

Caras v George Comfort & Sons, Inc.

2020 NY Slip Op 31245(U)

May 6, 2020

Supreme Court, New York County

Docket Number: 152645/2015

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

-----x
KEITH CARAS,

Plaintiff,

DECISION AND ORDER
MOT SEQ Nos.004, 008,
009, 010

- against -

Index No. 152645/2015

GEORGE COMFORT & SONS, INC., WWP OFFICE LLC,
NOMURA HOLDING AMERICA, INC. and TURNER
CONSTRUCTION COMPANY,

Defendants.

-----x
GEORGE COMFORT & SONS, INC., WWP OFFICE LLC,
NOMURA HOLDING AMERICA, INC. and TURNER
CONSTRUCTION COMPANY,

Third-Party
Plaintiffs,

- against -

FOREST ELECTRIC CORP.,

Third-Party
Defendant.

-----x
NANCY M. BANNON, J.:

I. INTRODUCTION

Motion sequence nos. 004, 008, 009, and 010 are consolidated
for disposition herein.

This Labor Law action arises out of an accident that occurred
on October 22, 2012 when plaintiff Keith Caras, a journeyman
steamfitter, allegedly slipped on debris while stepping onto a
one-man lift or scissor lift, and sustained injuries to his right
knee requiring surgery.

In motion sequence no. 004, defendants/third-party plaintiffs George Comfort & Sons, Inc. (GCS), WWP Office LLC (WWP), Nomura Holding America, Inc. (Nomura), and Turner Construction Company (Turner) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint with prejudice. Plaintiff opposes the motion and cross-moves for partial summary judgment on the issue of defendants' liability under Labor Law § 241 (6).

In motion sequence no. 008, defendants move under CPLR 3126 (3) for an order striking the answer of third-party defendant Forest Electric Corp. (Forest) for failing to produce discovery, or in the alternative, for a preclusion order under CPLR 3216 (2).

In motion sequence no. 009, Forest moves for an order (1) striking the third-party complaint under CPLR 3126, (2) severing the third-party action from the main action under CPLR 603 and 1010, (3) vacating the note of issue under CPLR 3401, and (4) extending the time to move for summary judgment to October 4, 2019.

In motion sequence no. 010, defendants move for summary judgment on the third-party complaint for contractual and common-law indemnification and breach of contract for failure to procure insurance against Forest.

II. BACKGROUND

On the day of the accident, WWP owned a building located at 825 Eighth Avenue, New York, New York, and GCS served as WWP's

building manager (New York St Elec Filing [NYSCEF] Doc No. 154, affirmation of Jennessy A. Rivera [Rivera], exhibit B at 5; NYSCEF Doc No. 152, Peter S. Duncan aff, ¶ 3). Nomura leased a portion of the building (the Premises). and contracted with Turner to perform pre-construction and construction management services related to a complete renovation of the Premises (the Project) (NYSCEF Doc No. 154 at 7 and 11; NYSCEF Doc No. 175, affirmation of Philip Di Pippo [Di Pippo], exhibit 1 at 11; NYSCEF Doc No. 151, Eileen Nopper aff, ¶ 3). Turner retained Forest as an electrical subcontractor on the Project (NYSCEF Doc No. 316, Rivera affirmation, exhibit L [Darrell L. Fullerton (Fullerton) 6/14/19 tr] at 34; NYSCEF Doc No. 320, Rivera affirmation, exhibit P at 1). Turner also hired nonparty Island Fire Sprinkler (Island Fire) to perform fire sprinkler protection work on the Project (NYSCEF Doc No. 160, Rivera affirmation, exhibit H [Fullerton 1/24/17 tr] at 10). Plaintiff was an employee of Island Fire (NYSCEF Doc No. 155, Rivera affirmation, exhibit C, ¶ 20).

Plaintiff testified that he was employed by Island Fire on the day of the accident (NYSCEF Doc No. 157, Rivera affirmation, exhibit E [plaintiff 2/16/26 tr] at 38), as an "A" journeyman steamfitter (NYSCEF Doc No. 313, Rivera affirmation, exhibit I [plaintiff 3/22/19 tr] at 11). The day of the accident was also his first day working on the Project for Island Fire, although he had worked on the same Project for a different employer several

months earlier (NYSCEF Doc No. 157 at 45-46). Plaintiff testified that he arrived at the Premises at 6:15 a.m. for a 7 a.m. shift (*id.* at 52). He and his partner, "Danny," met with Island Fire's foreman, who explained that their job for the day was to put up sprinkler pipes in the ceiling (*id.* at 62-63). Their work required use of a "one-man lift," which plaintiff described as a machine consisting of a wheeled metal "bucket" three to four feet high sitting on a two-foot high platform that could be raised and lowered using a joystick control inside the bucket (*id.* at 63; NYSCEF Doc No. 158, Rivera affirmation, exhibit F [plaintiff 12/1/16 tr] at 25). Island Fire rented the lift from Pride Equipment (NYSCEF Doc No. 157 at 64). The accident occurred on the fourth floor of the Premises (NYSCEF Doc No. 313 at 11).

Plaintiff testified that "Danny" told him to retrieve the lift from the other side of the building (NYSCEF Doc No. 313 at 25). The accident occurred when plaintiff stepped onto the lift. Plaintiff explained, "I lifted the safety bar, went to step in [the bucket], and then went to turn to the left, and that's where I twisted it, and then fell forward" (NYSCEF Doc No. 157 at 68, lines 23-25 and at 69, line 2). He stated, "[t]here was some debris on there that I saw when I went to walk into the bucket, and then I slipped and twisted my knee, and fell on my knee" (*id.* at 71, lines 2-5). He did not know where the debris, which consisted of sheetrock, insulation and a two-by-four, came from as

his steamfitting work did not require the use of those materials (*id.* at 72; NYSCEF Doc No. 158 at 109; NYSCEF Doc No. 313 at 26). Laborers were responsible for removing debris from the man lift (NYSCEF Doc No. 157 at 110).

Plaintiff testified that he did not notice the debris on the lift before he stepped on it, stating that “[i]t was dark. The room was dark” (NYSCEF Doc No. 157 at 108). He stated,

“They were making a wall and the machine was in the left-hand corner. They had a wall up and then the guy was working on the other side. So that wall was brand new. I don’t know if it was that day or the day before or whatever, but that cut off the light. So he was working on the other side while the lift was on that side. So there was nothing. It was dark in there”

(NYSCEF Doc No. 158 at 110, lines 9-17). Plaintiff testified there was no temporary lighting near the lift (*id.* at 111; NYSCEF Doc No. 313 at 32). There was a window on the other side of the new, unfinished wall, where “[t]he guy was scaffolding and he was working on the light or whatever he was working on” (NYSCEF Doc No. 158, at 111, lines 4-8), but the new wall cut off the natural light into the accident area (*id.*; NYSCEF Doc No. 313 at 45 and 47-48). Plaintiff testified that he did not complain to anyone about the lighting conditions, and that he was not aware of any prior complaints about the lighting (NYSCEF Doc No. 313 at 36). He did not know if Forest was one of the contractors on the Project (*id.* at 39).

Plaintiff testified that he did not look inside the lift for any debris before stepping into the bucket (NYSCEF Doc No. 158 at 111), stating that “[y]ou just get into the lift, you go” (*id.* at 112, lines 3-4). He subsequently testified that he looked into the bucket before stepping inside it, but he did not see anything (*id.* at 118). Plaintiff did not complain to anyone about the debris in the lift or the lack of lighting (NYSCEF Doc No. 157 at 109). When shown a copy of Turner’s incident investigation report, plaintiff testified the report contained a fair and accurate description of the accident (*id.* at 87). Plaintiff, though, disputed the portion of his signed statement describing the lighting as “fine” (NYSCEF Doc No. 313 at 61).

Daniel Coker (Coker) testified that he was employed by Island Fire as a journeyman steamfitter (NYSCEF Doc No. 162, Rivera affirmation, exhibit J [Coker tr] at 18 and 20). He and plaintiff worked together as a two-man gang, with Coker in charge on the day of the accident (*id.* at 24). Coker testified that he did not take his instructions from Turner (*id.* at 29). Coker stated their work that day required the use of a scissor lift, which he described as a 20-inch wide by five-foot long platform on four wheels (*id.* at 27). The foreman sent plaintiff to find the lift while he spoke to Coker about the work (*id.* at 24-25). Coker testified that it was a “pretty big floor,” and plaintiff had been gone about 15 to 20 minutes before he began to look for him (*id.* at 25, line 15).

Coker stated, "I saw Keith coming around the corner, and he was limping pretty bad ... and he said he just fell" (*id.*, lines 16-20), and pointed to the room where the lift was located (*id.* at 26). Coker described the room's dimensions as 12 feet by 12 feet or 12 feet by 16 feet (*id.* at 32). When Coker looked in, he saw "our lift, but it wasn't steamfitter material that was on the lift. It seemed like -- it looked like carpenters' material that was on the lift, and in the area all around" (*id.* at 26, lines 6-10). Coker testified that he was standing five feet away from the lift when he saw "pieces of sheetrock and sheetrock dust" (*id.*, lines 24-25), and that it was "all around the lift, and on the lift: (*id.* at 27, lines 2-3).

Coker testified that Island Fire furnished the tools and equipment for this job (NYSCEF Doc No. 162 at 30). After the accident, Coker asked the foreman if he had lent the lift to another contractor, but Coker could not recall the foreman's response (*id.* at 32). Coker stated, however, that "when I explained it to him, it didn't seem like he lent it, like it was just taken" (*id.* at 23-25). Coker stated that "laborers on the job ... pick up after what you leave [sic]" (*id.* at 30, lines 9-10), but the laborers did not "necessarily" clean the man lifts, although "sometimes [they did], depending on the job" (*id.* at lines 16-17). Coker testified that if he observed debris in his work space, he would find a laborer or ask a foreman for the general

contractor to move the material out of Island Fire's workspace (*id.* at 41). Coker was not aware of any prior complaints about the lifts or complaints about others using Island Fire's equipment (*id.* at 40-41).

As for the lighting conditions at the accident location, Coker testified that "[t]he lighting was poor" (NYSCEF Doc No. 162 at 37, line 25). Coker clarified his answer and explained "that is because when the carpenters come and they close off rooms with sheetrock, that some of the lighting is outside the room now. When it's all open, the temporary lighting is all over, so as they close up rooms, you lose lighting in particular rooms" (*id.* at 38, lines 2-8).

Frank Steffens (Steffens) testified that he was Island Fire's foreman on the Project and that Island Fire provided its own equipment (NYSCEF Doc No. 161, Rivera affirmation, exhibit I [Steffens tr] at 12 and 14). On the day of the accident, he met plaintiff at 7:30 a.m. and told plaintiff to attend a 9 a.m. orientation conducted by Turner (*id.* at 16). Steffens then took plaintiff to the floor where plaintiff would be working (*id.* at 17), and told him to move the lift (*id.* at 23). Plaintiff was injured shortly thereafter (*id.* at 17). Steffens testified that he could not recall how plaintiff described the accident, and he could not recall plaintiff mentioning the debris in the lift (*id.* at 25). At his deposition, Steffens read from a signed statement

he had given to an insurance investigator about the accident (*id.* at 21, 31 and 69). Steffen's statement read, in part, that "I took a lift before the incident, and there was no [debris] ... on it" (*id.* at 30, lines 24-25, and at 31, line 2).

When asked who was responsible for cleaning the lift, Steffens replied that Turner would not clean Island Fire's equipment because "[t]hat would be our obligation (NYSCEF Doc No. 161 at 74, line 15). Steffens explained, "[w]e would clean our own equipment" (*id.* at 75, line 2), adding that it "would be the last person -- well, either way, the last person that used it or if you came to a lift, sometimes debris falls, you should clean it yourself, the next person to use it, there was debris on the lift" (*id.* at 24, lines 9-13).

Fullerton testified that he had worked for Turner as a safety manager on the Project, which entailed a full renovation of 18 floors of the building for Nomura (NYSCEF Doc No. 160, Rivera affirmation, exhibit H [Fullerton 1/24/17 tr] at 7 and 14). Fullerton had the authority to stop work if he saw a hazardous condition at the site (*id.* at 58). Fullerton testified that he saw plaintiff at the first aid station on the eighth floor after the accident, and that plaintiff complained he had hurt his right knee (*id.* at 63-64). He explained that plaintiff told him "he was getting -- going -- he was -- he got up in the lift, and he was moving it, and he was -- and somehow, he hurt his leg in the lift"

(*id.* at 68, lines 6-9). Fullerton testified plaintiff said "it just hurt ... [h]e said he was in the lift, walk -- he was in the lift, and his leg started hurting. His knee started hurting" (*id.* at 68, lines 15-18).

Fullerton testified that he traveled to the fourth floor where the accident occurred, and saw more three or four man lifts in the northwest corner of the building (NYSCEF Doc No. 160 at 94). However, he could not identify the lift involved in plaintiff's accident (*id.* at 91). Fullerton did not speak to anyone about plaintiff's accident (*id.* at 77), and Turner's risk management department sent "Terrier Claims" to conduct an investigation (*id.* at 73).

Fullerton stated that Turner employed laborers to clean excess debris from the worksite (NYSCEF Doc No. 160 at 17), but it was not their responsibility to remove debris from man lifts, explaining it was the job of the lift operator to perform that task (*id.* at 18 at 21). Fullerton also testified that it was the subcontractor's responsibility to ensure that its working area was free of hazards (NYSCEF Doc No. 316 at 32).

Fullerton testified there were four electrical subcontractors on the Project, including Forest (NYSCEF Doc No. 316 at 34). There was temporary lighting on each floor (*id.* at 42), but he did not know who at Turner was involved in dictating when and where lighting was installed (*id.* at 41). Fullerton had the authority

to direct a subcontractor to replace a light bulb or a missing light bulb (*id.* at 40). According to his personal notes, Fullerton logged a call about a light on the fourth floor on September 21, 2012, though he had no specific recollection of it (*id.* at 59 and 63).

Brenden Hendrickson (Hendrickson) avers that he is a licensed investigator employed by nonparty Terrier Investigations, Inc. (NYSCEF Doc No. 193, Hendrickson aff, ¶¶ 1-2). Hendrickson states that he was dispatched to investigate the accident (*id.*, ¶ 3). Upon arriving at the Premises, he met with plaintiff and took his signed statement (*id.*). Hendrickson states that plaintiff indicated he had slipped inside the lift (*id.*, ¶ 4). Hendrickson also took a signed witness statement from Steffens (*id.*, ¶ 6).

Plaintiff commenced this action by filing a summons and complaint on March 17, 2015. He seeks damages for common-law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendants interposed an answer and brought a third-party action against Forest asserting causes of action for contractual and common-law indemnification, contribution, and for breach of contract for Forest's failure to procure insurance.

In accordance with an order of the undersigned dated March 6, 2019, plaintiff filed the note of issue and certificate of readiness on May 1, 2019 (NYSCEF Doc No. 249).

III. DISCUSSIONMotion Sequence No. 004

Defendants move for summary judgment dismissing the complaint, and plaintiff cross-moves for summary judgment on defendants' liability on the Labor Law § 241 (6) claim.

The movant on 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." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212 [b]). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers." William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 [2013], citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012]).

A. The Labor Law § 240 (1) Claim

At the outset, defendants have established, and plaintiff has conceded, that the accident does not implicate the protections of Labor Law § 240 (1) because plaintiff was not exposed to an elevation-related risk. Thus, summary judgment dismissing the

Labor Law § 240 (1) claim is granted, without opposition (see Leveron v Prana Growth Fund I, L.P., 181 AD3d 449, 450-451 [1st Dept. 2020]), and the Labor Law § 240 (1) claim is dismissed.

B. The Labor Law § 241 (6) Claim

Labor Law § 241 (6) reads, in relevant part, that:

"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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

The statute "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998) (emphasis in original). The statute applies where the plaintiff is an employee within the meaning of the Labor Law (see Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573, 576-577 [1990]), and the injury occurs "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). In addition, Labor Law § 241 (6) requires an owner or contractor "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). Not only must the rule or regulation be relevant to the action, it must also "set[] forth a specific requirement or standard of conduct." Id. at 503. "The particular [Industrial Code] relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles." Misicki v Caradonna, 12 NY3d 511, 515 (2009). Therefore, to prevail on a Labor Law § 241 (6) claim, a plaintiff must plead and prove that there was a violation of rule or regulation setting 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 Nassar v Macy's Inc., - AD3d -, 2020 NY Slip Op 02160, *2 (1st Dept 2020).

In his verified Bill of Particulars, plaintiff alleges violations of the Industrial Code provisions: 12 NYCRR 23-1.5; 12 NYCRR 23-1.7; 12 NYCRR 23-1.7 (d); 12 NYCRR 23-1.7 (e) (1) and (e) (2); 12 NYCRR 23-1.8; 12 NYCRR 23-1.30; 12 NYCRR 23-1.31; 12 NYCRR 23-1.32; and 12 NYCRR 23-2.1 (a) and (b) (NYSCEF Doc No. 155, ¶ 14; NYSCEF Doc No. 163, Rivera affirmation, exhibit K, ¶ 1). Plaintiff, though, has addressed only sections 23-1.7 (e) (2) and

23-1.30 in his opposition. Therefore, with the exception of sections 23-1.7 (e) (2) and 23-1.30, plaintiff has abandoned his reliance on the other Industrial Code provisions cited in his verified bill of particulars as predicates for the Labor Law 241 § (6) claim. See Perez v Folio House, Inc., 123 AD3d 519 (1st Dept. 2014); Rodriguez v Dormitory Auth. of the State of N.Y., 104 AD3d 529, 530-531 (1st Dept. 2013); Cardenas v One State St., LLC, 68 AD3d 436 (1st Dept. 2009). Defendants are entitled to summary judgment dismissing so much of the Labor Law § 241 (6) claim predicated on the abandoned provisions. See Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 (1st Dept. 2012) (stating that “[w]here 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.”).

The court now turns to the applicability of sections 23-1.7 (e) (2) and 23-1.30.

1. 12 NYCRR 23-1.7(e) (2)

Defendants contend section 23-1.7 (e) (2) is inapplicable to the facts because it applies to tripping hazards, and plaintiff testified that he slipped on debris. Defendants also contend the accident occurred in a storage area, and storage areas are not “working areas” within the meaning of the section. Plaintiff maintains there was a violation because he slipped on discarded

construction material, and that the violation was the proximate cause of his injuries.

Section 23-1.7 (e) (2) states "Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." This provision is sufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim. See Licata v AB Green Gansevoort, LLC, 158 AD3d 487 (1st Dept. 2018).

Here, neither argument advanced by defendants in support of dismissal is persuasive. First, although section 23-1.7 (e) is entitled "Tripping and other hazards," the section applies to slipping hazards as well. See Ohadi v Magnetic Constr. Group Corp., — AD3d —, 2020 NY Slip Op 02278, *4 (1st Dept. 2020); Fitzgerald v Marriot Intl., Inc., 156 AD3d 458 (1st Dept. 2017) (concluding that the fact the plaintiff slipped does not bar application of section 23-1.7 (e)); DeMaria v RBNB 20 Owner, LLC, 129 AD3d 623, 625 (1st Dept. 2015) (stating "that plaintiff 'slipped,' rather than 'tripped,' ... does not render 12 NYCRR 23-1.7 (e) (2) ('Tripping and other hazards') inapplicable.").

Defendants next contend that storage rooms do not constitute working areas for purposes of section 23-1.7 (e) (2). See Conway v Beth Israel Med. Ctr., 262 AD2d 345 (2nd Dept. 1999); Dacchille

v Metropolitan Life Ins. Co., 262 AD2d 149 (1st Dept. 1999). However, the area where the accident occurred does not bear the characteristics of a storage room, as defendants suggest. The accident occurred on a floor undergoing renovation, and the testimony establishes that construction activities were taking place at the time of the accident, including the building of a new interior wall where the man lift was located. See Caminito v Douglaston Dev., LLC, 146 AD3d 597 (1st Dept. 2017). Thus, defendants have not met their prima facie burden that section 23-1.7 (e) (2) is applicable, and that part of their motion for summary judgment dismissing the Labor Law 241 § (6) claim based on an alleged violation of 23-1.7 (e) (2) is denied.

With regard to the cross motion, plaintiff has established that his work falls within the ambit of Labor Law § 241 (6) and section 23-1.7 (e) (2). See Serrano v Consolidated Edison Co. of N.Y. Inc., 146 AD3d 405 (1st Dept. 2017). At the outset, the bucket of the man lift constitutes a working area for purposes of this section. As discussed above, the sprinkler work plaintiff was to undertake required him to install or affix sprinkler pipes near the ceiling. To accomplish this task, he had to stand on the raised man lift to reach the ceiling. Shortly before the accident, plaintiff was instructed to move the lift to a different location, and to do so, he had to stand inside the bucket to use the joystick control. The construction material on which plaintiff slipped

also constitutes debris under section 1.7 (e) (2). Plaintiff's work did not involve the use or installation of sheetrock or insulation, and the accident occurred when plaintiff slipped on discarded sheetrock and insulation on the lift.

Nevertheless, a triable issue of fact exists whether there was any debris at the bottom of the bucket. While plaintiff and Coker testified observing debris in the bucket, Steffens testified that he did not see any debris when he looked at the lift prior to the accident. This conflicting testimony raises credibility questions that cannot be resolved on a motion for summary judgment. See Prevost v One City Block LLC, 155 AD3d 531 (1st Dept. 2017); Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593 (1st Dept. 2014).

2. 12 NYCRR 23-1.30

Defendants contend this section is inapplicable because plaintiff's description of the inadequate lighting is too vague. Plaintiff counters that poor lighting was a factor in causing the accident based on his testimony that he did not notice the debris before he stepped onto the lift. Coker also testified that the lighting was poor. Forest opposes plaintiff's cross-motion and argues that plaintiff's testimony established he was able to see the injury-causing debris before he fell, and that two contemporaneous accident reports described the lighting condition as "good."

Section 23-1.30 states:

"Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

This section is a proper predicate for Labor Law § 241 (6).
See Emery v Steinway, Inc., 178 AD3d 613 (1st Dept. 2019).

Plaintiff's and Coker's descriptions of the lighting conditions as "poor" and "dark" are "too vague to support any interference that the lighting fell below the specific statutory requirements." Kochman v City of New York, 110 AD3d 477, 478-479 (1st Dept. 2013), citing Carty v Port Auth. of N.Y. & N.J., 32 AD3d 732, 733 (1st Dept. 2006); Tucker v Tishman Constr. Corp. of N.Y., 36 AD3d 417 (1st Dept. 2007); Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347 (1st Dept. 2006). Plaintiff initially testified that he observed the debris inside the bucket of the lift before he slipped, although he later denied seeing any of the debris before the accident. Coker testified that he was able to read the markings on the lift and observe the construction material on the lift and on the ground from his position approximately five feet away. This evidence does not suggest that the lighting was either "nonexistent" or "pitch black." See Murphy v Columbia Univ., 4 AD3d 200, 202 (1st Dept. 2004) (concluding that expert testimony

was not necessary where the witnesses testified the "lighting was 'nonexistent' and 'pitch black'"). Plaintiff, in opposition, has failed to raise a triable issue of fact that the lighting in the vicinity of the accident location fell below the limits set in section 23-1.30.

Thus, defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.7 (e) (2) and 23-1.30 is granted to the extent of dismissing so much of the claim predicated on an alleged violation of section 23-1.30. Plaintiff's cross motion for partial summary judgment under Labor Law § 241 (6) is denied.

C. The Common-Law Negligence and Labor Law § 200 Claims

Defendants argue there is no basis for imposing liability on the common-law negligence and Labor Law § 200 claims regardless of whether the accident arose out of the means and methods of plaintiff's work or arose from a premises condition. As to the first, defendants submit they had no control over the means and methods of plaintiff's work because he received all his instructions from his foreman, Steffens. As to the second, defendants claim they had no notice of and did not create an unsafe condition on the worksite. Defendants assert that laborers employed by Turner were not required to clean equipment that Island Fire rented for its employees. Defendants also maintain they could

not have had notice of the dangerous condition on the lift because it was the responsibility of Island Fire's employees to ensure their equipment was clean before and after each use. Lastly, defendants submit the debris was an open and obvious condition, and that they had no duty to warn plaintiff of the condition because the debris was readily observable.

Plaintiff, in opposition, argues the accident arose out of a dangerous or defective premises condition. Plaintiff submits that Turner was contractually obligated to keep the worksite free from debris, and a question of fact exists as to whether Turner knew or should have known of the debris on the lift. As for defendants' open and obvious defense, plaintiff argues the defense is inapplicable because the condition was not inherent in plaintiff's work.

Labor Law § 200 (1) provides, in relevant part:

"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."

The statute codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. See Comes v New York State Elec. & Gas Corp., 82 NY2d 876,

877 (1993). Claims brought under Labor Law § 200 “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 an accident arises out of a dangerous 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 (1st Dept. 2011). In that instance, “[p]roof of the defendants’ supervision and control over a plaintiff’s work is not required.” Licata, 158 AD3d at 489. If an accident results from the “means and methods” of the work, liability may be imposed only if the defendant supervised or controlled the injury-producing work. See Cappabianca, 99 AD3d at 144; Ortega v Puccia, 57 AD3d 54, 62 (2nd Dept. 2008). The means and methods category includes the tools, materials and methods used to accomplish the work. Cappabianca, 99 AD3d at 150.

Here, plaintiff’s description of the accident implicates both categories. When an accident arises out of both the means and methods of the work and a premises condition, a defendant “is obligated to address the proof applicable to both liability standards.” Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 52 [2nd Dept. 2011).

As described earlier, plaintiff testified that his work required him to move the lift, which his employer had rented for its use on the Project, and that he slipped stepping into the bucket of the lift. Therefore, insofar as the accident arose out of plaintiff's use of his employer's equipment, it falls into the means and methods category. The "duty to provide a safe workplace is not breached where plaintiff's alleged injuries arose out of an alleged defect in his employer's tools or method." De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 192 (1st Dept. 2003). "A property owner or general contractor will only be liable under Labor Law § 200 for dangerous or defective equipment that it did not supply if it possessed the authority to supervise or control the means and methods of the work." Davies v Simon Prop. Group, Inc., 174 AD3d 850, 854 (2nd Dept. 2019); see also Persichilli v Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145 [1965]. "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed." Hughes v Tishman Constr. Corp., 40 AD3d 305, 311 (1st Dept. 2007).

Applying these precepts, defendants have established they did not furnish plaintiff with the lift. See Smith v 499 Fashion Tower, LLC, 38 AD3d 523 (2nd Dept. 2007) (dismissing the common-law negligence and Labor Law § 200 claims against the defendant owner who did not supply the plaintiff's decedent with the ladder from

which he fell). Defendants have also established that they lacked the requisite control over plaintiff's work as the testimony demonstrates he received his instructions from Island Fire's foreman. As such, defendants bear no liability to plaintiff. See Weaver v Gotham Constr. Co. LLC, 171 AD3d 427 (1st Dept. 2019) (granting summary judgment where the plaintiff testified his employer's superintendent directed his work). The fact that Turner had the authority to issue a stop work order is insufficient. See McLean v Tishman Constr. Corp., 144 AD3d 534 (1st Dept. 2016).

Plaintiff fails to raise a triable issue of fact insofar as the accident pertains to the means and methods category, as his testimony does not show that defendants exercised the requisite degree of supervision or control necessary to impose liability. There is no evidence that GCS, WWP or Nomura were even present at the worksite. To the extent plaintiff argues that Turner was contractually obligated to keep the worksite clean of debris, Turner's contract did not require it to clean a subcontractor's equipment. Coker, Steffens and Fullerton testified that Island Fire's employees were responsible for the condition of the man lift, with Coker adding that had he seen debris on the lift, he would have notified a laborer or his foreman that the debris had to be removed before their work could begin. There is no evidence that defendants exercised supervision or control over this aspect of the work. See Hutchins v Finch, Pruyn & Co., 267 AD2d 809 (3rd

Dept. 1999). Moreover, had plaintiff slipped on construction debris on the ground around the lift, then a question of fact would exist as to whether Turner met its contractual obligation to keep the worksite clean and free from debris. See Kutza v Bovis Lend Lease LMB, Inc., 95 AD3d 590 (1st Dept. 2012)]. Plaintiff, though, testified unequivocally that he slipped on debris inside the bucket of the lift.

Although defendants have demonstrated that they did not supervise the means and methods of plaintiff's work, they failed to meet their burden on whether they created or had notice of a defect or dangerous condition at the Premises because they did not discuss plaintiff's claim of inadequate lighting. Inadequate lighting constitutes a dangerous premises condition for purposes of Labor Law § 200 (see Moura v City of New York, 165 AD3d 434, 435 [1st Dept. 2018]), and requires a defendant to establish that it did not create or have actual or constructive notice of the inadequate lighting condition. See Carty, 32 AD3d at 733; Cahill, 31 AD3d at 350-351. In this instance, defendants failed to address whether they did not create or have actual or constructive notice of this condition, as the moving papers discussed only the condition of the lift.¹ Therefore, defendants have not met their

¹ Although plaintiff pled a violation of 23-1.30 in connection with the Labor Law 241 § (6) claim, the standard for imposing liability under common-law negligence and Labor Law § 200 is different. As stated above, liability for a Labor Law 241 (6) claim hinges on whether there was a violation of an Industrial Code provision that

prima facie burden on summary judgment (see Masiello v 21 E. 79th St. Corp., 126 AD3d 596 [1st Dept. 2015]), and the court is constrained to deny summary judgment on the common-law negligence and Labor Law § 200 claims.

Motion Sequence Nos. 008

Defendants move for an order striking Forest's third-party answer for failing to comply with court-ordered discovery, or in the alternative, for an order precluding Forest from offering evidence or testimony at the time of trial. Defendants argue that Forest has refused to comply with an October 11, 2018 status conference order and a January 10, 2019 status conference order directing the parties to appear for depositions by dates certain (NYSCEF Doc No. 235, Rivera affirmation, exhibit F at 2; NYSCEF Doc No. 236, Rivera affirmation, exhibit G at 2). Correspondence between the parties shows that Forest initially confirmed a date and time for Turner's deposition before renegeing and then refusing to appear, stating that the third-party complaint was barred under the anti-subrogation rule (NYSCEF Doc No. 239, Rivera affirmation, exhibit J at 1-2; NYSCEF Doc No. 240, Rivera affirmation, exhibit K at 1). Forest also refused to produce a witness for its court-ordered deposition (NYSCEF Doc No. 242, Rivera affirmation, exhibit M at 1).

Forest, in opposition, submits that defendants' application is moot because the parties completed Forest's deposition on June

24, 2019 (NYSCEF Doc No. 294, affirmation of Kyle T. McEwen [McEwen], ¶ 3).

Defendants respond that Forest's opposition is untimely (see CPLR 2214 [b]), and urge the court to decline to consider it. Additionally, defendants contend that the initial motion sought more than just Forest's deposition because their initial moving papers contained the broad assertion that the motion concerned Forest's "failure to 'provide discovery'" (NYSCEF Doc No. 297, Rivera affirmation, ¶ 10).

When a party fails to disclose information that should be disclosed, and the failure to do so was willful, contumacious, or in bad faith, the court may strike the offending party's pleadings in accordance with CPLR 3126 (3). See CDR Créances S.A.S. v Cohen, 23 NY3d 307 (2014); Henderson-Jones v City of New York, 87 AD3d 498, (1st Dept. 2011) (striking a defendant's pleading for failing to comply with court-ordered discovery). CPLR 3126 (2) also provides that the court may issue an order precluding a party from introducing evidence or witness testimony based on that party's failure to comply with discovery. See Northway Eng'g v Felix Indus., 77 NY2d 332 (1991).

As an initial matter, the court will consider Forest's late-served opposition because there has been no prejudice to defendants, who have submitted a reply. See JPMorgan Chase Bank, N.A. v Hayes, 138 AD3d 617 (1st Dept. 2018). That said, the court

finds the motion is now moot since Forest has produced a witness for deposition. Furthermore, contrary to defendants' assertion, the only outstanding discovery referred to their moving papers was Forest's deposition (NYSCEF Doc No. 229, Rivera affirmation, ¶¶ 11-18). Even assuming the motion pertained to documentary discovery as well, defendants' affirmation of good faith is deficient as it fails to inform the court of the "time, place and nature of the consultation and the issues discussed and any resolutions" with regard to the documentary discovery. 22 NYCRR 202.7 [c]; see Cashbamba v 1056 Bedford LLC, 172 AD3d 415 (1st Dept. 2019). While the court may overlook this deficiency in some instances (see Loeb v Assara N.Y. I L.P., 118 AD3d 457 [1st Dept. 2014]), such is not the case here, where the statements in the affirmation and the exhibits referred only to Forest's deposition. Thus, that part of the motion for an order striking Forest's answer or for an order of preclusion is denied.

Motion Sequence No. 009

Forest moves for an order (1) striking the third-party complaint, (2) severing the third-party action under CPLR 603 and 1010, (3) vacating the note of issue, and (4) extending Forest's time to move for summary judgment.

A. Striking the Third-Party Complaint

Forest moves for an order striking the complaint for defendants' nine-month delay in responding to its discovery

demands, and when defendants responded, they lodged largely general objections to the demands or exchanged documents that had already been provided. At the same time, defendants served a subpoena upon Forest's insurance broker seeking copies of Forest's commercial general liability policy, excess/umbrella liability insurance policy, certificate of insurance for the Project, and the underwriting file and correspondence related to the above policies, without serving the subpoena upon Forest (NYSCEF Doc No. 259, exhibit G at 1-2). Forest alleges these documents are potentially privileged. Defendants commenced a declaratory judgment against Forest's insurer, but in response to Forest's document requests, defendants denied possessing the pleadings and discovery for that action. Forest also contends that defendants belatedly offered to schedule a witness for deposition after having initially refused to proceed on an earlier date.

Defendants, in opposition, contend that Forest's counsel is in possession of Turner's entire, original file for the Project because counsel "is **actively representing** Turner, WWP and NOMURA in a labor law action currently pending ... wherein **an employee of Forest** allegedly sustained bodily injuries in connection with work at the Project" (NYSCEF Doc No. 278, Rivera affirmation, ¶¶ 5-6 [emphasis in original]). Thus, defendants claim they were unable to produce the requested documentary discovery because Forest's counsel in this action did not return the Project file to Turner.

Defendants further argue that the majority of the documents pertaining to Forest's work on the Project are already in Forest's possession. They maintain that the subpoena served upon Forest's insurance broker was an error, and that any issues related to that subpoena were resolved at a court conference. Defendants add that Forest has been delinquent in pursuing discovery based upon a mistaken belief that Forest's carrier has assumed defendants' defense, when in reality, Forest's carrier reserved its right to withdraw the defense (NYSCEF Doc No. 270, McEwen affirmation, exhibit R at 3).

In reply, Forest contends that defendants' excuse that they were unable to produce responsive documents from Turner's file is belied by the discovery defendants had furnished previously in 2017. Forest claims that defendants' belated offer to retrieve the Project file from Forest's counsel was not broached until two days before plaintiff filed the note of issue.

Defendants have filed a supplemental affirmation indicating that the documentary discovery has been exchanged.

As discussed above, a party's dilatory conduct in providing discovery warrants the striking of the offending party's pleading. See CDR Creances S.A.S., 23 NY3d at 318. The discovery process is meant to promote "both the ascertainment of the truth at trial and the prompt disposition of actions" (Matter of M. Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80 [1984]), and

the gamesmanship of the parties relating to their conduct on discovery will not be entertained. See Caplin v Ranhofer, 112 AD2d 821 (1st Dept. 1985).

Here, Forest has not established that defendants' behavior in conducting discovery was either willful or contumacious such that the third-party complaint should be stricken. Forest complains that depositions of witnesses from Turner and Forest had not taken place and that certain documentary discovery had not yet been exchanged when the note of issue was filed. However, it appears the requisite depositions have been held and that the outstanding documentary discovery has been provided. Furthermore, it is apparent from the correspondence between defendants and Forest that they equally refused to proceed with discovery, despite this court's status conference orders. Thus, this branch of Forest's motion is denied.

B. Severance

Forest seeks to sever the third-party action on the ground that defendants waited two years after plaintiff first described the inadequate lighting at the accident location to commence the third-party action. Defendants oppose severance and argue that Forest has not suffered prejudice because it has significantly participated in the action.

CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may

order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." CPLR 1010 concerns third-party actions, and states, in part:

"The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue ... [and] [i]n exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

"[W]here it will facilitate the 'speedy, unprejudiced disposition' of a case, severance is appropriate in the sound exercise of discretion." Cross v Cross, 112 AD2d 62, 65 (1st Dept. 1985). Indeed, "[i]t is preferable to try related actions together, to avoid a waste of judicial resources and the risk of inconsistent verdicts." Williams v Property Servs., 6 AD3d 255, 256 (1st Dept. 2004). Thus, "severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced." Rothstein v Milleridge Inn, 251 AD2d 154, 155 (1st Dept. 1998). Furthermore, "[t]o avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together." Id.

As applied herein, the court declines to sever the third-party complaint from the main action because the claims involve common questions of fact. See Marbilla, LLC v 143/145 Lexington

LLC, 116 AD3d 544 (1st Dept. 2014); Neckles v VW Credit, Inc., 23 AD3d 191 (1st Dept. 2005); cf. Torres v Visto Realty Corp., 106 AD3d 645, 645 (1st Dept. 2013). Although Forest maintains that defendants were delinquent in commencing the third-party action, the evidence does not suggest that the delay was intentional or deliberate. See Skolnick v Max Connor, LLC, 89 AD3d 443 (1st Dept. 2011) (severing the third-party action where the defendants/third-plaintiffs waited several months after the plaintiff filed the note of issue to commence the third-party action). Plaintiff served the supplemental bill of particulars pleading a violation of 12 NYCRR 23-1.30 only two weeks before defendants filed the third-party summons and complaint. The note of issue filed in April 2018 was also stricken, and the time to refile the note of issue was extended to May 1, 2019. Forest appeared in the action when it served an answer in June 2018 (NYSCEF Doc No. 257, McEwen aff, exhibit E at 6), and it participated in two status conferences. Hence, Forest was afforded ample time to complete discovery before May 1, 2019. To the extent Forest complains that defendants were dilatory in furnishing discovery, the same can be said for Forest based upon its refusal to proceed with court-ordered depositions, as noted in defendants' discovery motion.

Additionally, the issue of liability has not been determined in the main action, and therefore, plaintiff's issues will not predominate. See Toscani v One Bryant Park, LLC, 139 AD3d 644 (1st

Dept. 2016) (severing the third-party action where the defendants' liability had already been decided). Consequently, Forest cannot demonstrate there was prejudice to a substantial right. See Marbilla, LLC, 116 AD3d at 544 (1st Dept. 2014); Zawadzki v 903 E. 51st St., LLC, 80 AD3d 606 (2nd Dept. 2011).

C. Vacating the Note of Issue

Forest submits that the note of issue filed May 1, 2019 should be vacated because discovery is incomplete.

22 NYCRR 202.21 (e) states, in part, that:

"Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

"Where a party timely moves to vacate a note of issue, it need show only that 'a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect.'" Vargas v Villa Josefa Realty Corp., 28 AD3d 389, 390 (1st Dept. 2006) (internal citation omitted).

Forest's motion to vacate the note of issue is denied. Forest did not seek court intervention related to the discovery due from defendants until after plaintiff filed the note of issue. See

Aikanat v Spruce Assoc., L.P., - AD3d -, 2020 NY Slip Op 02188, *1 (1st Dept. 2020) (declining to vacate the note of issue where the defendant failed to take any action regarding discovery until after the plaintiff filed the note of issue). Forest admits it was aware of the firm May 1, 2019 deadline for filing the note of issue (NYSCEF Doc No. 251, McEwen affirmation, ¶ 23), and it was aware of defendants' nine-month delay in responding to its document demands. Forest, though, has not explained why it waited several months to file the present motion. Additionally, Forest argues that defendants hindered their ability to depose a witness with knowledge because defendants intended to produce Fullerton as its witness. However, Forest has not established that it complied with CPLR 3107 (d), or that it had been prohibited from pursuing the deposition of a different witness after it deposed Fullerton and shown that he lacked specific knowledge. In any event, it appears that the overdue discovery has been exchanged.

D. Extension of Time to Move for Summary Judgment

Forest also requests an extension of time to move for summary judgment. This branch of the motion is denied for Forest's failure to present good cause for the extension. See Ocasio-Gary v Lawrence Hosp., 69 AD3d 403 (1st Dept. 2010). The delays in moving forward with discovery were attributable, in part, to Forest's own conduct in refusing to produce a witness for its examination before trial and for refusing to proceed with Turner's deposition. See e.g.

Beni v Green 485 TIC LLC, 144 AD3d 613 (1st Dept. 2016). In addition, Forest had previously indicated that it would not proceed with discovery because it believed the third-party complaint was barred by the anti-subrogation rule, and urged defendants to dismiss the third-party action (NYSCEF Doc No. 271, McEwen affirmation, exhibit S at 1). Forest, though, has not explained how the overdue discovery from defendants, such as Project plans, drawings and change orders, impacted its ability to move for summary judgment based upon the anti-subrogation rule. Accordingly, Forest's motion to strike the third-party complaint, sever the third-party action, vacate the note of issue and extend Forest's time to move for summary judgment is denied.

Motion Sequence No. 010

Defendants move for summary judgment on its third-party claims for contractual and common-law indemnification and for breach of contract for Forest's failure to procure insurance. In support, defendants submit a 14-page agreement dated July 3, 2012 between Turner, as contractor, and Forest, as subcontractor (the Contract) (NYSCEF Doc No. 319, Rivera affirmation, exhibit O at 1). Article I of the Contract, entitled "Description of Work," provides, in part, that Forest "shall perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for all work on various projects authorized and defined in Work Orders to be

issued, executed and made part of this Contract" (*id.* [emphasis in original]). The indemnity provision found in Article XXII partially reads that Forest "assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever ... to all persons ... caused by, resulting from, arising out of or occurring in connection with the execution of the Work" (*id.* at 11). The provision further states that Forest "agrees to indemnify and save harmless the Indemnified Party from and against any and all such claims," with the "Indemnified Party" defined as the "Contractor, the Owner, any party required to be indemnified pursuant to the General Contract ..." (*id.*). Defendants also submit a 118-page subcontract work order dated June 21, 2012 between Turner and Forest (the Work Order), which states, in part, that Forest "shall furnish all work, labor, services, materials ... and other things necessary for Subcontractor Work noted ... for and at the Nomura Worldwide Plaza ... located on premises at 825 8th Avenue ..." (NYSCEF Doc No. 320 at 1).

Defendants maintain that they are entitled to contractual indemnification from Forest because Forest was responsible for providing temporary lighting at the worksite, and plaintiff alleges the accident was caused, in part, by poor lighting.

Forest opposes the motion and argues that triable issues of fact exist as to the lighting conditions at the time of the accident. Forest points to plaintiff's signed statement and

Turner's incident report which indicates that the lighting was adequate, and plaintiff's testimony that he saw the debris when he stepped into the bucket of the lift. Forest also contends that defendants failed to establish that Forest was responsible for installing or maintaining the temporary lighting on the fourth floor, in view of Fullerton's testimony that Forest was one of four electrical subcontractors on the Project. In any event, Forest maintains that Turner was responsible for scheduling and setting a sequence for the work. Forest claims that any change in the temporary lighting at the accident location was the result of Turner's failure to request a lighting change to account for the installation of the new interior wall. Lastly, Forest claims the contract documents upon which defendants rely are inadmissible in the absence of testimonial or other evidence authenticating them.

Defendants, in reply, proffer an affidavit from Lawrence Costello (Costello), Turner's project manager on the Project, who avers that the agreements submitted in defendants' initial moving papers were true, accurate and complete copies of the agreements between Turner and Forest for the Project.

A. Contractual Indemnification

It is well settled that "[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).

Defendants rely on the Contract and the Work Order to establish that Forest unambiguously agreed to indemnify them. However, the documents are inadmissible. Hearsay evidence cannot be used to support a motion for summary judgment (see Zuckerman, 49 NY2d at 562), unless the documents offered into evidence fall within an exception to the hearsay rule. See e.g. Viviane Etienne Med. Care, P.C. v County-Wide Ins. Co., 25 NY3d 498, 508 (2015). In this instance, defendants have not established that the documents fall within an exception to the hearsay rule, such as the business records exception.

"To establish a foundation for the admission of a record under the business record exception to the hearsay rule, the proponent of the record must satisfy the requirements identified in CPLR 4518 (a)." U.S. Bank N.A. v Moulton, 179 AD3d 734, 738 (2nd Dept. 2020); see also People v Kennedy, 68 NY2d 569 (1986). Defendants have not demonstrated their compliance with CPLR 4518 (a) either by an affidavit or through testimonial evidence so as to render the documents admissible. See JPMorgan Chase Bank, N.A. v. Clancy, 117 AD3d 472 (1st Dept. 2014). Their attempt to cure this deficiency through the submission of an affidavit from Turner's project manager, Costello, in reply is improper. See American Tr.

Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1st Dept. 2015) (refusing to consider evidence submitted for the first time in reply).

Defendants' reliance on DeLeon v Port Auth. of N.Y. & N.J. (306 AD2d 146, 146 [1st Dept. 2003]) for the proposition that "merely attaching" the contract documents to an attorney's affirmation renders those documents admissible is misplaced. In DeLeon, the fact that the leases at issue were annexed to the attorney's affirmation was not the basis for the Court's conclusion that they could be considered. The Court noted that "a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files." Id. In DeLeon, the defendant relied on testimony from its lease administrator who had personal knowledge of the documents, and the Court concluded that the testimony was sufficient to show that the documents were business records. Id. By contrast, Fullerton never looked at Turner's subcontract with Island Fire (NYSCEF Doc No. 160 at 13), and he had never seen the Contract or the Work Order (NYSCEF Doc No. 316 at 48).

Even if the court were to ignore the issue of admissibility, Costello has not explained the date discrepancies on the documents.

Costello avers that the documents annexed to his affidavit are true, complete and accurate copies of the Contract and the Work Order for this Project (NYSCEF Doc No. 342, ¶¶ 5-6). The Work Order states that “[t]he terms and conditions of the Master Subcontract dated 7/1/2011 shall govern this order” (NYSCEF Doc No. 320 at 1). The Contract, though, is dated July 3, 2012. This discrepancy does not appear to be a mere scrivener’s error as it appears in more than one location on the first page of the Work Order. As such, it is unclear whether the indemnification provision in the Contract dated July 3, 2012 is identical to the indemnification provision in the July 1, 2011 contract referenced in the Work Order or if the July 1, 2011 contract contained an indemnification provision. Thus, defendants have not met their prima facie burden on their claim for contractual indemnification. In any event, a determination on the claim is premature as defendants have not demonstrated their freedom from negligence. See Biscup v E.W. Howell, Co., 131 AD3d 996, 998 (2nd Dept. 2015); Francescon v Gucci Am., Inc., 71 AD3d 528 (1st Dept. 2010).

B. Common-Law Indemnification

“[I]n the case of 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 causation of the accident for which the

indemnatee was held liable to the injured party by virtue of some obligation imposed by law." Correia v Professional Data Mgt., 259 AD2d 60, 65 (1st Dept. 1999). "Summary judgment on common law indemnification claims is only warranted where 'there are no issues of material fact concerning the precise degree of fault attributable to each party involved.'" Tzic v Kasampas, 93 AD3d 438, 440 (1st Dept. 2012) (internal citation omitted).

In view of the fact that liability has not been determined on the common-law negligence and the Labor Law §§ 200 and 241 (6) claims, a determination on the common-law indemnification claim is premature as there has been no finding as to liability against any defendant. See Brockman v Cipriani Wall St., 96 AD3d 576 (1st Dept. 2012]; Francescon, 71 AD3d at 529.

C. Breach of Contract for Failure to Procure Insurance

Defendants also move for summary judgment on their breach of contract claim based upon Forest's failure to procure insurance and rely on the Contract, Work Order and a certificate of liability insurance dated September 22, 2012 naming Forest as the insured in support (NYSCEF Doc No. 321, Rivera affirmation, exhibit Q at 1). Defendants argue that Forest failed to procure insurance (1) that named the defendants as additional insured, (2) that was primary and non-contributory, and (3) that provides a defense and indemnity against all claims or suits arising out of or related to Forest's work.

A cause of action for breach of contract requires the plaintiff to prove the existence of a contract, the plaintiff's performance, a defendant's breach, and damages. See Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010). Absent evidence showing that an enforceable agreement had been reached, a breach of contract claim shall be dismissed. See Aksman v Xiongwei Ju, 21 AD3d 260 (1st Dept. 2005).

The breach of contract cause of action suffers from the same infirmity as the contractual indemnification cause of action. The Contract and Work Order submitted with the initial moving papers were not authenticated, and defendants' attempt to cure this deficiency in reply is improper.

Lastly, the third-party complaints pleads a cause of action for contribution. Defendants did not address this cause of action in their moving papers.

Accordingly, it is,

ORDERED that the motion of defendants/third-party plaintiffs George Comfort & Sons, Inc., WWP Office LLC, Nomura Holding America, Inc., and Turner Construction Company for summary judgment dismissing the complaint (SEQ 004) is granted to the extent of dismissing plaintiff's Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim except as to the alleged violation of 12 NYCRR 23-1.7 (e) (2), and is otherwise denied; and it is further,

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of defendants/third-party plaintiffs' liability on the Labor Law § 241 (6) claim predicated upon the alleged violations of 12 NYCRR 23-1.7 (e) (2) and 23-1.30 (SEQ 004) is denied; and it is further,

ORDERED that the motion of defendants/third-party plaintiffs George Comfort & Sons, Inc., WWP Office LLC, Nomura Holding America, Inc., and Turner Construction Company for an order striking the answer of third-party defendant Forest Electric Corp. or for a preclusion order (SEQ 008) is denied; and it is further,

ORDERED, that the motion of third-party defendant Forest Electric Corp. for an order striking the third-party complaint, severing the third-party action from the main action, vacating the note of issue, and extending the time to move for summary judgment to October 4, 2019 (SEQ 009) is denied; and it is further

ORDERED that the motion of defendants/third-party plaintiffs George Comfort & Sons, Inc., WWP Office LLC, Nomura Holding America, Inc., and Turner Construction Company for summary judgment on the third-party complaint against third-party defendant Forest Electric Corp. (SEQ 010) is denied.

Dated: May 6, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON