SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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MICHAEL LOCKE, ERICA LOCKE,

Plaintiff,

- v -

URS ARCHITECTURE & ENGINEERING-NEW YORK, PC,URS CORPORATION-NEW YORK, CRESCENT CONTRACTING CORPORATION, TRI-RAIL CONSTRUCTION, INC.,

Defendant.

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INDEX NO. 151471/2013

MOTION DATE 4/29/2019

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 273, 274, 275, 276, 277, 278, 279, 280, 294, 295, 296, 297, 298, 299, 305, 306, 307, 308, 309, 310, 311, 314, 315, 319, 320, 321, 322, 323, 324, 325, 326

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 265, 267, 268, 269, 270, 271, 272, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 293, 300, 301, 302, 303, 304, 312, 313, 316, 317, 318

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

ORDER

Upon the foregoing documents, it is

ORDERED that the part of defendant/second third-party plaintiff Tri-Rail Construction, Inc.'s (Tri-Rail) motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted to the extent of dismissing the Labor Law § 241 (6) claim as against it, except with respect to those claims predicated upon alleged

violations of Industrial Code section 23-1.7 (d), and the motion is otherwise denied; and it is further

ORDERED that plaintiffs Michael Locke (plaintiff) and Monica Locke's cross-motion, pursuant to CPLR 3212, for summary judgment as to liability on its common-law negligence and Labor Law §§ 200 and Labor Law § 241 (6) claims as against Tri-Rail and defendant URS Architecture and Engineering-New York, P.C., defendant/third-party defendant URS Corporation-New York (together, URS) is granted, and the cross-motion is otherwise denied; and it is further

ORDERED that defendant/third-party plaintiff Crescent Contracting Corporation's (Crescent) cross-motion, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 241 (6) claim as against it is granted, and the cross-motion is otherwise denied; and it is further

ORDERED that URS's motion (motion sequence 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it, and for summary judgment in its favor on its third-party claims against Crescent and Tri-Rail is granted to the extent of dismissing the Labor Law § 241 (6) claim as against it, except with respect to those claims predicated upon alleged violations of Industrial Code section 23-1.7 (d), and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue, and further

ORDERED that counsel are directed to appear in the Early Settlement Part by Skype for Business on August 7, 2020 at 10:30 AM, upon counsel for plaintiff submitting the standard form request for settlement conference at least two days in advance of such date.

DECICION

Motion sequence numbers 007 and 008 are hereby consolidated for disposition.

In this action, plaintiff seeks to recover damages for personal injuries allegedly sustained while he was employed as a carpenter on April 7, 2011, when he slipped and fell on soapy water on the floor of the worker's bathroom at a construction site located at 373 Ninth Avenue, New York, New York (the Premises), a building known as the James Farley U.S. Post Office.

In motion sequence number 007, defendant/second third-party plaintiff Tri-Rail Construction Inc. (Tri-Rail) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it.

Plaintiffs Michael Locke (plaintiff) and Monica Locke cross-move, pursuant to CPLR 3212, for summary judgment in their favor on the complaint as against Tri-Rail as well as defendant

URS Architecture and Engineering-New York, P.C., defendant/third-party defendant URS Corporation-New York (together, URS) and defendant/third-party plaintiff Crescent Contracting Corporation (Crescent).

Crescent cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it, as well as summary judgment in its favor on its third-party claim for common-law indemnification as against URS.

In motion sequence number 008, URS moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it, as well as summary judgment in its favor on its crossclaims for contractual indemnification as against Crescent and Tri-Rail.

Background

On the day of the accident, the Premises was owned and/or operated by non-party Empire State Development Corporation (ESDC). ESDC hired URS to provide overall construction management services at a project at the Premises that entailed the internal fit-out of the fourth floor (the Project). ESDC then hired Crescent as a prime contractor to perform HVAC and plumbing work at the Project at the Premises. ESDC also hired Tri-Rail as a prime contractor responsible for general construction. Tri-Rail, in turn, hired second third-party defendant Anthem Contracting, Inc. (Anthem) to perform carpentry

work at the Premises.[1] On the day of the accident, plaintiff was employed as a carpenter by Anthem.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed by Anthem as the carpenter foreman for the Project at the Premises. Anthem's work included "light gauge framing" on the fourth floor of the Premises (plaintiff's tr, 27). Plaintiff's duties included overseeing the three other Anthem workers at the Premises, "layout, framing" and "sheetrocking" (id. at 31). The superintendent for the Project was John Cannella, a Tri-Rail employee.

Plaintiff testified that the fourth floor had seven bathrooms. However, "most of them were demolished" with only three still operational (id. at 34). Of the operational bathrooms, two were "padlocked" (*id.* at 35) and specifically "designated" for the superintendent and the electrician's foreman (id. at 40). The third bathroom, closest to Anthem's staging area, had been designated by URS as the bathroom for Anthem's workers (the Bathroom). Plaintiff did not have a key to the padlocked bathrooms.

[1] By decision and order dated December 4, 2017, a default judgment was granted in favor of Tri-Rail on its second third-party complaint as against Anthem (Doc No. 139).

Plaintiff described the Bathroom as "nasty" and "falling apart," with one of the two sinks detached from the wall and sitting on the floor (id. at 44). Approximately two weeks before the accident, plaintiff informed Cannella and Kenrick Williams, a URS representative, that the one remaining sink in the Bathroom was regularly overflowing, causing water to pool on the Bathroom's floor. The first time he noticed the water on the floor, plaintiff estimated that it covered half the Bathroom's floor to a depth of approximately one inch. Afterwards, he spoke with Williams about the flooding. The next day, the water had been mopped up by "Timmy," a Tri-Rail laborer (id. at 68). However, by the afternoon, water had again pooled on the floor. The day after that, water covered the "[e]ntire floor" in the Bathroom. At that time, plaintiff began using a bathroom at the loading dock, on the ground floor, but then "a wall went up to block us off from using the bathroom" (id. at 73). Over the course of two weeks, plaintiff complained daily about the Bathroom's condition to Cannella, Williams and Williams's boss, "Scott." Williams' response was that "it's a Tri-Rail problem" and not a URS issue (id. at 77).

On the day of the accident, plaintiff arrived at work in the morning and worked through the day without incident. Around 3:15 p.m., plaintiff was preparing to leave for the day. He and a coworker, "Matt," travelled to the Bathroom (id. at 86). Matt

entered the Bathroom first and indicated to plaintiff that there was a tipped-over, open-topped bottle of soap on the edge of the sink, and the floor was covered by "two inches" of water (id. at 89). Plaintiff testified that he saw soap flowing out of the container and mixing with the water.

Plaintiff then proceeded carefully through the soapy water to the urinal. On his way out of the Bathroom, plaintiff testified to the following:

> "On the way out the door I started to slip. I was trying to be careful because there was soap on the floor and the water . . . [It was] like walking on ice. And I started to slide . . . . I caught my heel on [the door saddle] and it launched me forward into the privacy wall"

(id. at 96). Plaintiff then fell to the floor. Williams came over to plaintiff after the accident and took pictures of the Bathroom.

Deposition Testimony of Kenrick Williams (URS's Project Inspector)

Williams testified that on the day of the accident, he was employed by URS as an inspector at the Project. According to Williams, URS was the Project's construction manager. URS was hired by ESDC. William's duties at the Project included preparing daily progress reports, monitoring the work performed, and keeping track of how many workers were present from each trade. He was regularly present on the fourth floor.

Williams did not witness the accident. He arrived at the scene shortly after the accident and spoke with plaintiff. Williams then briefly inspected the Bathroom, set up a temporary barricade immediately outside of it, and prepared a report. At the deposition, Williams was shown a copy of a daily report for the date of the accident and confirmed that he had signed it.

Williams also testified that the bathroom was to be "maintained by Tri-Rail" and that, in the morning on the day of the accident, he had notified Tri-Rail, via email, to clean the Bathroom (Williams tr at 44). Specifically, he wrote that "there are various safety deficiencies at the job site that must be corrected . . ." including "water and debris on the floor in the workers' toilet" (id. at 94). The email also directed Tri-Rail to "correct these deficiencies without delay" (id.).

At his deposition, Williams was shown three photographs. He testified that the photographs depicted the Bathroom with water on the floor. Despite his email to Tri-Rail, Williams could not recall whether the leak in the Bathroom was a continuous or ongoing problem.

As to Crescent, Williams was unsure whether it was responsible for maintaining or repairing the Bathroom, though he confirmed that URS had requested that Crescent "check two other bathrooms" including the "shanty-area bathrooms" (id. at 55). The Bathroom was near Tri-Rail's shanty - and, as far as

Williams knew, Tri-Rail was the only entity that had a shanty at the Project, but Williams did not know for certain whether the Bathroom was one of the "shanty-area bathrooms" URS had asked Crescent to check.

At a second deposition, Williams was shown a daily report dated March 31, 2011 (prior to the accident) (the Daily Report). He confirmed that it noted "Crescent Plumbers fourth floor testing . . . ticket item" (id. at 141). Williams testified that a "ticket item" signifies work that is outside the scope of a contractor's original work.

Finally, Williams testified that URS did not have any control over Tri-Rail or its subcontractors or over the ordering/sequencing of work. Nor did it have any control over safety at the Project.

Deposition Testimony of Reed Rickman (Crescent's President)

Rickman testified that he was the president of Crescent on the day of the accident. He was present at the Project approximately once per week and was not present on the day of the accident. Crescent had two contracts with ESDC at the Project, one for HVAC and one for plumbing. The plumbing contract included the gut renovation of several bathrooms on the fourth floor of the Premises, but not the bathroom in the "staging area," i.e. the Bathroom (Rickman tr at 37). According

to Rickman, the staging area bathrooms were not designated for renovation.

Rickman testified that he was unaware of a leak in the Bathroom and, to his knowledge, Crescent was never asked to make any repairs in the Bathroom. Rickman also testified that if it had been asked to perform such a repair, the "owner or construction manager would have to authorize us with a written change order" (id. at 31). In addition, the "construction manager would have to issue a request for proposal" to Crescent, who would then have to review the request and prepare a work order proposal (id. at 71).

Rickman acknowledged that the Daily Report indicated that URS requested that Crescent check that the "shanty area bathrooms" were "operational" (id. at 90). However, no work order was ever prepared with respect to those bathrooms.

Deposition Testimony of Giuliano DelPeschio (Crescent's Project Manager)

DelPeschio testified that on the day of the accident, he was Crescent's project manager at the Project. Crescent was hired to perform HVAC and plumbing at the Project. The plumbing contract entailed the renovation of two bathrooms. DelPeschio also testified that he did not recall any changes to the scope of Crescent's plumbing work at the Project.

According to DelPeschio, URS was the construction manager, or "owner's representative," for the Project (DelPeschio tr at 18). They controlled the overall pace of the work at the Project and would "coordinate all the prime contractors and make all the decisions" with respect to "[t]he construction [and] the schedule" (id. at 19). More specifically, URS "had mechanical inspectors on site" who would "make sure that things were done properly, per code" and then would "make sure that everything was tested" (id. at 36).

URS also designated the bathroom that was available for all workers. Specifically, DelPeschio recalled that, at the meeting on day one of the Project, "URS staff was there, and they were very specific. This is our staging area. This is gonna be designated as the worker's bathroom" (id. at 62-63). Crescent was not contracted to work on that bathroom.

At his deposition, DelPeschio was shown a portion of the construction meeting's minutes dated February 9, 2011. He confirmed that the minutes indicated that Crescent was directed, in addition to its contract work, to "check the other two bathrooms outside the CLL, pink area A and shanty area bathrooms" (id. at 39). DelPeschio testified that he had no recollection of Crescent performing such work, and no recollection of any change orders, or requests for proposals, for additional plumbing work (id. at 93).

DelPeschio was then shown a copy of the Daily Report from March 31, 2011 which stated that Crescent performed "testing" work in a bathroom as a "ticket item" (id. at 100). DelPeschio explained that a ticket item could be extra-contractual work. However, he did not know for certain, and did not have a copy of the specific ticket or "bulletin" that URS generated with respect to the ticket item. Finally, DelPeschio testified that he did not recall hearing of any issues with the Bathroom's sink or flooding.

Relevant Documents

February 9, 2011 Meeting Minutes

Section 17.1 of the minutes for the Project, dated February 9, 2011 (the Minutes) addresses "Plumbing/Bathrooms" (plaintiff's amended notice of cross-motion, exhibit K-6; Doc No. 253). It provides, as relevant, that on January 26, 2011, "Crescent is to check that all bathrooms in contract are operational" and that "URS requested [Crescent] check the 2 other bathrooms outside the CLL (Pink - Area A and Shanty Area Bathrooms)" (id. at 17.1.17).

In addition, the Minutes indicate that on February 2, 2011, "Crescent needs to complete testing of the bathrooms and advises that flush valves need to be replaced" (id. at 17.1.20) and on February 9, 2011 that:

> "After the survey, Crescent advised most flush valves are not working and need to be replaced and there are numerous cracked toilets. Crescent to provide a list of all items need replaced [sic] and submit it to URS/ESDC"

(id., at 17.1.21).

March 31, 2011 Daily Report

On March 31, 2011, Crescent issued the Daily Report on its work at the Project. It states that Crescent performed certain work at the Project on that date, including "Plumbers 4th floor testing, Bulletin #3 work (ticket item)" (Bernstein aff in opposition, exhibit C; Doc No. 284).

Notably, "Bulletin #3" is not a part of the record before the court.

April 7, 2011 Emails

On April 7, 2011 at 10:47 a.m. (approximately five hours before plaintiff's accident), URS, by Williams, sent an email to Tri-Rail's Cannella.

> "There are various safety deficiencies at the jobsite that must be corrected, most notably are . . . [w]ater and debris on the floor in the workers toilet. You are directed to correct these deficiencies without delay"

(amended notice of motion, exhibit A; Doc No. 241). Shortly thereafter, Cannella responded that "we have asked for the sink to be fixed for a week now. How about getting that done" (*id.*). In response, that same day, Scott Weiss, URS's senior project

manager, responded that the leak in the Bathroom was "not our issue - building issue further down the drain line" (id.).

Then, on the same day at 4:37 p.m., Williams emailed Cannella and Weiss, among others, stating, as relevant, the following:

> "At approx. 3:20 this afternoon, I was called to the scene of a slip and fall accident in the workers toilet. I witnessed [plaintiff] resting on a pile of gypsum board just outside the toilet . . . . [Plaintiff stated that he] slipped in the water in the workers toilet and hurt his neck and back . . . There was no one from Tri-Rail here on site to take the appropriate action.
>
> "I have installed a temporary barrier to prevent anyone from having a similar accident.
>
> "You are directed (as I directed earlier today) to correct all the safety deficiencies at the jobsite"

(id.).

The Construction Management Contract

URS entered into a general "Owner's Representative Services Agreement" (the URS Agreement) with the Pennsylvania Station Redevelopment Corporation (a subsidiary of ESDC) on May 15, 2000, wherein URS was hired "to provide pre-construction, construction oversight [and] project management . . . services for the restoration and redevelopment of the [Premises]" (plaintiff's notice of motion, exhibit S; Doc No. 261).

The URS Agreement requires URS to perform "Basic Services when and as required by . . . the Contract Documents" (id. § 2.2). The definition of "Basic Services" includes within its scope an additional defined term "Construction Services" (id. § 1.1). "Construction Services" is defined as, inter alia, "all other services pursuant to the terms of any Contract Document, [which] are to be furnished or performed by [URS]" (id. § 1.1).

Notably, the term "Contract Documents" includes a list of several documents that would establish the specific scope of URS work under its "Basic Services" agreement. However, none of these documents are entered into the record before this court.

The ESDC/Tri-Rail Contract

ESDC and Tri-Rail entered into an owner/prime-contractor agreement with respect to the Project at the Premises (plaintiff's notice of motion, exhibit R; Doc No. 260) (the Tri-Rail Contract). Tri-Rail was specifically named as the holder of the "(G) General Construction Work Contract" (id., § 2.3 [a] [1] [a]). Tri-Rail was the (G) Contractor. The scope of work in the Tri-Rail Contract includes that Tri-Rail was "solely responsible for all construction means, methods . . . and procedures within the scope of its work" (id. § 2.8 [a]). In addition, the Tri-Rail Contract references and incorporates a separate "schedule of drawings and specifications" (the Specifications) in defining its' scope of work (id., § 2.4).

Section 01 50 00 of the Specifications, entitled "Temporary Facilities and Control" sets forth the following, as relevant:

> "1.4 Temporary Toilet Facilities
>
> "Designated Toiler rooms in the building may be used as temporary toilet facility by Contractors. The (G) Contractor shall maintain such temporary toilet facility in a sanitary condition.
>
> * * *
>
> "2. The (G) Contractor shall maintain the restroom in good working order and provide necessary cleaning and restroom supplies as required for the use of all the Contractors.
>
> "3. The cost of any necessary repair or replacement shall be borne by the (G) Contractor.
>
> "4. Contractor is not allowed to use any toilet facility in the building other that the one designated by CM"[2]

(URS notice of motion, exhibit L [part 2], sub-exhibit E, § 01 50 00 [the Specifications]; Doc No. 181).

Notably, the ESDC/Crescent contract (the Crescent Contract) is substantively identical to the Tri-Rail contract.

DISCUSSION

"[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

[2] The Tri-Rail Contract establishes that "Owner's Representative and Construction Manager (CM) are inter-changeable terms within this contract" (plaintiff's notice of motion, exhibit R; Doc No. 260, § 2.1).

any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (Genger v Genger, 123 AD3d 445, 447 [1st Dept 2014], quoting Schiraldi v U.S. Min. Prods., 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

Procedural Issues

As an initial matter, the parties raised a timeliness issue with respect to the filing of plaintiff's cross motion. Such issue was addressed at oral argument and was denied (court tr at 24). Accordingly, all motions before the court are timely.

The Labor Law § 241 (6) Claim Against the Defendants (Motion Sequence Number 007 and 008)

URS and Tri-Rail move for summary judgment dismissing the Labor Law § 241 (6) claim as against them. Crescent cross-moves

for the same relief as to it, while plaintiff cross-moves for summary judgment in its favor as to liability on said claim. Labor Law § 241 (6) provides, in pertinent part, as follows:

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

Labor Law § 241 (6) imposes a 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]; see also Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (Ross, 81 NY2d at 505). Such violation must

be a proximate cause of the plaintiff's injuries (Annicaro v Corporate Suites, Inc., 98 AD3d 542, 544 [2d Dept 2012]).

URS argues that, as the construction manager, it is not a proper labor law defendant in this action. Similarly, Tri-Rail and Crescent each argue that, as independent prime contractors, they are also not proper labor law defendants.

URS

URS is not an owner or a general contractor. Rather, it is the construction manager. Therefore, it must be determined whether URS can be considered an agent of the owner for the purposes of the Labor Law, so as to be potentially liable under the statute.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third-party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]). Thus, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]).

URS argues that it did not control plaintiff's work and, therefore, it cannot be considered an agent. However, the standard does not require that an entity to have the authority to control the plaintiff's specific work, only that it has the authority to control the activity which brought about the injury.

Here, plaintiff was injured when he slipped in a puddle of water that had pooled on the floor of the Bathroom - the only bathroom that was available for him at the Project. In fact, plaintiff and DelPeschio testified that URS had designated the Bathroom as the sole bathroom available for workers use, with DelPeschio further explaining that "URS staff was there, and they were very specific . . . . This is gonna be designated as the worker's bathroom" (DelPeschio tr at 62-63). In addition, the project specifications annexed to Tri-Rail and Crescent's contracts indicate that URS, in its role as the construction manager, was the entity authorized to designate what bathroom the workers could use (URS notice of motion, exhibit L [part 2], sub-exhibit E, § 01 50 00; Doc No. 181).

Given the foregoing, URS had the specific authority to designate what bathroom was available for plaintiff's use. Therefore, URS had the ability to control an activity that caused plaintiff's accident - namely plaintiff's use of the sole designated, yet unsafe and flooded, Bathroom (as opposed to

another bathroom that URS might have temporarily designated). Therefore, URS is an agent with respect to the Labor Law.

To establish that it was not an agent under the Labor Law, URS supplies a copy of the URS Agreement. It argues that URS's scope of work under the URS Agreement did not include the ability to control or supervise any entity at the Project. However, URS failed to submit any of the exhibits referenced in its contract (such as contract documents) that would define the specific scope of its work as referenced in the URS Agreement's "Basic Services" clauses. As noted above, the URS Agreement ultimately requires URS to perform "all other services pursuant to the terms of any Contract Document" - none of which are included in the record (plaintiff's notice of motion, exhibit S, § 1.1 [the URS Agreement]; Doc No. 261). In addition, URS argues, without citing to any specific documentation that ESDC was the entity that designated the Bathroom and that URS merely disseminated ESDC's decision. As this position is unsupported, it does not overcome the evidence in the record establishing that URS had that very authority (*see* URS notice of motion, exhibit L [part 2], sub-exhibit E, § 01 50 00 [the Specifications]; Doc No. 181).

Tri-Rail

Tri-Rail is not an owner, and though it holds the general contracting prime contract, it argues that it is not a general

contractor as defined by the Labor Law. It also argues, as URS did, that it is not a statutory agent.

Here, because there is no evidence that Tri-Rail was responsible for "the co-ordination and execution of all the work under all the contracts" on the Project, it cannot be said that Tri-Rail was the general contractor for the purposes of the Labor Law (Russin, 54 NY2d at 316; Paulino v 580 8th Ave. Realty Co., LLC, 138 AD3d 631, 631 [1st Dept 2016]). That said, Tri-Rail's contract explicitly sets forth that it "shall maintain [the Bathroom] in a sanitary condition" and that it "shall maintain the [Bathroom] in good working order . . . as required for the use of all the Contractors" (URS notice of motion, exhibit L [part 2], sub-exhibit E, § 01 50 00, ¶ 1.4; Doc No. 181). Therefore, Tri-Rail was explicitly delegated the responsibility to keep the Bathroom in a safe and clean condition for all workers.

Here, as noted above, plaintiff was injured when he slipped in a puddle of water that had pooled on the floor of the Bathroom that Tri-Rail was contractually obligated to keep clean and safe. Testimony established that Tri-Rail was aware of this problem and even assigned a worker to clean the Bathroom. Therefore, Tri-Rail had the authority to control an activity which brought about plaintiff's injury - i.e. the cleaning and maintenance (or lack thereof) of the Bathroom. As it relates to

this action, Tri-Rail was an agent of the owner for the purposes of Labor Law § 241 (6).

Crescent

Crescent was neither the owner nor the general contractor at the Project. Like Tri-Rail, Crescent argues that, as a prime contractor, it is not a proper Labor Law defendant. Notably, no party opposes this portion of Crescent's motion, or otherwise argues that Crescent is an agent of the owner, such that it could be considered strictly liable for plaintiff's injuries under Labor Law § 241 (6). Therefore, Crescent is entitled to dismissal of the Labor Law § 241 (6) claim as against it.

The Specific Industrial Code Violations

While plaintiff has alleged multiple Industrial Code violations in his complaint and bill of particulars, he only moves for relief under section 23-1.7 (d). In addition, plaintiff opposes only those parts of defendants' motions that seek dismissal of the Labor Law § 241 (6) claim predicated on alleged violations of section 23-1.7 (d). For such reasons, the unaddressed Industrial Code provisions are deemed abandoned, and defendants are entitled to summary judgment dismissing those abandoned provisions (Kempisty v 246 Spring St., LLC, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not

violated be deemed to abandon reliance on that particular Industrial Code section"]).

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Initially, section 23-1.7 (d) is sufficiently specific to sustain a cause of action under Labor Law § 241 (6) (see Velasquez v 795 Columbus LLC, 103 AD3d 541, 541 [1st Dept 2013]).

Here, it is uncontested that plaintiff slipped on a slippery, water covered floor. Both URS and Tri-Rail, as agents of ESDC, had a nondelegable duty to provide reasonable and adequate protection and safety to plaintiff, including to ensure that the floor of the Bathroom was safe and free from any substance, including water, that creates a slippery condition. URS and Tri-Rail failed to do so. The fact that Tri-Rail tasked one of its employees with a daily mopping of the Bathroom does not discharge Tri-Rail from its non-delegable duty to protect plaintiff from slipping hazards where the testimony and evidence

in the record establishes that such daily mopping was insufficient to keep the Bathroom safe throughout the workday.

Thus, plaintiff is entitled to summary judgment in his favor as to that part of his Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 12-NYCRR 23-1.7 (d) as against URS and Tri-Rail, and URS and Tri-Rail are not entitled to summary judgment dismissing the same.

The Common-Law Negligence and Labor Law § 200 Claims

URS and Tri-Rail move for summary judgment dismissing the common-law negligence and Labor Law claims as against them. Crescent cross-moves for the same relief as to it, while plaintiff cross-moves for summary judgment in its favor as to liability on said claim.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Singh v Black Diamonds LLC, 24 AD3d 138, 139 [1st Dept 2005], citing Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

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

> in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (LaRosa v Internap Network Servs. Corp., 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (***Naughton v City of New York***, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual

or constructive notice'" (Mendoza v Highpoint Assoc., IX, LLC, 83 AD3d 1, 9 [1st Dept 2011], quoting Chowdhury v Rodriguez, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff's accident was caused due to two separate but connected means and methods of work. Specifically (1) the designation of the unsafe Bathroom, and (2) the inadequate maintenance and cleaning of the Bathroom.

URS

A precondition to the duty to provide a safe place to work under Labor Law "is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin*, 54 NY2d at 317). Here, as discussed above, part of URS's work at the Project included designating the sole bathroom available to workers on the Project. Given this duty, under the Labor Law, URS also had the obligation to ensure that the designated bathroom was safe. Here, it failed in that duty when it became aware of the repeated flooding in the Bathroom and did not designate a different bathroom, in order to avoid the unsafe condition. Simply put, URS had the authority to control its own work - which included designating and providing a safe bathroom for workers. This failure was a proximate cause of plaintiff's accident, inasmuch as the unsafe

Bathroom was the only facility offered for plaintiff's use at the Project.

Thus, plaintiff is entitled to summary judgment in his favor on the common-law negligence and Labor Law § 200 claims as against URS, and URS is not entitled to summary judgment dismissing the same.

Tri-Rail

It is undisputed that Tri-Rail had an explicit contractual duty to keep the bathroom clean and free from hazards, such as the slippery footing caused by flooding (URS notice of motion, exhibit L [part 2], sub-exhibit E, § 01 50 00; Doc No. 181). In addition, it is undisputed that Tri-Rail directed one of its workers to clean the Bathroom's floor on at least a daily basis. Therefore, clearly, Tri-Rail had the authority to control and supervise the means and methods related to the cleaning and maintenance of the Bathroom.

It is also undisputed that plaintiff slipped in water that had been allowed to pool on the Bathroom's floor - which was a known, continuing issue. As per testimony, Tri-Rail's cleaning was enough to keep the Bathroom safe in the morning, but by the afternoon, the Bathroom was often flooded and unsafe. Tri-Rail failed to ensure that the Bathroom was safe for use at these times. Thus, as Tri-Rail's cleaning of the Bathroom was insufficient to provide a safe facility for plaintiff's use,

Tri-Rail breached its duty to "maintain the restroom in good working order" (id. at sub-section 1.4). Tri-Rail had the same common duty of care, and as a matter of law and fact, it breached such duty, which was a substantial factor in causing plaintiff's accident. There is no evidence in the record that tends to refute the evidence of Tri-Rail's negligence.

Accordingly, plaintiff is entitled to summary judgment in his favor on the common-law negligence and Labor Law § 200 claims as against Tri-Rail, and Tri-Rail is not entitled to summary judgment dismissing the same.

Crescent

With respect to Crescent, a question of fact remains as to whether it had a duty to repair the leaking sink that caused the flooding in the Bathroom. It is uncontested that Crescent did not have a duty to perform any repair work in the Bathroom pursuant to the Crescent Contract. There is evidence that, in the months prior to the accident, Crescent was asked to "check" the Bathroom (plaintiff's amended notice of cross-motion, exhibit K-6; Doc No. 253), and that it performed certain unspecified testing on the fourth floor pursuant to "Bulletin #3" (Bernstein aff in opposition, exhibit C; Doc No. 284). Based on this, plaintiff argues that Crescent was specifically tasked with repairing the Bathroom's sink, and that it negligently failed to do so. However, because the record does

not include "Bulletin #3" - which may define the specifics of Crescent's work in the Bathroom - plaintiff has failed to demonstrate whether Crescent, in fact, had a duty to repair the Bathroom's sink in the first place.

Thus, as there remains a question of fact as to whether Crescent had the ability to supervise or control any repair work in the Bathroom, plaintiff is not entitled to summary judgment in his favor on the common-law negligence and Labor Law § 200 claims as against Crescent, and Crescent is not entitled to summary judgment dismissing the same.

Crescent's Third-Party Claims against URS

In its cross-motion, Crescent seeks summary judgment in its favor on its third-party claim for common-law indemnification against URS. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]).

Here, as discussed above, since a question of fact remains with respect to the scope of Crescent's work on the Project (with respect to change orders/Bulletins), Crescent has not

established that it was, in fact, free from negligence. Therefore, Crescent is not entitled to summary judgment in its favor on its common-law indemnification claim as against URS.

URS's Third-Party Claims against Tri-Rail and Crossclaims against Crescent

URS moves for summary judgment in its favor on its claims for contractual indemnification against Tri-Rail and Crescent. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 [1987], quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 [1973]; see also Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]).

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

Additional Facts Relevant to This Issue

The Tri-Rail Contract includes an indemnification provision, which states, in pertinent part, as follows:

> "[Tri-Rail] assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever . . . to all persons, whether employees of [Tri-Rail] or otherwise . . . caused by, resulting from, arising out of or occurring in connection with the execution of the Work. [Tri-Rail] shall hold the Owner, the Owner's Representative, Construction Manager, Architect, ESDC . . . harmless from and shall indemnify them against and for any and all liability . . . by reason of claims of its employees or employees of its subcontractors for injuries or death, by reason of claims of any other person or persons . . . for injuries to person or property or for death occasioned in whole or in part by any act or omission of [Tri-Rail] . . . . If, however, this indemnification is limited by applicable law, than the said indemnification hereby shall be similarly limited to conform with such law"

(plaintiff's notice of motion, exhibit R, § 15.6.2.a; Doc No. 260). The ESDC/Crescent contract contains the same indemnification provision with respect to Crescent (URS's notice of motion, exhibit O, § 15.6.2.1; Doc No. 184).

Here, as discussed above, plaintiff's accident was caused, at least in part, by URS's negligent failure to designate a safe bathroom for plaintiff's use at the Project. As URS was not free from any negligence, it is not entitled to summary judgment in its favor on its contractual indemnification crossclaims

against Tri-Rail or Crescent (see e.g. Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc., 170 AD3d 509, 511 [1st Dept 2019] [denying summary judgment where an issue of fact existed as to the movant-indemnitee's own negligence]; citing *Correia*, 259 AD2d at 65).

Crossclaims Against Tri-Rail

Tri-Rail's motion also seeks summary judgment dismissing all crossclaims against it. However, Tri-Rail neither identifies any specific crossclaims it seeks to dismiss, nor raises any arguments with respect to such dismissal. On such basis, Tri-Rail is not entitled to summary judgment dismissing the crossclaims against it.

The court has considered the parties remaining arguments and finds them unavailing.

7/2/2020
DATE

DEBRA A. JAMES, J.S.C.

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