardboard boxes, which blocked her view of the floor, while walking to the elevator area. (A. Mustafa Deposition, NYSCEF No. 154, at 76-77, 79.) Plaintiff tripped and fell on the Masonite boards over the newly installed carpet. When she looked back to see what caused her fall, she saw “the tape had released, loosened up, and [the boards] spaced over.” (*Id.* at 77.)

Plaintiff reported this incident later that night to her supervisor at Pritchard, Mark Agron. (M. Agron’s Deposition, NYSCEF No. 221, at 27.) Agron examined the site of the accident that night. (*Id.* at 36.) Agron testified that he couldn’t remember whether there was tape on the boards, whether there were gaps among the boards, or whether there were raised portion of the boards. But he stated that the boards were laid nice and neat. (*Id.* 37-38.)

In August 2014, plaintiff filed a negligence action against 1221 Avenue, and Rockefeller Group, and Sirius. (*See* NYSCEF No. 1.) Sirius brought third-party claims against RD Weis and Pritchard for indemnification and contribution. (NYSCEF No. 11.) In November 2014, Sirius filed a second third-party action against JK Moving, Bolcor, and DC Tile for common-law and contractual indemnification. (NYSCEF No. 23.) Because Bolcor failed to respond to the claims against it, this court granted Sirius default judgment against Bolcor. (NYSCEF No. 61.) In August 2015, plaintiff filed a second amended complaint that added negligence claims against RD Weis and DC Tile.<sup>3</sup> (NYSCEF No. 59.)

In July 2016, Mata testified at a deposition that he remembered seeing workers from Cross Consulting Inc., (a construction company working in the building) laying down Masonite boards. (*See* J. Mata’s Deposition, NYSCEF No. 212, at 94-96.) In light of this testimony, plaintiff brought a separate action against Cross and Clancy-Cullen. That action was later consolidated with this action.

All the defendants thus far involved deny laying down the Masonite boards that allegedly tripped plaintiff.

## DISCUSSION

The motions now before this court all seek summary judgment. “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial if the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted].) Once prima facie entitlement has been established, , the opposing party must, to defeat the motion, “assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set

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<sup>3</sup> As noted above, this court later granted DC Tile’s motion to dismiss plaintiff’s claims against it. (*See* NYSCEF No. 277.)

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 any doubt arises about the existence of a triable fact, the motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].)

### **I. Motion Sequence 009 (JK Moving)<sup>4</sup>**

In motion sequence 009, JK Moving moves for summary judgment dismissing plaintiff’s negligence claim and seeks sanctions against plaintiff for asserting (putatively) frivolous claims.<sup>5</sup> JK Moving’s motion for summary judgment is granted; its request for sanctions is denied.

#### **A. The Branch of JK Moving’s Motion Seeking Summary Judgment Dismissing Plaintiff’s Negligence Claim**

JK Moving argues that because it is an independent contractor, it does not owe a duty to a third party like plaintiff, and therefore cannot be liable to her in negligence. Under the seminal case of *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]), “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.” (*Id.* at 138 [internal citations omitted].) Liability may be imposed on a contractor, however, if one of the three following exceptions to this general rule exists: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm”; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties; or (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely. (*Id.* at 140 [internal citations omitted].)

Here, JK Moving was an independent contractor engaged by Sirius to move office furniture to facilitate the carpet installation work. Thus, for JK Moving to be found liable for plaintiff’s fall, one of the three *Espinal* exceptions must be present. The dispute here centers on whether JK Moving created a defective condition, or “a force or instrument of harm,” that resulted in Mustafa’s injuries. Asserting that it did not, JK Moving produced multiple affidavits to show that it subcontracted the carpet installing work for Sirius to Clancy-Cullen, that JK Moving did not have physical presence in New York for the work, and that it did not in any form instruct Clancy on how to carry out that work.

Specifically, JK Moving deposed Clancy-Cullen owner Daniel Clancy, , who testified that he did not know of anyone from JK Moving providing any instructions to any of Clancy-Cullen’s representatives or employees about floor protection and that, to his knowledge, JK Moving did not have a physical presence on the Premises. (D. Clancy’s Deposition, NYSCEF No. 270, at 78, 83.) Additionally, Mata testified that Clancy-Cullen was the moving company

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<sup>4</sup> For organizational and analytical clarity, this decision analyzes defendants’ various motions out of numerical order.

<sup>5</sup> JK Moving initially moved for summary judgment dismissing Sirius’s third-party indemnification claim against it and also sought sanctions against Sirius. Those claims settled during briefing on the motion. *See* Stipulation of Discontinuance, NYSCEF No. 407; Reply Affirmation, NYSCEF No. 429, at 2.

and that “JK used CLANCY-CULLEN to do the work.” (J. Mata’s deposition, NYSCEF No. 254, at 108-109.)

Because JK Moving has met its burden in making a prima facie showing that did not launch a force of harm on the Premises, plaintiff must raise a material, triable fact to defeat a defendant’s motion for summary judgment. Plaintiff, in her Opposition Affirmation, did not press on holding JK Moving liable for the negligence claim. Therefore, JK Moving’s motion for summary judgment to dismiss plaintiff’s negligence claim against it is granted.

### **B. The Branch of JK Moving’s Motion Seeking Sanctions Against Plaintiff**

JK Moving also seeks sanctions against plaintiff for raising frivolous claims against it. To be frivolous, a claim must have been brought in bad faith: either because the claim was brought “solely to delay or prolong the litigation or to harass or maliciously injure another,” or because the claim “had no reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law.” (CPLR 8303.)

Here, JK Moving argues that plaintiff’s claim lacked any reasonable basis in law or fact. Before JK Moving was sued by plaintiff, its attorney sent a letter, dated August 4, 2015, to plaintiff and Sirius, stating: “I have been advised by my client that it did not perform any work, labor, or services at the premises at or about the time of the plaintiff’s accident.” (NYSCEF No. 431, at 1.) JK Moving argues that this letter should have led plaintiff to abandon her claims against it as groundless. This court disagrees.

The record reflects that JK Moving provided plaintiff with no evidence of its lack of involvement beyond this letter from counsel. letter was the only evidence that JK Moving gave to plaintiff prior to her bringing suit against it. Plaintiff was not required to take this letter at face value as establishing that JK Moving was not involved (and thus could not be held liable) in the project.

Second, whether JK Moving may be vicariously held liable for work done by Clancy-Cullen depends on whether the relationship between them was that of a contractor/subcontractor subcontract or of an employer/employee, which is ordinarily a question of fact.

Finally, even if plaintiff *had* been required to credit JK Moving’s assertions in its 2015 letter about what work it had (or had not done) on the premises, that JK Moving was not itself on the premises during the pertinent time period would not eliminate the possibility that JK Moving might have exercised control *over Clancy-Cullen* in the latter’s performance of work on premises. And the key depositions indicating that JK Moving did not exercise such control were not taken until September 2017 and January 2018—long after plaintiff brought suit. To be sure, JK Moving’s reply affirmation does assert that “[p]laintiff’s counsel has been well aware for a significant amount of time that JK did not direct or otherwise control the work.” (JK Moving’s Reply Affirmation, NYSCEF No. 429, at 5.) But JK Moving does not provide the basis (or supporting evidence) for this assertion.

JK Moving's motion for summary judgment to dismiss plaintiff's negligence claim against it is granted; JK Moving's request for sanctions is denied.

## II. Motion Sequence 007 (Clancy-Cullen)

In motion sequence 007, Clancy-Cullen moves for summary judgment dismissing plaintiff's negligence claims against it. Clancy-Cullen's motion is denied.

Clancy-Cullen was engaged by JK Moving to perform moving work on the Premises. Because Clancy-Cullen is an independent contractor, the law governing its liability toward plaintiff is the same as that governing JK Moving. That is, Clancy-Cullen cannot be liable for plaintiff's injuries unless it is found to have created a defective condition, or "a force or instrument of harm," that resulted in Mustafa's trip and fall. (*See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002].) Thus, on this motion Clancy-Cullen is entitled to summary judgment only if (i) it first makes out a prima facie showing that it did not create a tripping hazard, and (ii) plaintiff then fails to provide evidence creating a triable issue of fact as to creation of a tripping hazard.

To establish that it did not launch the harm that caused plaintiff's fall, Clancy-Cullen advances two arguments: that Clancy-Cullen's project was completed at least two weeks prior to the accident and that it was not Clancy-Cullen's Masonite that resulted in plaintiff's trip and fall. This court is not persuaded by these arguments.

That Clancy-Cullen's project was finished at least two weeks before the accident does not without more resolve whether Clancy-Cullen created a tripping hazard. Clancy-Cullen's business owner, Daniel Clancy, testified at a deposition that JK Moving hired Clancy-Cullen to facilitate the carpet-installing project on the premises by moving out office contents on October 23, 2013, and by moving them back in on October 26, 2013. (D. Clancy's deposition, NYSCEF No. 243, at 18, 22.) On November 8, workers of Clancy-Cullen returned to the Premises to retrieve some of its equipment that had been left on site and did not return to the Premises until February 2014. (*Id.* at 44, 56.) Plaintiff fell on November 21.

Clancy-Cullen contends that the lapse in time between the performance of its moving work and the accident makes it unlikely it was Clancy-Cullen's performance that caused harm to plaintiff. Both cases cited by Clancy-Cullen, *Cardona v City of New York* and *Carbo v City of New York*, concern incidents where pedestrians tripped at a trench on the street and sued the City of New York for negligently building the trenches in question. (*See Cardona*, 305 AD2d 303 [1st Dept 2003]; *Carbo*, 275 AD2d 439 [2d Dept 2000].) The courts granted summary judgment in the City's favor in both cases because it could well be that it was the "normal pavement deterioration over time" rather than negligent construction work by the City that caused the tripping hazard and because plaintiff pedestrians failed to provide sufficient evidence in showing that a dangerous condition existed at the time the repair work completed. (*See Cardona*, 305 AD2d at 303; *Carbo*, 275 AD2d at 439.) But the time lapse in those cases was five years in *Cardona* and eight to ten years in *Carbo*. (*Id.*) Here, the accident happened less than a month after Clancy-Cullen's work.

Moreover, plaintiff provided evidence raising at least a triable issue about whether Clancy-Cullen's Masonite-installing work, if any, could be negligent. Plaintiff testified that it was loosened tape that left a gap in the Masonite boards, resulting in her fall. (A. Mustafa's Deposition, NYSCEF No. 234, at 78.) Clancy admitted that Clancy-Cullen, as a general practice, lays Masonite boards "end to end over the carpet and tape[s]," leaving open the possibility that the sides of the boards were not taped and led to a gap between boards. (Clancy's Deposition, NYSCEF No. 243, at 36.) Given the possibility of negligent performance of installing Masonite, the fact that Clancy-Cullen finished its moving work merely several weeks prior to the accident does not entitle it to summary judgment to dismiss the negligence claim.

Clancy-Cullen's evidence that it did not install the Masonite boards does not establish Clancy-Cullen's lack of involvement as a matter of law. Clancy-Cullen provided testimony by Daniel Clancy indicating that the actual time spent on the move in and out made it unlikely that Clancy-Cullen would have put down Masonite, and that even if it had, Masonite is expensive and therefore would have been taken back by Clancy-Cullen rather than left in place. (*Id.* at 96, 58.) But Daniel Clancy's deposition testimony showed that he lacked specific, personal knowledge of the actual work that Clancy-Cullen had performed on the Premises. To the question "Did Clancy-Cullen use any sort of floor protection in performing that work?" he answered: "I don't know." (*Id.* at 27.) To the question: "Did you know if Clancy-Cullen out down any floor protection over the carpets on November 8, 2013?" he answered: "I do not." (*Id.* at 43.)

Second, documents exist indicating that Clancy-Cullen used Masonite and that removal of Masonite did not happen when the project was finished on October 26, 2013. A quote for service for Clancy's work, dated May 7, 2012, has a specific entry for "Building Protection (Floor/Wall Protection: Masonite; Koraflex; Door-Bucks.)" (Quote for Service, NYSCEF No. 268.) In the bill of lading, dated October 26, 2013, the instructions dictate the removal of wall protection and corner boards but does not mention "floor protection." (Bill of Lading, NYSCEF No. 99.) All these open up the question whether Clancy-Cullen installed the Masonite on which plaintiff allegedly tripped.

Clancy-Cullen further argues that it customarily uses Masonite boards in the size of 32 by 48 inches (0.8 by 1.2 meters), and that this size differed from the size of the boards given by plaintiff (about 1 by 1.5 meters) and Julio Mata, Sirius's project manager on site (about 1.5 by 1.2 meters). (Clancy's Deposition, NYSCEF No. 243, at 58; Mustafa's Deposition, NESCEF No. 238, at 158; Mata's Deposition, NYSCEF No. 240, at 102.) Plaintiff and Mata said, though, that the board-sizes they gave were merely estimations. This court concludes in these circumstances that the discrepancy between Clancy-Cullen's typical board dimension and the size estimates given by plaintiff and Mata does not establish as a matter of law that the boards in question were laid down by a party other than Clancy-Cullen. Finally, although Clancy-Cullen argued that the tape connecting the Masonite boards here was blue whereas Clancy-Cullen's tape is silver, Daniel Clancy testified only that Clancy-Cullen's tape is "*usually* silver." (D. Clancy's Deposition, NYSCEF No. 243, at 36 [emphasis added].)

For the reasons above, Clancy-Cullen's motion for summary judgment on plaintiff's negligence claim against it is denied.

### III. Motion Sequence 012 (RD Weis)

In motion sequence 012, RD Weis moves for summary judgment on several different claims. RD Weis seeks dismissal of plaintiff's negligence and Labor Law claims against it. RD Weis also seeks dismissal of Sirius's contractual-indemnity claim; and, in the alternative, seeks judgment in its favor against Cross on a common-law-indemnity theory.

#### A. The Branch of RD Weis's Motion Seeking Summary Judgment Dismissing Plaintiff's Negligence Claim

RD Weis moves for summary judgment on plaintiff's negligence claim against it. The motion is granted.

Since RD Weis was retained by Sirius as a general contractor for the carpet installing project, *Espinal* governs the scope of RD Weis's liability in negligence (if any) to plaintiff. And although RD Weis is the general contractor responsible for the carpet installing project, plaintiff did not make factual allegations as to *Espinal*'s second and third prong. Thus, the key question is whether RD Weis launched the harm that caused plaintiff's fall. "Launch is an action verb, requiring by definition evidence that the contractor affirmatively left the premises in a more dangerous condition than it was found." (*Santos v Deanco Servs., Inc.* (142 AD3d 137, 142 [2d Dept 2016].)

Here, the parties have provided contradictory testimony concerning RD Weis's involvement in the installing of Masonite boards. Mata, the Sirius employee, testified that he instructed RD Weis to make sure to protect the newly installed carpet from traffic made by workers on the stone-installation-project, which was still in progress at the time. (*See* Mata Deposition, NYSCEF No. 321, at Tr. 84-85.) Mata stated that he went back and forth with Robert McGill, RD Weis's account executive at the time, about what material was to be used to protect the carpet. (*See id.* at Tr. 92-93.)

On the other hand, two RD Weis employees—Bernard Vargas, RD Weis's project manager, and Robert McGill—both testified at depositions that Mata did not instruct them to install protections for the carpet. (*See* Vargas Deposition, NYSCEF No. 325, at Tr. 65; McGill Deposition, NYSCEF No. 333, at Tr. 15.) The contract between Sirius and RD Weis does not include a provision for installing protective covers for carpet. (*See* Service Agreement between RD Weis Companies and Sirius XM Radio, NYSCEF No. 335.)

Regardless, it is undisputed that no laborers from RD Weis performed any work on the Premises. (*See* NYSCEF No. 325, at 61; NYSCEF No. 321, at Tr. 141-142.) Given that affirmative conduct creating a hazardous condition is required for the court to find a "launch of force or instrument of harm," RD Weis's conduct did not come within this *Espinal* exception, even assuming that RD Weis were found to have engaged Cross to install the Masonite boards. The contrary cases cited by plaintiff each involved a defendant that performed some type of construction work on the premises here. RD Weis did not itself perform the work, but rather served as an intermediate contractor subcontracting the work on the premises to other entities.

For these reasons, RD Weis's motion for summary judgment dismissing plaintiff's negligence claim against it is granted.

**B. The Branch of RD Weis's Motion Seeking Summary Judgment Dismissing Plaintiff's Labor Law and Health Code Claims**

RD Weis also moves for summary judgment dismissing plaintiff's claims against it under Labor Law § 241 (6) and NYC Health Code §§ 131.05 and 131.9. The motion is granted.

Labor Law § 241 (6) requires owners and contractors to "provide reasonable and adequate protection and safety" for workers in "all areas in which construction, excavation or demolition work is being performed," and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As RD Weis argues, the record here reflects that no construction, excavation, or demolition was occurring in the hallway where plaintiff tripped and fell. Nor does plaintiff identify any specific rules or regulations that RD Weis might have violated here. RD Weis thus establishes a prima facie entitlement to summary judgment on this claim; and plaintiff's opposition papers do not attempt to put forward evidence that might create a material dispute of fact on the claim.

With respect to plaintiff's Health Code claims, RD Weis persuasively argues that neither § 131.05 (a) nor § 131.9 is applicable here; and plaintiff does not contest their arguments in her opposition to summary judgment.

This court therefore concludes that RD Weis is entitled to summary judgment on plaintiff's claims against it under the Labor Law and the New York City Health Code.

**C. The Branch of RD Weis's Motion Seeking Summary Judgment Dismissing Sirius's Contractual Indemnity Claim**

Sirius brought a cross-claim against RD Weis sounding in contractual indemnity. RD Weis moves for summary judgment on that claim. The motion is denied.

The contractual provision on which Sirius relies provides in relevant part that:

"[E]ach party shall indemnify, defend and hold harmless the other party from and against any and all losses, claims, actions, damages, expenses of any kind, including reasonable attorney's fees, and liabilities that are incurred as a result of . . . death or bodily injury resulting from the actions or omissions of the indemnifying party or any of its employees, officers, directors, agents or subcontractors."

(Services Agreement Between RD Weis Companies and Sirius XM Radio Inc., NYSCEF No. 226, at 1.)

In other words, RD Weis is required to indemnify Sirius for damages and defense costs incurred as a result of bodily injuries to a third party resulting from an act of RD Weis or one of its subcontractors. As discussed above, RD Weis has shown as a matter of law that its employees

did not themselves install the Masonite boards on which plaintiff tripped. Thus, RD Weis could be liable on this indemnity claim only if (i) Cross installed those boards, and (ii) it was that installation—rather than, for example, Sirius failing to properly maintain and monitor the boards—that led to plaintiff’s injuries. Those are both jury questions, as set forth further on motion sequence 010 (Sections IV.A) and motion sequence 006 (Section VI.A), *infra*.

Granting summary judgment to RD Weis on Sirius’s contractual indemnity claim therefore would be premature, because the resolution of that claim depends on determinations by the fact finder about installation and maintenance of the Masonite.<sup>6</sup>

#### **D. The Branch of RD Weis’s Motion Conditionally Seeking Judgment Against Cross on a Common-Law-Indemnity Theory**

RD Weis also conditionally moves for judgment against Cross on a common-law indemnity theory against Cross—in essence, a cross-claim.<sup>7</sup> As set forth in greater detail on motion sequence 010, *infra*, this court concludes that RD Weis should be permitted to amend its answer to assert a cross-claim against Cross on this theory. But RD Weis is not entitled on this motion to summary judgment on the cross-claim.

RD Weis argues, in essence, that if this court concludes RD Weis is required to indemnify Sirius under their contract for actions taken by Cross, then RD Weis is entitled to common-law indemnity from Cross to make RD Weis whole. (*See* NYSCEF No. 302, at 18.) This court agrees with that proposition, as discussed more fully on motion sequence 010. *See* Section IV.B, *infra*. But again, it is premature to grant summary judgment on this claim before a jury has resolved whether RD Weis is required to indemnify Sirius under their contract.

#### **IV. Motion Sequence 010 (Cross)**

In motion sequence 010, Cross moves for summary judgment dismissing plaintiff’s claims against it and seeks dismissal of any common-law indemnity claim against it brought by RD Weiss. The motion is denied.

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<sup>6</sup> RD Weis argues that it cannot be liable under this indemnity clause because the terms of the “clause refer[] to the contractual definition of the work,” rather than also encompassing work that RD Weis had undertaken in addition to the contract. NYSCEF No. 435, at 2-3. But the indemnity provision does *not* incorporate—either expressly or by reference—the contractual definition of RD Weis’s work in defining the scope of the indemnity clause. (*See* NYSCEF No. 226, at 1.) And the broad language of the clause would include installation of the Masonite by Cross as RD Weis’s subcontractor.

<sup>7</sup> RD Weis also requests permission to amend its answer to formally assert a cross-claim and to conform its pleadings to the proof, should the court conclude that an amendment is required. (*See* NYSCEF No. 419, at 4.)

**A. The Branch of Cross's Motion Seeking Summary Judgment Dismissing Plaintiff's Negligence Claim**

Cross moves for summary judgment dismissing plaintiff's negligence claim against it. This claim is based on testimony from Mata, the Sirius employee, that Cross had been hired by RD Weis to put down Masonite to protect the carpet in the hallway where plaintiff tripped and fell. Since on this theory Cross, too, would be an independent contractor, *Espinal* governs the scope of any duty owed by Cross to plaintiff. As with RD Weis's motion for summary judgment, the dispute on this motion focuses on the first prong of the *Espinal* test, *i.e.*, whether Cross launched an instrument of harm.

Cross argues that this first prong of the test further breaks down into three elements: that it installed the Masonite boards, that the Masonite boards were installed improperly, and that Cross had a duty to maintain or supervise the Masonite boards after installation. Cross suggests that it can only be held liable for launching "a force or instrument of harm" only if all three elements are satisfied. This court disagrees.

Under the first prong of the *Espinal* analysis, the question is whether a defendant has "undertake[n] to render services and then negligently create[d] or exacerbate[d] a dangerous condition." (*Espinal*, 98 NY2d at 141-141.) Here, that prong would be satisfied by evidence creating a triable issue about whether Cross installed the Masonite boards in a manner that created a tripping hazard. Whether Cross was responsible for maintaining or superintending the Masonite boards *after* they were installed might go to causation—*i.e.*, whether the hazardous tripping condition leading to plaintiff's injury resulted from the Masonite boards having been installed or maintained improperly by Cross, or instead from some other party improperly maintaining those boards (in which case Cross would not be liable). But it does not affect the existence (or absence) of a tort duty itself.

With respect to whether Cross negligently installed the Masonite boards, Cross has provided testimony to support the claim that Cross did not install the boards at all. Earnest Chirico is Cross's superintendent, who was responsible for coordinating all the carpentry work and brining in business for Cross. (E. Chirico's Deposition, NYSCEF No. 218, at 11.) He testified that nobody asked him to put down Masonite to protect the carpet. (*Id.* at 62.) Cross also produced all the documents in its possession for projects completed for or bid on for Sirius XM from August 2013 to February 2014; and those documents do not show any Masonite installation. (*See* Cross's Global Response to Party Demands, NYSCEF No. 356.)

On the other hand, Mata testified at his deposition that he believed RD Weis had hired Cross to lay down the Masonite boards, and that he remembered seeing Cross's staffers installing Masonite on the Premises. (J. Mata's Deposition, NYSCEF No. 341, at 95, 102-03.) Chirico also admitted that Cross could perform work for Sirius worth less than \$2,500 without a written contract; and that the Masonite installation here would have cost less than \$2,500. (*See* E. Chirico's Deposition, NYSCEF No. 218, at 21-22, 83.) Cross argues, to be sure, that this customary practice only existed between Cross and Sirius given their longstanding relationship, and that Cross did not have such a relationship with RD Weis. But drawing all inferences in favor of plaintiff as the nonmoving party here, this court concludes that plaintiff has raised an

issue of fact requiring trial as to whether her injuries resulted from Cross's negligent conduct. Cross's motion for summary judgment is denied.

This court notes that given this ruling and the court's resolution of motion sequence 007, *supra*, plaintiff currently has live claims against both Clancy-Cullen *and* Cross for having caused her injuries by improperly installing the Masonite boards—essentially proceeding in the alternative. The court concludes that in light of the ongoing lack of clarity as to which entity installed the Masonite, it is appropriate to permit plaintiff to pursue this course for the moment; at any trial in this matter, though, only one of these two defendants (if any) may be held liable for plaintiff's injuries.

### **B. The Branch of Cross's Motion Seeking Summary Judgment Dismissing RD Weis's Common-Law-Indemnity Claim**

Cross also moves for summary judgment on RD Weis's common-law indemnity claim against it. The motion is denied.

Cross argues as a procedural matter that because RD Weis did not previously plead a common-law indemnity cross-claim against it, RD Weis should not be permitted belatedly to assert such a claim now. (*See* NYSCEF No. 447, at 3-5.) This court is mindful that considerable time elapsed between Cross's entry into the case and RD Weis's assertion that Cross is subject to liability on a common-law-indemnity theory. The court concludes nonetheless that RD Weis should be permitted to amend its answer to assert a common-law indemnity cross-claim, because Cross has not shown that it would be meaningfully prejudiced by having to defend such a claim. (*See Manganaro v Estwing Mfg. Co.*, 27 AD2d 711, 711 [1st Dept 1967] [permitting defendant to assert a cross-claim served three years into the action absent a showing of prejudice].)

As reflected above, a central issue on the cross-claim—whether Cross installed the Masonite boards at issue in this case at the request of RD Weis—largely overlaps the question on plaintiff's main claim against Cross. That Cross must now raise many of the same arguments (supported by the same evidence) against RD Weis as well as against plaintiff does not constitute sufficient prejudice to bar RD Weis from asserting its cross-claim.

On the merits, Cross argues that it is not liable to RD Weis because there is no evidence that Cross breached any duty that it owed. (*See* NYSCEF No. 447, at 6-7.) This court disagrees. Cross is correct, to be sure, that “the key element of a common-law cause of action for indemnification is . . . a separate duty owed the indemnitee [*i.e.*, RD Weis] by the indemnitor [Cross].” (*Raquet v Raun*, 90 NY2d 177, 183 [1997] [internal quotation marks omitted].) Here, though, if Cross *did* install the Masonite, its actions might have caused RD Weis to have to pay indemnification to Sirius—which in turn would give rise to a common-law duty owed by Cross to indemnify RD Weis for that payment. (*See id.*)

Cross contends that RD Weis has failed to provide sufficient evidence that Cross (rather than some other entity) installed the Masonite. As discussed above on this motion, though, that evidence, though not overwhelming, is sufficient to create a dispute of fact for a jury to resolve.

That evidence is, perforce, sufficient to preclude granting summary judgment to Cross on RD Weis's indemnity claim.

Finally, Cross argues, in the alternative, that even if one were to find that Cross had installed the Masonite boards, RD Weis should not be able to recover on a common-law indemnity theory because the record (assertedly) indicates that plaintiff fell due to RD Weis or Sirius improperly maintaining the boards, rather than Cross having installed them improperly. (See NYSCEF No. 447, at 6.) Cross has not, however, established *as a matter of law* that RD Weis bears all (or most) of the causal responsibility for plaintiff's injury, so as to foreclose RD Weis's indemnity claim.

## V. Motion Sequence 011 (1221/Rockefeller)

In motion sequence 011, Defendants 1221 Avenue and Rockefeller Group move for summary judgment on several claims. 1221/Rockefeller seek summary judgment dismissing plaintiff's claims against them. They seek summary judgment on their contractual-indemnity claims against Sirius and against Pritchard. They also seek summary judgment on their breach-of-contract claim against Pritchard, which is based on Pritchard's (putative) failure to procure insurance for their benefit.

### A. The Branch of 1221 Avenue and Rockefeller Group's Motion for Summary Judgment Seeking Dismissal of Plaintiff's Negligence Claim

1221 Avenue and Rockefeller Group seek summary judgment dismissing plaintiff's negligence claims against them. The motion is granted.

The threshold question is whether 1221/Rockefeller owes a tort duty to plaintiff as the landlord and manager, respectively, of the Premises. Here, 1221 Avenue had leased the Premises to Sirius at the time of plaintiff's accident. A landlord is not liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is (i) contractually obligated to make repairs or maintain the premises; or (ii) is contractually *permitted* to reenter, inspect and make needed repairs at the tenant's expense, *and* the asserted basis for liability is a significant structural or design defect that is contrary to a specific statutory safety provision. (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010].)

When asked in a deposition "Do you know who had the responsibility to inspect the floors on the 37th floor for tripping hazard back in November 2013?" Gerald Blume, the senior vice president and assistant secretary of Rockefeller Group, testified: "I know that the landlord is not responsible for inspecting the floor for tripping hazards." (Blume's Deposition, NYSCEF No. 296, at 32-33.) Plaintiff did not present any evidence to contradict this statement. And although Blume admitted in the deposition that 1221 Avenue and Rockefeller Group had the right under the lease to reenter the Premises in certain circumstances, it is clear that the alleged tripping hazard that caused plaintiff's injury did not result from a significant structural or design defect that was contrary to a specific safety provision. (*Id.* at 33-34.)

1221/Rockefeller thus made out a prima facie showing that they did not owe a tort duty to plaintiff; and plaintiff's opposition papers do not raise any material disputes of fact. These two defendants' motion for summary judgment dismissing plaintiff's negligence claim against them is granted.

**B. The Branch of 1221 Avenue and Rockefeller Group's Motion for Summary Judgment Seeking Dismissal of Plaintiff's Labor Law and Health Code Claims**

1221 Avenue and Rockefeller Group also move for summary judgment dismissing plaintiff's claims against them under the Labor Law and NYC Health Code. The motion is granted for the same reasons as RD Weis's motion for summary judgment on these claims in motion sequence 012, *supra*.

**C. The Branch of 1221 Avenue and Rockefeller Group's Motion for Summary Judgment on Their Contractual-Indemnity Claim Against Sirius**

1221 Avenue and Rockefeller move for summary judgment in their favor on their claim for a declaration that Sirius is contractually obligated to defend and indemnify 1221 Avenue and Rockefeller Group for any claims of plaintiff. The motion is granted.

As discussed above on this motion, this court concludes that 1221 Avenue and Rockefeller Group have demonstrated as a matter of law that they are not liable to plaintiff. Thus, any claim by these defendants for indemnification of damages paid to plaintiff is academic. The 1221 Avenue/Rockefeller contractual claim for reimbursement of defense costs and expenses (including attorney fees), however, remains. (*See Reply Aff.*, NYSCEF no. 445, at 2, 3-4.)

The indemnity clause in the contract between 1221 Avenue and Sirius provides in relevant part that Sirius agrees to

"indemnify, and save harmless, the Landlord [1221 Avenue] and its agents [Rockefeller Group] (the "Indemnitees") . . . from and against all liability (statutory or otherwise), claims, suits, demands, damages, judgments, costs, interest and expenses (including reasonable counsel fees and disbursements incurred in the defense thereof) to which an Indemnatee may (except to the extent arising out of the negligence of any indemnitee or willful misconduct of any Indemnatee) be subject or suffer whether by reason of, or by reason of any claim for, any injury to, or death of, any person or persons or damage to property (including any loss of use thereof) or otherwise arising from or in connection with the (i) use of, or from any work or thing whatsoever done in, any part of the Premises . . . or ii) the negligence or willful misconduct of the tenant or any Tenant Party in the Building, during the term of this lease . . . or arising from any condition of the Premises . . . due to, or resulting from . . . any act or negligence of any Tenant Party." (Lease, NYSCEF No. 298, at 29-30).

Sirius argues a party seeking legal reimbursement from another party in association with a case must provide notice to the insurer in the form of a written tender, which 1221 Avenue and Rockefeller Group did not do here. This court disagrees. Absent a specific provision in the indemnity contract, an indemnitee is not required to give notice of claims against it to the indemnitor. (*See Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 298 [1st Dept 1959].) The contrary decisions cited by Sirius addressed the particular context of insurance policies. (*See Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972] [discussing “[n]otice provisions in insurance policies”]; *See also Structure Tone, Inc. v Burgess Steel Prod. Corp.*, 249 AD2d 144, 145 [1st Dept 1998] [noting that “the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts”].) And the indemnitor’s “contractual obligation” to indemnify “is separate and distinct from the insurer’s obligations under the policy.” Thus, any failure by an indemnitee to comply with the notice provisions of an insurance policy does not also afford the *non-insurer codefendant* a notice-based defense against its contractual indemnity obligations. (*Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp.*, 78 AD3d 613, 613 [1st Dept 2010].) 1221 Avenue and Rockefeller Group’s motion for summary judgment on their claim for a declaration that Sirius is obligated to reimburse them for defense costs (including reasonable attorney fees) in this action is granted.

**D. The Branch of 1221 Avenue and Rockefeller Group’s Motion for Summary Judgment on Their Contractual-Indemnity Claim Against Pritchard**

1221 Avenue and Rockefeller Group also move for summary judgment on their claim seeking to require Pritchard to indemnify and reimburse them for expenses incurred both for the claims of plaintiff and for the breach of contract claim based on the indemnity clause.<sup>8</sup>

The Service Agreement between Pritchard and 1221 Avenue contains an indemnity provision providing in relevant part that

“To the extent permitted by law, Contractor will indemnify and save harmless Owner, its agents, its and their respective officers, directors, and employees, the lessor under any ground or underlying lease and any mortgagees of the Premises or of Owner’s interest therein (collectively “the Indemnitees”) from and against any and all liability (including, but not limited to, statutory liability), loss, damages, interest, judgments, and liens growing out of, and any and all costs and expenses (including, but not limited to, counsel fees and disbursements) arising out of or incurred in connection with, any and all claims, demands, suits, actions, and/or proceedings which shall be made or brought against any of the Indemnitees for or in relation to . . . any (or any alleged) injury to, or death of, any person or persons (including, but not limited to, officers, directors, and employees of any of the Indemnitees or of Contractor) . . . arising out of or in connection with the

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<sup>8</sup> In addition to opposing this motion, Pritchard has also moved in motion sequence 008 for summary judgment dismissing 1221 Avenue/Rockefeller’s contractual-indemnity claims against it.

performance of the Services . . . and which shall be (or shall be alleged to be) in whole or in part due to or the result of any act, omission, negligence, carelessness, or unlawful conduct on the part of Contractor, its agents, or subcontractors.” (Service Agreement between Pritchard and 1221 Avenue, NYSCEF No. 299, at 3).

Pritchard argues that for two reasons it is not obligated to indemnify 1221 Avenue/Rockefeller under the provision. First, Pritchard contends, this clause is triggered only when claims against 1221 Avenue/Rockefeller arise out of an action connected to the services performed by Pritchard under the contract, and plaintiff (assertedly) was not performing contractual services when she was injured in her fall. Second, Pritchard claims, even assuming plaintiff was carrying out contractual services, the indemnity provision applies only when Pritchard has acted negligently, which (assertedly) was not the case here. This court disagrees on both counts.

Pritchard asserts that because plaintiff fell while removing cardboard boxes to a freight elevator, she was not performing contractual services at the time of the accident. (*See* NYSCEF No. 416, at 2.) According to Pritchard, its contract with 1221/Rockefeller called for removal only of wastebasket trash. Removal of larger items such as cardboard boxes would assertedly be handled instead by Pritchard under its separate contract with Sirius, which was limited to supplemental cleaning services beyond the scope of the base cleaning contract with 1221/Rockefeller. (*See* NYSCEF No. 249, at 2; *see also* NYSCEF No. 227, at 3, 5 [discussing scope of the Pritchard/Sirius contract].) The terms of 1221/Rockefeller’s agreement with Pritchard, however, expressly encompassed collection and removal from offices of cardboard boxes, not merely wastebasket trash. (*See* NYSCEF No. 299, at 20.) And plaintiff testified that the boxes she was carrying when she fell were “50, 60 centimeters” long (NYSCEF No. 211, at 74)—*i.e.*, not unusually large boxes that might thereby fall outside the scope of that agreement. Thus, for purposes of the indemnity clause here, Mustafa was injured while providing services under Pritchard’s contract with 1221/Rockefeller, not the supplemental cleaning contract between Pritchard and Sirius.

This court is also unpersuaded by Pritchard’s argument that it is obliged to indemnify 1221 Avenue/Rockefeller only for negligent conduct by Pritchard or its employees. The contract provided that an indemnity obligation applies where an injury is sustained in connection with Pritchard’s contractual services and is alleged to have been “due to or the result of any act, omission, negligence, carelessness, or unlawful conduct” of Pritchard and its employees. (NYSCEF No. 299 at 12.) This broad language is not limited solely to incidents in which Pritchard was negligent. (*See Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 88 [1st Dept 2018] [reversing denial of indemnitee’s motion for summary judgment and holding that indemnity provision applying to claims “arising from any act, omission or negligence” of the indemnitor did not require negligence or fault on the part of the indemnitor].)

1221 Avenue and Rockefeller Group are therefore entitled to summary judgment on their indemnification claim against Pritchard for expenses and costs (including reasonable attorney fees) incurred for defending against plaintiff’s claim against them. Such expenses include the costs and fees incurred in litigating the applicability of the indemnity clause itself, because that

litigation can fairly be said to be “arising out of” an action within the scope of Pritchard’s indemnification obligation. (*See* NYSCEF No. 299, at 9.)

Since 1221/Rockefeller is entitled to receive indemnification of its reasonable defense costs from both Sirius and Pritchard, consistent with its counsel’s submission at oral argument this court directs that those costs be split equally among the two indemnitors.

**E. The Branch of 1221 Avenue and Rockefeller Group’s Motion for Summary Judgment on Their Breach of Contract Claim Against Pritchard**

1221 Avenue and Rockefeller Group move for summary judgment on their claim for a declaration that Pritchard breached the contract among the three parties by failing to procure insurance for the benefit of 1221 Avenue and Rockefeller Group as additional insureds. Pritchard also moved for summary judgment dismissing this claim in motion sequence 008. 1221 Avenue/Rockefeller’s motion for summary judgment is denied, and Pritchard’s motion is granted, for reasons discussed in greater detail on motion sequence 008 (Point VII), *infra*.

**VI. Motion Sequence 006 (Sirius)**

In motion sequence 006, Sirius moves for summary judgment dismissing plaintiff’s claims against it; plaintiff cross-moves for summary judgment in her favor. Sirius also moves for summary judgment on its contractual-indemnity claims against Pritchard and RD Weis.

**A. The Branch of Sirius’s Motion Seeking Summary Judgment Dismissing Plaintiff’s Negligence Claim**

Sirius moves first for summary judgment dismissing plaintiff’s negligence claim, which is based upon Sirius’s status as the tenant-in-possession of the office space where plaintiff fell and injured herself. The motion is denied.

Landowners must act as a reasonable person in maintaining their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. (*Peralta v Henriquez*, 100 NY2d 139 [2003].) Where a defendant moves for summary judgment on the ground that it lacked even constructive notice of a hazard on its premises, the defendant must initially “offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell.” (*Birnbaum v New York Racing Ass’n, Inc.*, 57 AD3d 598, 598–599 [2d Dept 2008].)

To meet this burden, Sirius relies on the testimony of its employee, Mata, that he was present daily on the 37th floor overseeing the installation of the carpet and then the stone tile. (*See* NYSCEF No. 391, at 4; *see also* NYSCEF No. 212, at 50-51, 57-58, 107.) But this testimony merely described Mata’s general practices over the course of the month prior to the accident—not when Mata last saw or inspected the particular area where plaintiff fell relative to her accident. That is not sufficient to warrant summary judgment for lack of constructive notice.

(See *Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285 [1st Dept 2006]; *Britto v Great Atl. & Pac. Tea Co.*, 21 AD3d 436, 437 [2d Dept 2005].)

Sirius also argues that it established its lack of constructive notice through the testimony of plaintiff herself that on the night before the accident she had walked without incident over the area where she fell. (See NYSCEF No. 391, at 4.) Plaintiff, though, was employed by Pritchard rather than Sirius, and was responsible for cleaning Sirius's offices on the 37th floor and removing garbage, not inspecting the state of the Masonite boards laid down over the carpet. Additionally, her testimony that she had not noticed a problem on the previous night did not rule out the possibility that the tape had come loose (leading to a gap in the boards) in the 24 hours before her accident—in which case Sirius would still need to submit sufficient evidence to establish when the area was last inspected on the day of the accident itself. (See *Yioves v T.J. Maxx, Inc.*, 29 AD3d 572, 573 [2d Dept 2006].) Nor did “[p]laintiff’s failure to notice the hazard prior to her fall did not conclusively establish defendants’ lack of notice” (*Porco*, 30 AD3d at 284-285)—particularly since plaintiff testified that she had been carrying three cardboard boxes in front of her and could not see the ground where she was walking. (See NYSCEF No. 211, at 257-258.)

Finally, Sirius asserts that the alleged gap in the boards where plaintiff fell could not have been obvious and apparent, because plaintiff’s supervisor, Agron, testified at his deposition that he had looked at the Masonite boards after plaintiff’s fall was reported, and that he had not noticed any problems or gaps with the boards. (See NYSCEF No. 391, at 5.) But that testimony merely creates a factual dispute with plaintiff’s testimony that should be resolved at trial, not at summary judgment.

#### **B. The Branch of Sirius’s Motion Seeking Summary Judgment Dismissing Plaintiff’s Labor Law and Health Code Claims**

Sirius also moves for summary judgment on plaintiff’s Labor Law and Health Code claims against it. The motion is granted. These claims are based on the same provisions as plaintiff’s claims against 1221 Avenue and Rockefeller Group. And plaintiff’s opposition papers with respect to these claims again fail here to put forward any evidence or legal argument establishing that a material dispute of fact exists requiring trial. Thus, plaintiff’s Labor Law and Health Code claims against Sirius fail for the same reasons as her identical claims against 1221/Rockefeller.

#### **C. Plaintiff’s Cross-Motion for Summary Judgment on Her Negligence Claim Against Sirius**

Plaintiff also cross-moves on motion sequence 006 for summary judgment in her favor on her negligence claim against Sirius. The motion is denied.

To make out a prima facie case of negligence, a plaintiff must demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it. (*Leo v Mt. St. Michael Acad.*, 272 AD2d 145, 145–146 [1st Dept 2000].) Plaintiff argues that Sirius had constructive

notice because the tripping hazard, i.e. the Masonite boards and the loosen tape, existed over a period of time sufficient for Sirius to have observed and remedied it.

Plaintiff fails, however, to provide direct evidence showing that the tape had been missing from the Masonite boards or that the board she tripped on was elevated for a significant period of time. And as noted above, Agron, when asked “After the accident when you looked at the Masonite, did you see anything wrong with it?” answered: “No.” (Agron’s Deposition, NYSCEF No. 221, at 107.) Plaintiff, like Sirius, has failed to establish that summary judgment should be granted in her favor on her negligence claim. The claim must instead be resolved by the finder of fact.

#### **D. The Branch of Sirius’s Motion Seeking Summary Judgment on its Contractual-Indemnity Claim Against Pritchard**

Sirius moves for summary judgment in its favor on its contractual-indemnity claim against Pritchard. The motion is denied.<sup>9</sup>

Sirius’s claim is based on an indemnity clause in the cleaning contract between Sirius and Pritchard. The clause provides that Pritchard:

“shall indemnify, defend and hold harmless Sirius XM from and against any and all losses, claims, actions, damages, expenses of any kind including reasonable attorney fees, and liabilities that are incurred by Sirius XM as a result of the performance of the services or a negligent act or omission of, or willful misconduct by, Company or its employees or agents including, without limitation, the death or bodily injury of any agent, employee, customer, business invitee or business visitor of either party.” (Service Agreement Between Pritchard Industry, Inc. and Sirius XM Radio Inc., NYSCEF No. 227, at 6.)

Pritchard argues that this clause is unenforceable because it requires that Pritchard indemnify Sirius not only for claims from wrongful acts by Pritchard but also for claims from wrongful acts by *Sirius*, which would be barred by General Obligation Law § 5-322.1. (See NYSCEF No. 433, at 3-4.) This court disagrees. The indemnification clause requires Pritchard to indemnify Sirius for losses that result from “a negligent act or omission of, or willful misconduct by,” Pritchard, *or* losses “incurred by Sirius XM as a result of the performance of the Services.” (NYSCEF No. 227, at 6 ¶ 5.) Under the contract, though, the “Services” are to be performed *by Pritchard*, not by Sirius. (See *id.* at ¶ 1.) This language thus does not require Pritchard to indemnify Sirius for Sirius’s own negligence. (See *Brooks v Judlau*, 11 NY3d 204, 209 [2008] [holding that a clause requiring subcontractor to indemnify owner for losses resulting from “any

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<sup>9</sup> Sirius asks this court to disregard Pritchard’s opposition papers to this motion because Pritchard served its opposition six days before the return date, rather than the seven days required by CPLR 2214 (b). (See NYSCEF No. 442, at 2-3.) Given the minimal delay here and the lack of prejudice to Sirius, the court exercises its discretion to consider Pritchard’s opposition papers despite their untimely service.

claims or causes of action of whatever nature arising *from the Subcontractor's work*" did not require the subcontractor to indemnify the owner for the owner negligence] [emphasis added].)

That the indemnity clause here is enforceable does not itself resolve the question whether the clause applies to the losses at issue here. Pritchard claims that the indemnity clause does not apply because plaintiff's fall "was not occasioned by anything other than the fact that she was walking through the Sirius space"—it did not occur as a result of plaintiff being "engaged in any particular work-related function or task." (NYSCEF No. 433, at 3.) But plaintiff fell while carrying cardboard boxes toward the freight elevator to be removed as trash, not merely while she was walking down a hallway in the Sirius offices like any other person might have done.

That plaintiff fell while engaged in cleaning work (namely removing boxes) does not end the inquiry. As discussed above on motion sequence 011 (Section V.D, *supra*), plaintiff's removal of the cardboard boxes did not constitute services performed under Pritchard's contract with Sirius, but rather was covered as a matter of law by Pritchard's contract with 1221 Avenue and Rockefeller Group, instead. Thus, for purposes of the indemnity clause, Sirius did not incur any loss "as a result of the performance of the Services" under the contract. Nor has Sirius established that plaintiff fell as a result of negligence on the part of *Pritchard*.

Sirius has therefore failed to show as a matter of law that Pritchard is required to indemnify Sirius under the terms of their contract. Sirius's motion for summary judgment on its contractual-indemnity claim against Pritchard is denied.

#### **E. The Branch of Sirius's Motion Seeking Summary Judgment on its Contractual-Indemnity Claim Against RD Weis**

Sirius moves for summary judgment on its contractual indemnity claim against RD Weis. This motion is denied. As discussed on motion sequence 010 (Point IV, *supra*), factual questions remain about whether Cross (rather than Clancy-Cullen) installed the boards so as to make RD Weis contractually liable to Sirius for Cross's acts. Additionally, as discussed above on this motion, even if Cross did install the boards, a factual question remains about whether plaintiff's injury was caused by that installation or instead by an intervening act of negligence committed *by Sirius*, for which RD Weis would not be contractually liable.

### **VII. Motion Sequence 008 (Pritchard)**

In motion sequence 008, Pritchard moves for summary judgment dismissing 1221 Avenue Group and Rockefeller's contractual-indemnity claim. That motion is denied for the reasons given in this court's discussion of motion sequence 011, *supra*. Pritchard also moves for summary judgment dismissing Sirius's contractual-indemnity claim; that motion is granted. And Pritchard moves for summary judgment dismissing 1221 Avenue/Rockefeller and Sirius's claims for breach of Pritchard's contractual obligation to obtain insurance. That motion is granted.

#### **A. The Branch of Pritchard's Motion Seeking Summary Judgment Dismissing Sirius's Contractual-Indemnity Claim**

Pritchard moves for summary judgment dismissing Sirius's contractual-indemnity claim, which is based on the indemnity provision quoted at Section VI.D, *supra*. The motion is granted.

Under this indemnity provision, two potential sources for liability run from Pritchard to Sirius: performance of contractual services by Pritchard that caused a loss to Sirius, or negligence by Pritchard that caused a loss to Sirius. (*See* NYSCEF No. 227, at 6.) Neither source of liability applies here. *First*, as discussed above at Sections V.D and VI.D, the record demonstrates as a matter of law that plaintiff was not performing contractual services for Sirius when she was injured. *Second*, this court concludes that Pritchard established prima facie that Sirius's losses did not result from any breach by Pritchard of a duty that it owed, and that Sirius's opposition papers failed to raise any dispute of material fact on this point. Pritchard has therefore demonstrated as a matter of law that it is not liable to Sirius in contractual indemnity.

**B. The Branch of Pritchard's Motion Seeking Summary Judgment Dismissing 1221/Rockefeller and Sirius's Obtaining-Insurance Contract Claims**

Finally, Pritchard moves for summary judgment dismissing the claims brought by 1221 Avenue and Rockefeller Group and by Sirius that Pritchard breached its contractual obligation to obtain insurance for their benefit. The motion is granted.

It is undisputed that Pritchard was contractually obligated to obtain insurance coverage for 1221 Avenue/Rockefeller and for Sirius. In support of its motion, Pritchard offers an insurance policy it obtained from First Mercury Insurance Company. The policy contains a blanket endorsement designating as additional insureds "[a]ny person or organization as required by written contract or agreement" to be named on the policy. (*See* NYSCEF No. 251, at 30.) Such a blanket endorsement affords insurance coverage for 1221 Avenue, Rockefeller Group, and Sirius, which meets Pritchard's contractual obligations. (*See New York Univ. v Royal Ins. Co.*, 200 AD2d 527, 528 [1st Dept 1994].) This policy establishes prima facie that Pritchard is entitled to summary judgment on the obtaining-insurance claims.

1221 Avenue and Rockefeller Group do not attempt to provide any evidence in opposition that might create a material dispute of fact. Nor, for that matter, does Sirius. To the contrary, in opposing Pritchard's motion for summary judgment on the indemnification claim, Sirius *concedes* that it is an additional insured on Pritchard's policy. (*See* NYSCEF No. 389, at 5-6.) Pritchard is thus entitled to summary judgment dismissing the obtaining-insurance claims against it.

Accordingly, for all the foregoing reasons, it is hereby

ORDERED that the branch of JK Moving's motion seeking summary judgment dismissing plaintiff's negligence claim against it (motion sequence 009) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to JK Moving as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of JK Moving's motion seeking sanctions against plaintiff (motion sequence 009) is denied; and it is further

ORDERED that Clancy-Cullen's motion for summary judgment dismissing plaintiff's negligence claim against it (motion sequence 007) is denied; and it is further

ORDERED that the branch of RD Weis's motion seeking summary judgment dismissing plaintiff's negligence claim against it (motion sequence 012) is granted; and it is further

ORDERED that the branch of RD Weis's motion seeking summary judgment dismissing plaintiff's Labor Law and Health Code claims against it (motion sequence 012) is granted; and it is further

ORDERED that plaintiff's complaint against RD Weis is dismissed in its entirety, with costs and disbursements to RD Weis as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of RD Weis's motion seeking summary judgment dismissing Sirius's contractual-indemnity claim against it (motion sequence 012) is denied; and it is further

ORDERED that the branch of Sirius's motion seeking summary judgment on its contractual-indemnity claim against RD Weis (motion sequence 006) is denied; and it is further

ORDERED that the branch of RD Weis's motion conditionally seeking summary judgment in its favor on RD Weis's common-law indemnity claim against Cross (motion sequence 012) is denied; and it is further

ORDERED that the branch of Cross's motion seeking summary judgment dismissing RD Weis's conditional common-law indemnity claim against it (motion sequence 010) is denied; and it is further

ORDERED that the branch of Cross's motion seeking summary judgment dismissing plaintiff's negligence claim against it (motion sequence 010) is denied; and it is further

ORDERED that the branch of 1221 Avenue and Rockefeller Group's motion seeking summary judgment dismissing plaintiff's negligence claim against them (motion sequence 011) is granted; and it is further

ORDERED that the branch of 1221 Avenue and Rockefeller Group's motion seeking summary judgment dismissing plaintiff's Labor Law and Health Code claims against them (motion sequence 011) is granted; and it is further

ORDERED that plaintiff's complaint against 1221 Avenue and Rockefeller Group is dismissed in its entirety, with costs and disbursements to 1221 Avenue and Rockefeller Group as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of 1221 Avenue and Rockefeller Group's motion seeking summary judgment on its breach-of-contract claim against Pritchard (motion sequence 011) is denied; and it is further

ORDERED that the branch of 1221 Avenue and Rockefeller Group's motion seeking summary judgment on its contractual-indemnity claim against Sirius (motion sequence 011) is granted; and it is further

ORDERED that the branch of 1221 Avenue and Rockefeller Group's motion seeking summary judgment on its contractual-indemnity claim against Pritchard (motion sequence 011) is granted; and it is further

ORDERED that the branch of Pritchard's motion seeking summary judgment dismissing 1221 Avenue and Rockefeller Group's contractual-indemnity claim against it (motion sequence 008) is denied; and it is further

ORDERED that pursuant to the grant of summary judgment on 1221 Avenue and Rockefeller Group's contractual-indemnity claims against Sirius and Pritchard (motion sequence 011), Sirius and Pritchard shall each bear one-half of the defense costs (including reasonable attorney fees) incurred by 1221 Avenue and Rockefeller Group; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the issue of the amount of defense costs incurred by 1221 Avenue and Rockefeller Group, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part; and it is further

ORDERED that the branch of Sirius's motion seeking summary judgment dismissing plaintiff's negligence claim against it (motion sequence 006) is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on her negligence claim against Sirius (motion sequence 006) is denied; and it is further

ORDERED that the branch of Sirius's motion seeking summary judgment dismissing plaintiff's Labor Law and Health Code claims against it (motion sequence 006) is granted; and it is further

ORDERED that plaintiff's Labor Law and Health Code causes of action against Sirius are dismissed; and it is further

ORDERED that the branch of Sirius's motion seeking summary judgment on its contractual-indemnity claim against Pritchard (motion sequence 006) is denied; and it is further

ORDERED that the branch of Pritchard's motion seeking summary judgment dismissing Sirius's contractual-indemnity claim against it (motion sequence 008) is granted; and it is further

ORDERED that the branch of Pritchard's motion seeking summary judgment dismissing Sirius's breach-of-contract claim against it (motion sequence 008) is granted; and it is further

ORDERED that Sirius's third-party complaint against Pritchard is dismissed in its entirety, with costs and disbursements to Pritchard as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of Pritchard's motion seeking summary judgment dismissing 1221 Avenue and Rockefeller Group's breach-of-contract claim against it is granted, and the claim is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

02/24/20

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE