SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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INDEX NO. 155864/2016

JAROSLAW PAWLICKI AND, EDYT PAWLICKI,

MOTION DATE 5/13/20

Plaintiff,

MOTION SEQ. NO. 005, 006, 007

- v -

200 PARK, L.P., STRUCTURE TONE, LLC,FOUR DAUGHTERS LLC,FOUR DAUGHTERS NY, LLC,

DECISION + ORDER ON MOTION

Defendant.

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200 PARK, L.P.,, STRUCTURE TONE, LLC

Third-Party
Index No. 595266/2017

Plaintiff,

-against-

HUMBOLDT WOODWORKING INSTALLATIONS, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 235, 236, 239, 240, 250, 251, 252

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 243, 244, 245, 246, 247, 248, 249

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 237, 238, 253, 254, 255, 256

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

Upon the foregoing documents, it is

ORDERED that the branch of Defendants 200 Park L.P. (“200 Park”) and Structure Tone LLC’s (“Structure Tone”) motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment dismissing Plaintiffs’ Labor Law claims, is granted to the extent that Plaintiff’s Labor Law § 240(1) claim and Labor Law § 241(6) claims pursuant to Industrial Code Section 23-

1.7(b)(1) and the Industrial Code provisions abandoned by Plaintiffs are dismissed; and Plaintiffs' remaining Labor Law claims are severed and continue against 200 Park LP and Structure Tone, and it is further

ORDERED that the branch of 200 Park and Structure Tone's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment on their Third-Party Complaint and crossclaims against co-defendants Four Daughters, LLC and Four Daughters NY, LLC (collectively, "Four Daughters") and third-party defendant Humboldt Woodworking Installations, Inc. ("Humboldt") for contractual defense, indemnification, and insurance procurement, is denied; and it is further

ORDERED that Plaintiffs Jaroslaw Pawlicki and Edyt Pawlicki's motion (Motion Seq. 006), pursuant to CPLR 3212, for summary judgment as to liability on their Labor Law claims against Defendants 200 Park, Structure Tone, and Four Daughters (collectively, Defendants) is denied in its entirety; and it is further

ORDERED that the branch of Defendant Four Daughters and Third-Party Defendant Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment dismissing Plaintiffs' Labor Law claims as against Four Daughters, is granted to the extent that Plaintiff's Labor Law § 240(1) claim and Labor Law § 241(6) claims pursuant to Industrial Code Section 23-1.7(b)(1) and the Industrial Code provisions abandoned by Plaintiffs are dismissed; and Plaintiffs' remaining Labor Law claims are severed and continue against Four Daughters, and it is further

ORDERED that the branch of Four Daughters and Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, seeking summary judgment on the Third-Party Complaint and crossclaims against Four Daughters is granted to the extent that 200 Park and Structure Tone's breach of contract for the failure to procure insurance claim against Four Daughters is granted, and the remaining crossclaims continue against Four Daughters; and it is further

ORDERED that the branch of Four Daughters and Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment dismissing the Third-Party Complaint and all crossclaims against Humboldt is granted, and this action is discontinued as against Humboldt; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for Four Daughters and Humboldt shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

NON FINAL DISPOSITION

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 005, defendants/third-party plaintiffs 200 Park. L.P. ("200 Park") and Structure Tone, LLC ("Structure Tone") move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against them, and for summary judgment on their Third Party Complaint and crossclaims against co-defendants Four Daughters, LLC and Four Daughters NY, LLC (collectively, "Four Daughters") and third-party defendant Humboldt Woodworking Installations, Inc. ("Humboldt") for contractual defense, indemnification, and insurance procurement.

In Motion Seq. 006, Plaintiffs Jaroslaw Pawlicki ("Pawlicki") and Edyt Pawlicki move for summary judgment against Defendants on the issue of liability pursuant to New York Labor Law Sections § 240(1), § 241(6), § 200, and under the Common Law, and for an order setting this matter down for an assessment of damages.

In Motion Seq. 007, Four Daughters and Humboldt move for summary judgment dismissing the Complaint, Third-Party Complaint, and all crossclaims against them.

BACKGROUND FACTS

On January 20, 2016, Pawlicki, a carpenter employed by Humboldt, was working at 200 Park Avenue in Manhattan ("the subject premises"), owned by 200 Park. 200 Park hired Structure Tone as the general contractor for the construction project at the building. Structure Tone then hired Four Daughters to provide mill work. Four Daughters in turn subcontracted with Humboldt for carpenters to perform millwork installations.

Pawlicki's Deposition Testimony

The day of the accident, Pawlicki was working on the 58th Floor of the subject premises and was assigned the task of installing a door frame. Pawlicki was holding the door frame and standing in a walkway between the windowed perimeter of a building and a sheetrock wall, and the door frame was to be installed perpendicular to the window (NYSCEF doc No. 235, ¶ 10). While attempting to install the door frame, Pawlicki stepped on an aluminum grille that was covering air conditioning equipment below when the grille, which was approximately 8 inches wide and 16 inches long, collapsed underneath him (*id.* at ¶ 11). The grille was unsecured by any screws, despite the presence of preexisting screw holes, and was covered by construction paper, which Pawlicki believes was placed over the grille for the purpose of dust protection (*id.* at ¶ 13).

Pawlicki's left foot slipped down into the exposed opening and Pawlicki then fell up to his waist height in the hole sustaining various injuries (*id.* at ¶ 11). Following his accident, Pawlicki placed the grille back in place and secured it by screwing the grille in and covering it with plywood (*id.* at ¶ 12).

Structure Tone's Deposition Testimony

Joseph Bello ("Bello"), a superintendent employed by Structure Tone, testified that he inspected the work site every day he was present to ensure there were no hazardous conditions, which included inspecting floor areas (*id.* at ¶ 16). Bello has no firsthand knowledge of the accident but testified that a floor area that collapses just because a worker steps on it is not properly secured and should have been either secured or affixed with a warning (*id.* at ¶ 19). The floor area in question here is known as a "computer raised floor," which is made up of tiles up on pedestals to create a space between the floor and concrete deck below to "allow electrical conduits or data requirements underneath the floor" (*id.* at ¶ 20). Bello also testified generally

that the grilles should have been secured in place to prevent incidents like the subject accident here. He recalled that the grilles were covered in construction paper and confirmed that Structure Tone may have been the party that placed paper over the grilles (*id.* at ¶ 23).

Four Daughters' Deposition Testimony

Marek Korzenny ("Korzenny"), a project manager for the worksite employed by Four Daughters, also had no firsthand knowledge of the incident but testified that the grilles were flush with the surrounding floor and noted that carpenters were often required to install door frames very close to the grilles and had to step on them while performing the installations (*id.* at 27). Four Daughters also produced Arkaiusc Samplawski ("Samplawski"), a field manager, who echoed Korzenny and Bello's testimony that unsecured grilles would be a dangerous condition on the premises as they were often stepped on by Humboldt's carpenters; he also noted that he occasionally walked on grilles that "didn't feel very secure" (*id.* at ¶ 34-35). Samplawski did not witness the incident, but Pawlicki reported the incident to him the next day (*id.* at ¶ 36).

Humboldt's Deposition Testimony

Leszek Roszkowski (Roszkowski) is employed by Humboldt as a carpenter and was working with Pawlicki on the day of the accident. Roszkowski observed Pawlicki's leg inside the hole created by the collapse of the unsecured grille (*id.* at ¶ 40). Rozskowski noted that Humboldt carpenters were often working adjacent to the metal grilles that were flush with the floor, and that he would have reported any loose grille that could lead to an injury.

PROCEDURAL HISTORY

Plaintiffs commenced this action against Defendants in which Pawlicki asserts common law negligence claims and seeks damages under New York Labor Law §§ 200, 240, and 241. His

wife has a derivative claim. Plaintiffs now move for summary judgment on the matter of liability under the Labor Law claims.

200 Park and Structure Tone move for dismissal of Plaintiffs' Labor Law and negligence claims and have a Third-Party Complaint against Four Daughters for contractual defense and indemnification, as they argue Four Daughters agreed to assume defense and indemnification in their subcontractor agreement. 200 Park and Structure Tone also claim that Four Daughters was obligated by the agreement to procure insurance on their behalf and failed to do so, and therefore an inquest on defense costs as incurred by Structure Tone should be conducted. Structure Tone and 200 Park also argue that they are third-party beneficiaries of the agreement entered into between Four Daughters and Humboldt and therefore are owed contractual defense and indemnification by Humboldt.

Four Daughters moves for dismissal of Plaintiffs' complaint as well as the Third-Party Complaint and all crossclaims by Structure Tone and 200 Park against them, arguing that all are without merit.[1]

Humboldt argues it is entitled to dismissal of the Third-Party Complaint pursuant to Workers' Compensation Law § 11, which permits an owner to bring a third-party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has entered into a written contract to indemnify the owner. Humboldt argues neither circumstance is applicable here, and therefore Structure Tone and 200 Park cannot maintain their crossclaims against it.

[1] Structure Tone and 200 Park do not move for summary judgment on their crossclaim of common law defense and indemnification against Four Daughters. However, Four Daughters moves for its dismissal, so the claim is discussed *infra.*

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). 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]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Here, since each side seeks summary judgment, each side bears the burden of making 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 (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A) (Sup. Ct., N.Y. County 2012], aff'd, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary

judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

As a preliminary matter, the Court notes that all three Defendants are proper Labor Law defendants. 200 Park is the owner of the premises, and Structure Tone is the general contractor that was in charge of the construction project. Four Daughters argues that it is not a proper Labor Law defendant as it is not an owner or general contractor. However, "when the work giving rise to the duty to conform to the requirements of Section 240(1) 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." (*Johnson v City of New York*, 120 AD3d 405, 406 [1st Dept 2014]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). As Structure Tone subcontracted with Four Daughters, it is an agent of Structure Tone and is thus a proper Labor Law defendant.

The Court thus proceeds to examine the liability of Defendants under each of the Labor Law sections cited by Plaintiffs.

Labor Law § 240 (1)

Labor Law § 240(1) provides, in relevant part:

> "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a

> building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a Section 240(1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

The Court of Appeals in *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009) explained that the dispositive inquiry is not "whether the injury resulted from a fall . . . [r]ather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.* at 603). In determining whether an elevation differential is "physically significant" versus *"de minimis,"* the Court of Appeals instructed that "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent," must be taken into account" (*Runner, supra; see also Brown v VJB Constr. Corp.*, 50 AD3d 373, 376-377, [2008]). In the years following *Runner,* the Court of Appeals' decisions have additionally clarified that the weight of the falling object and force it generated are crucial factors to be considered in a Section 240(1) claim, regardless of whether the base of the falling object is positioned at the "same level" of the worker (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011], *Salzar v Novalex Contracting Corp.*, 936 NYS2d 624 [2011], *Nicometi v Vineyards of Fredonia, LLC,* 7 NYS3d 263 [2015]).

However, the Court of Appeals has also made it clear since *Runner* that, regardless of the size or position of the falling object, the task involved must still involve some sort of elevation-related risk to fall within the protection of 240(1). It does not appear that the Court intended to equate the "single decisive question" of whether there was a failure to provide protection against a "physically significant elevation differential" (*Runner* at 603) with the "relevant inquiry" in "falling object cases" of "whether the harm flows directly from the application of the force of gravity to an object" (*id.* at 604). In other words, *Runner "*did not create a blanket rule that a physically significant elevation differential exists whenever an injury is gravity-related or gravity can be said to have contributed to the injury" (*Oakes v Wal-Mart Real Estate Business Trust,* 99

AD3d 31, 37 [2012]). Rather, *Runner* appears simply to have been instructing that liability under Labor Law § 240(1) in falling object cases is not limited to those fact patterns in which the object directly strikes the injured worker from above (*Strangio v Sevenson Envtl. Servs., Inc.*, 15 NY3d 914, 915, [2010], *modfg.* 74 A.D.3d 1892 [2010]; see also *Davis v Wyeth Pharms., Inc.*, 86 AD3d 907, 909 [2011]). Subsequent cases have also reaffirmed that the elevation differentia must be deemed "significant" under *Runner*—and, thus, trigger the applicability of the statute—whenever "gravity-related accidents" result in injury (*DiPalma v State of New York*, 90 A.D.3d 1659, 1660 [2011] [internal quotation marks and citation omitted]).

Here, Plaintiffs concede the requirement of a significant elevation differential, but they argue that Pawlicki was exposed to an elevation-related risk given that he was working above a void used to store air conditioning equipment. Plaintiffs cite to *Carpio v Tishman Constr. Corp.*, 240 AD2d 234 (1st Dept 1997), a case they argue is completely analogous to the present circumstances. In *Carpio*, the First Department reversed denial of summary judgment for plaintiff's 240(1) claim after he fell three feet into a hole in the floor while painting a ceiling. The hole was approximately 10 to 14 inches wide, similar in size to the hole involved in this incident. The Court noted that plaintiff was exposed to a risk of injury covered by the statute because of the "difference between the elevation level of the required work (the third floor) and a lower level (the bottom of the piping shaft)" (*id.* at 235). Plaintiffs also cite to *Brown v 44 St. Dev. LLC*, 137 AD3d 703 (1st Dept 2016) for the proposition that "[t]here is no bright line minimum height differential that determines whether an elevation hazard exists." In *Brown*, the First Department held that the statute applied when plaintiff "fell through an opening in a latticework rebar deck to plywood from that was 12 to 18 inches below" (*id.*). Plaintiffs conclude

that the small size of the hole under the grille and the fact that Pawlicki only fell to his waist height should not preclude a finding that the accident here is covered by 240(1).

Defendants contend that, regardless of the issue of the size of the elevation hazard, the cases cited by Plaintiffs are not applicable to the present circumstances. Defendants argue that *Carpio* is distinguishable because in that case, plaintiff's activity of looking up at the ceiling to paint, which he needed to do to perform his job, coupled with the fact that there was an opening in the floor that was not covered, brought his work activity within the statute. In *Brown,* plaintiff was injured while walking across a rebar ramp that had been constructed above the foundation of a parking garage for the purpose of allowing workers to install the second level of the garage (*Brown* at 703). Here, Pawlicki's assigned task of door installation work played no role in the accident as in *Carpio* and he was not working on an elevated platform constructed for the purpose of his work task as in *Brown*. Given that the task Pawlicki was engaged in was not a type of risk the statute was designed to protect against, Defendants conclude that 240(1) does not apply.

The Court agrees with Defendants that the cases cited by Plaintiffs are inapposite to the present circumstances. Here, the impetus for Pawlicki's fall was the presence of the unsecured grille, rather than a direct consequence of gravity or the nature of the task he was completing. Plaintiffs are correct that it is inconsequential that the unsecured grille was positioned at equal level to Pawlicki and that Pawlicki did not fall to a greater depth. However, 240(1) is still inapplicable as Pawlicki was not engaged in a task involving an elevation-related risk. The First Department has explained that "'[t]he crucial consideration under section 240(1) is ... whether a particular ... task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against'" (*Jones v 414 Equities LLC*, 57 A.D.3d 65, 78 [1st Dept. 2008]),

which is why the Court found the statute applied in *Carpio* notwithstanding the fact that plaintiff did not fall from a great height. Here, Pawlicki's task of installing a door frame was not elevation-related, and his fall stemmed not from an elevation risk but from a concealed object on the floor, which the First Department found in *Jones* to be a "usual and ordinary danger at a construction site" (*id.* at 71). Plaintiffs have not offered proof that the alleged danger posed by the loose grill presented dangers beyond the usual and ordinary dangers posed by a construction site, which would warrant the applicability of 240(1). The unsecured grille was also not a safety device creted for the function of the task, but rather a preexisting element of the subject premises not related to the construction work being performed.

As Pawlicki was not performing an elevation-related task that required a safety device to prevent him from falling, and his accident was caused by a separate hazard wholly unrelated to the risks contemplated by the statute, the Court finds that Defendants are entitled to dismissal of Plaintiffs' claims under Labor Law § 240(1). Therefore, the branches of Defendants' motions to dismiss Plaintiffs' Labor Law § 240(1) claim are granted and said claim is severed and dismissed. Consequently, the branch of plaintiffs' motion for summary judgment related to this claim is denied.

Labor Law § 241(6)

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

> "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."

It is well settled that this statute requires owners and contractors and their agents "to provide reasonable and adequate protection and safety measures for workers and to comply with

the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law Section 241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that the Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace (*St. Louis*, 16 NY3d at 416).

Initially, although Plaintiffs list multiple violations of the Industrial Code in the bill of particulars, with the exception of sections 23-1.7(e)(1) and 23-1.7(b)(1), Plaintiffs do not move for summary judgment in their favor as to those alleged violations, nor do they oppose their dismissal. Therefore, the Court deems these uncontested provisions abandoned.

Thus, Defendants are entitled to summary judgment dismissing the parts of Plaintiffs' Labor Law § 241 (6) claim predicated on the abandoned provisions (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]). The Court now turns to the two Industrial Code provisions that Plaintiffs maintain were violated, Sections 23.1-7 (b)(1) and 23-1.7(e)(1).

Industrial Code Section 23-1.7(b)(1)

Industrial Code section 23.1-7 (b)(1) states that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

The term "hazardous opening" is not defined in 12 NYCRR 23-1.7 (b)(1). The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation presents a question of law for the court (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [241(6) was inapplicable to the drainpipe hole into which plaintiff stepped because it was not large enough for a person to fit through, and thus, not a "hazardous opening"]; *accord Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Piccuillo v Bank of N.Y Co.*, 277 AD2d 93, 94 [1st Dept 2000] [a "hand-hole" approximately 8 by 12 inches in diameter, used by electricians to provide access to wiring and ducts embedded in floors, into which plaintiff stepped, was not a "hazardous opening" requiring a cover or safety railing]).

Here, the evidentiary record reflects that the subject hole was not of sufficient size and depth to constitute a "hazardous opening" under 23-1.7 (b)(1). Plaintiffs warrant that the hole was approximately 8 inches wide, and courts have maintained that Section 23-1.7(b)(1) only applies to openings "of significant depth and size" (*Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 (1st Dept 2009), *see also Urban v No 5 Times Sq. Dev LLC*, 62 AD3d 553, 556 (1st Dept 2009), noting that a "10 to 12 inch gap is not a hazardous opening for purpose of [the] regulation"). The First Department has opined that the openings contemplated by 23-1.7(b)(1) "all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit" (*Messina, supra*, at 123–24). The hole here was obviously not large enough for Pawlicki to completely fall into, as reflected by the fact that only his left leg fell into the hole up to his waist.

Plaintiffs argue that notwithstanding the small size of the hole, 23-1.7(b)(1) is still applicable given the First Department's ruling in *Keegan v. Swissotel N.Y. Inc.*, 262 AD2d 111,

(1st Dept 1999) which held that 23-1.7(b)(1) applied to a "partially covered 18-inch square hole." (id. at 113). However, in *Keegan,* there were numerous open holes in the subject job site that were cut in the floor for the elevator shaft, one of which was a 6-foot by 8-foot hole (*id.*) The 18-inch hole thus presented the type of hazard that the statute intended to protect against, especially as the holes went from the top floor all the way to the ground floor. However, the subject accident here involved only one small hole, a few feet under which there was equipment that broke Pawlicki's fall. Thus, *Keegan* is not applicable to the circumstances here and the holding in *Keegan* does not alter the general rule that a small hole not large enough for a person to fall completely into is not a "hazardous opening" as contemplated by 23-1.7 (b)(1).

Therefore, Defendants are entitled to dismissal of the part of Plaintiffs' Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code 23-1.7 (b)(1). Likewise, the branch of Plaintiffs' motion for summary judgment on this section of the Industrial Code is likewise denied.

Industrial Code Section 23-1.7(e)(1)

Section 23-1.7(e)(1) provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

As "passageway" is not defined in the code, "courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Quigley v Port Auth. of New York,* 168 AD3d 65, 67, [1st Dept 2018] quoting *Steiger v LPCiminelli, Inc.,* 104 A.D.3d 1246, 1250 [4th Dept. 2013]). The First Department has made it clear that a fall into a hole in a doorway constitutes a tripping hazard in a passageway pursuant to

23-1.7(e)(1). In *McCullough v One Bryant Park*, 132 AD3d 491 (1st Dept 2015), where plaintiff stepped into an uncovered drain hole in the floor directly behind the doorway threshold, the court held that "the doorway constitutes a passageway within the meaning of the regulation, and plaintiff raised an issue of fact as to whether the proximate cause of his injury was a tripping hazard within the passageway" (*id.* at 492).

Here, the parties dispute whether Pawlicki fell in a "passageway" or in an "open area." Plaintiffs argue that this case is analogous to *McCullough* given the proximity of the unsecured grille to a doorway. Pawlicki described the area where the incident occurred as "a walkway between the windowed perimeter of the building and a sheet rock wall where [Pawlicki] was installing a doorframe perpendicular to the perimeter window" (NYSCEF doc No. 195, ¶ 108). However, as Defendants point out, Pawlicki also described the area as "two walls, open space, and the glass wall" measuring about "12 by 10" (NYSCEF doc No. 245, ¶ 22). Defendants thus contend that *McCullough* is not applicable as while Pawlicki was intending to install a door in a door frame, he did not actually make it to the doorway, and the accident in fact occurred next to a window rather than in a doorway.

The differing depictions of the area where Pawlicki fell raise an issue of fact as to whether the area constituted a "passageway". As the Code does not provide a formal definition of "passageway," courts have held that the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact (*See Prevost v One City Block LLC*, 155 AD3d 531, 535 (1st Dept 2017]). In his deposition testimony, Pawlicki gave differing accounts of exactly where he was standing when he fell. Therefore, there is a question of fact as to whether Pawlicki fell in a "passageway" or an "open area" and the Court cannot declare that either party has demonstrated entitlement to summary judgment regarding a violation of 23-1.7 (e)(1).

Therefore, Defendants are not entitled to dismissal of the part of Plaintiffs' Labor Law § 24 (6) claim predicated on an alleged violation of Industrial Code 23-1.7 (e)(1), nor is Plaintiff entitled to summary judgment at this juncture. The branch of Plaintiffs' 241(6) claim predicated on this section of the Industrial Code is severed and continues against Defendants.

Labor Law § 200 and Common Law Negligence

Pawlicki claims negligence against Defendants under both the common law and Labor Law § 200. 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive

notice" (*Mendoza v Highpoint Assoc.*, IX, LLC, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Here, it is evident that Pawlicki's accident arose from a dangerous condition on the work site and not the means and methods used, given that all parties agree that the unsecured grille he stepped on was completely unrelated to the work being performed and its presence preceded the accident (NYSCEF doc No. 243, ¶ 33)[2]. Therefore, the relevant question for each Defendant is whether it created the condition or failed to remedy it after receiving actual or constructive notice, and it is irrelevant whether they supervised or controlled Pawlicki's work on the subject premises.

Structure Tone and 200 Park

Plaintiffs argue that Structure Tone and 200 Park are liable as Structure Tone created, or at least contributed to, the condition when it covered the grilles at the subject premises with construction paper and failed to advise Pawlicki or any workers of the paper covering dangerous grilles (NYSCEF doc No. 246, ¶ 41). As Bello, Structure Tone's representative, confirmed the grilles were covered with paper at some point, Plaintiffs argue that Structure Tone had constructive notice of the potentially dangerous condition of the grilles (*id.*). In opposition, Structure Tone and 200 Park argue that as the record establishes the unsecured grilles were a preexisting part of the project, they were not created by Defendants (NYSCEF doc No. 250, ¶

[2] In their moving papers, Structure Tone and 200 Park contend that the subject accident arose from the means and methods of the work being performed (NYSCEF doc No. 174). However, they offer no reasoning for this nonsensical assertion. Structure Tone's argument they lacked supervision over Pawlicki is thus not discussed in this decision as it is immaterial to Plaintiffs' claims.

32). Structure Tone also disputes that it covered the grilles with paper, citing to deposition testimony from Bello wherein he stated that he did not recall whether Structure Tone covered the grilles (*id.* at ¶ 35). Structure Tone and 200 Park also point out that given that the grilles were not part of the construction project, there is no reason to assume they would have been discovered during Structure Tone's daily general inspections of the premises.

The Court finds that there are multiple issues that render summary judgment improper for Structure Tone and 200 Park at this juncture. As discussed above, there is a question of fact regarding whether Structure Tone or another entity placed the construction paper over the unsecured grilles. Structure Tone also has not established that they lacked constructive notice of the dangerous condition. To show a lack of constructive notice, defendants must show when they last inspected the premises (*see Jahn v. SH Entertainment, LLC*, 117 AD3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]; *compare Ezzard v One East River Place Realty Co.*, LLC, 129 AD3d [1st Dept 2015] [in a misleveled elevator case, defendants made prima facie showing as to constructive notice by providing evidence of when they had last inspected the elevator]).

Here, Structure Tone and 200 Park fail to make a *prima facie* showing as to constructive notice, as they do not submit evidence as to when they last inspected the specific area where Pawlicki's accident took place. Notwithstanding the fact that the grille's presence superseded the commencement of the construction project and was unrelated to the work being performed, if Structure Tone's representatives were regularly inspecting the areas where construction was taking place, it stands to reason that they should have inspected the floor at issue here. 200 Park

and Structure Tone argue that they had no prior complaints about the specific grille Pawlicki fell through. However, a lack of prior complaints alone does not satisfy Structure Tone's evidentiary burden as the general contractor. It is axiomatic that a general contractor has a statutory duty under Section 200 to maintain a safe jobsite. Therefore, while Plaintiffs have not established that Structure Tone caused the condition or definitively had constructive notice of the loose grille, Structure Tone also has not shown a lack of constructive notice that would warrant dismissal of the Section 200 claim.

As there questions of fact regarding whether Structure Tone contributed to the dangerous defect on the subject premises and/or had constructive notice of the same, Structure Tone and 200 Park are not entitled to dismissal of the part of Plaintiffs' Labor Law § 200 and common law negligence claim, nor is Plaintiff entitled to summary judgment at this juncture.

Four Daughters

Plaintiffs argue that Four Daughters is liable under Labor Law § 200 and common law negligence as it had constructive notice of the unsecured grille on the premises. Plaintiffs point to the deposition testimony of Samplawski, Four Daughters' representative, wherein he stated that the grilles at the subject premises "didn't feel secure" and "weren't stable, were making noises" (NYSCEF doc No. 237, ¶ 95). As Four Daughters' own description of the grilles establishes their dangerous nature, Plaintiffs argue constructive notice as to Four Daughters cannot be disputed. Plaintiffs contend that as Four Daughters took no action to inspect or remedy the readily apparent dangerous condition, they are liable for Pawlicki's accident.

In opposition, Four Daughters argues that Samplawski's testimony should not be read to infer constructive notice as his testimony regarding the danger posed by an unsecured grille was "hypothetical," and he also testified that he was unaware of any complaints prior to the accident

(NYSCEF Doc No. 243, ¶ 34). Four Daughters contends that as Samplawski was never present at the specific accident location before the accident, he could not have been made aware of the condition (*id.* at ¶ 35). His testimony regarding the unsafe nature of the loose grilles pertains to his inspection after being informed of Pawlicki's fall, not prior to the incident. The date of Pawlicki's accident was also the first day Humboldt employees were working at the subject premises (*id.* at ¶ 36). Given that Samlplawki was not present at the worksite and received no complaints prior to the accident, Four Daughters conclude that constructive notice cannot be inferred.

The Court agrees with Four Daughters that Plaintiffs' use of post-accident observations and speculations about the grille do not establish that constructive notice as to Four Daughters is above dispute. However, as discussed above, Four Daughters is a statutory agent of Structure Tone that contracted with Humboldt for Pawlicki's employment, and it had the authority and ability to ensure that Humboldt's carpenters were working in a safe environment (NYSCEF doc No. 248, ¶ 9). Therefore, Four Daughters has the same evidentiary burden as Structure Tone and must show when they last inspected the premises to prove a complete lack of constructive notice. Four Daughters has not done so, and it cannot escape liability by arguing that they simply were not present the day of the accident. As Plaintiffs note, the doctrine of constructive notice exists in part to prevent defendants from avoiding responsibility by merely claiming ignorance of an unsafe condition.

As there are questions of fact regarding whether Four Daughters had constructive notice of the dangerous condition on the premises, Four Daughters is not entitled to dismissal of the part of Plaintiffs' Labor Law § 200 and common law negligence claim, nor is Plaintiff entitled to summary judgment at this juncture.

Structure Tone and 200 Park's Contractual Indemnification Claim Against Four Daughters

In addition to the Labor Law claims, Structure Tone and 200 Park move for summary judgment in their favor on their claim for contractual defense and indemnification as against Four Daughters. Four Daughters moves for summary judgment dismissing said claim against it.

"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).

The subcontract between Structure Tone[3] and Four Daughters, dated October 7, 2015, provides in pertinent part, the following:

> "To the fullest extent by law, [Four Daughters] will indemnify and hold harmless [Structure Tone]…arising in whole or in part and in any manner from the acts, omissions, breach or default of [Four Daughters]..in connection with the performance of any work by [Four Daughters], its employees and subcontractors….[Four Daughters] will defend and bear all costs of defending any action or proceedings brought against [Structure Tone] and or [200

[3] As an initial matter, Four Daughters argues that the Subcontract and Master Contract are inapplicable as the entity named on the contracts is Structure Tone Inc., not Structure Tone, LLC (the party to this proceeding). However, effective December 19, 2016, Structure Tone Inc. was merged into Structure Tone, LLC (NYSCEF doc No. 251, ¶ 13). The contracts entered between Four Daughters and Structure Tone Inc. thus remain binding and in effect pursuant to Business Corporation Law § 906(b)(1).

> Park]…arising in whole or in part out of any such acts, omission, breach or defaults."

(NYSCEF doc No. 182, ¶ 11.2).

However, The Master Contract dated December 21, 2015, which contains a provision noting that it supersedes all prior agreements (NYSCEF doc No. 183, ¶ 19), provides as follows:

> "To the fullest extent permitted by law, [Four Daughters] shall indemnify, defend and hold harmless [Structure Tone], [200 Park]…from and against all claims, damages, losses, penalties….including but not limited to, attorney's fees and court costs, arising out of, or resulting from the performance, or failure in performance, of [Four Daughters'] Work and obligations…and from any claim, damage, loss, or expense which (1) is attributable to bodily injury, sickness, disease, death…and (2) is caused in whole or in part by any acts, omissions or negligence of [Four Daughters] or anyone directly or indirectly employed by [Four Daughters] or anyone for whose acts [Four Daughters] may be liable regardless of whether it is caused in part by the acts, omissions, or negligence of a party indemnified hereunder"
>
> (*Id.* at Exhibit B, ¶ 1.0).

Given that the Master Contract requires that indemnification is triggered by a claim that arises out of Four Daughters' work *and* "is caused in whole or in part by any acts, omissions or negligence" of Four Daughters, the Court finds that summary judgment is premature as it cannot be said at this stage that the accident was caused by the acts or omissions of Four Daughters. In *Lopez v Consol. Edison Co. of New York*, 40 N.Y.2d 605, 607 [1976], the Court of Appeals interpreted a similar indemnity clause that required the contractor to "indemnify and save harmless the Company from and against any and all liability arising from injury to person or property occasioned wholly or in part By [sic] any act or omission of the Contractor, his agents, servants or employees." The Court explained that "the indemnity clause, by its own terms, has no application unless there has been an 'act or omission' by Peckham resulting in injury to persons or property" (*id.* at 609). As here it is not yet evident that Pawlicki's accident arose out of an act,

omission, or negligence by Four Daughters, and Structure Tone has not yet established it is free of negligence, Structure Tone and 200 Park are not entitled to summary judgment on their contractual indemnification claim. However, since as discussed above, Four Daughters has not demonstrated it is completely free of negligence, it is also not entitled to dismissal.

Therefore, the branch of Structure Tone and 200 Park's motion seeking summary judgment on its third-party contractual claims against Four Daughters is denied, and the branch of Four Daughters and Humboldt's motion seeking dismissal of the third-party contractual claims against Four Daughters is also denied.

Structure Tone and 200 Park's Common-Law Indemnification Claim Against Four Daughters

Structure Tone and 200 Park do not move for summary judgment on their crossclaim against Four Daughters for common law indemnification. However, Four Daughters moves for its dismissal.

"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 at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Here, as discussed, no party has demonstrated that they are either free or guilty of the negligence that led to a defective condition being present on the subject premises.

Therefore, the branch of Four Daughters and Humboldt's motion seeking dismissal of Structure Tone and 200 Park's common law crossclaim against Four Daughters is denied.

Structure Tone and 200 Park's Claim for Failure to Procure Insurance Against Four Daughters

Structure Tone and 200 Park move for summary judgment in their favor against Four Daughters for breach of contract for the failure to procure insurance as against Structure Tone. Four Daughters moves for dismissal of the same.

The Master Contract between Structure Tone and Four Daughters required Four Daughters to obtain insurance on Structure Tone's behalf. (NYSCEF doc No. 183). Structure Tone argues that Four Daughters failed to provide evidence of insurance procurement. However, in support of its application for summary dismissal of this claim, Four Daughters has submitted certificates of insurance and policy endorsements to 200 Park and Structure Tone (NYSCEF doc No. 185). The certificates indicate that Commercial General Liability (CGL) coverage in the amount of $1,000,000 each occurrence was obtained through Travelers Indemnity Company of America as well as excess coverage in the amount of $10,000,000 per each occurrence, through Travelers Property Casualty Company of America (*id.*). While the Master Contract requires $2,000,000 per each occurrence and a minimum limit of excess coverage of $5,000,000, it also provides that CGL insurance "may be arranged . . . by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy" (NYSCEF doc No. 183, Exhibit B, ¶ 3.1). The discrepancy in GCL single limits is thus immaterial as the overall coverage amount is satisfied. Accordingly, the branch of Four Daughters' motion seeking dismissal of Structure Tone's cross claim for the breach of contract for failure to procure insurance must be granted as there is no merit to Structure Tone's claim that Four Daughters breached its contractual duty (*see Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011]

[dismissing breach claim where the subject insurance policy listed the claimant as an additional insured]).

Therefore, the branch of 200 Park and Structure Tone's motion for summary judgment on their claim for failure to procure insurance against Four Daughters is denied. The branch of Four Daughters and Humboldt's' motion for summary judgment seeking dismissal of this claim is granted and said claim is severed and dismissed.

Humboldt's Motion for Dismissal of all Third-Party Claims Against It

Humboldt has established its *prima facie* entitlement to summary dismissal of Structure Tone and 200 Park's common law and contractual indemnification claims against it.

Regarding the common law claim, Pawlicki, an employee of Humboldt who acted within the scope of his employment during the accident, did not suffer a "grave injury" as defined under the Workers' Compensation Law § 11 (*Anton v West Manor Const. Corp.*, 100 AD3d 523, [1st Dept 2012] (granting summary judgment motion by defendant/employer Tiegre Mechanical Corp. to dismiss West Manor Construction Corp. and Bradhurst 100 Development LLC's claims for common-law indemnification and contribution against it where Tiegre established that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and opponents failed to raise an issue of fact]). It is uncontested that Pawlicki did not suffer a grave injury, and thus the common law indemnification claim against Humboldt must be dismissed.

Regarding the contractual indemnification claim against Humboldt, neither 200 Park nor Structure Tone entered into a written agreement requiring Humboldt to indemnify them or procure insurance for their benefit (NYSCEF doc No. 222, ¶ 58). 200 Park and Structure Tone argue that the insurance procurement provisions of Structure Tone's agreement with Four

Daughters were incorporated and/or binding on Humboldt. However, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor *only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor*" (*Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008] [emphasis added]).

200 Park and Structure Tone also contend that they are third-party beneficiaries to the Four Daughters-Humboldt subcontract. The subcontract states the following relevant provisions:

> "2. The Subcontractor is bound to Four Daughters for the performance of the work in the same manner as Four Daughters is bound to the Owner under Four Daughter's contract with the Owner. The pertinent parts of such contract will be made available upon Subcontractors [sic] request. In the event of any conflict between these Terms and Conditions and a contract between Four Daughters and the Owner, the more strict provision in favor of Four Daughters shall govern.
>
> 9. The Subcontractor shall be liable for any damages incurred by Four Daughters as a consequence of the failure by Subcontractor to comply with this Subcontract.
>
> 11. The Subcontractor shall Obtain Workers Compensation as required by law, Comprehensive GL Insurance and automobile insurance."
>
> (NYSCEF doc No. 184).

The subcontract notably does not include (1) any language imposing an obligation on Humboldt to indemnify or procure insurance for 200 Park and Structure Tone's benefit, (2) any incorporating language concerning indemnification or insurance procurement, and (3) any language imparting to them specific beneficiary status for purposes of indemnification or insurance procurement (NYSCEF doc No. 239, ¶ 7). Humboldt agreed to perform its work in the manner warranted, and to procure insurance as required by law, but the subcontract confers no benefit upon 200 Park and Structure Tone. Parties asserting third-party beneficiary rights under a contract must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is

sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.'" (*Mendel v Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783, 786 (2006), quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 N.Y.2d 314, 336 [1983]). The language of the subcontract fails to support any intent to confer indemnity or insurance procurement third-party benefits in favor of Structure Tone and 200 Park, and thus their claim against Humboldt for contractual indemnification is unwarranted.

Therefore, the branch of 200 Park and Structure Tone's motion for summary judgment on their third-party claims against Humboldt is denied. The branch of Four Daughters and Humboldt's motion for summary judgment seeking dismissal of all third-party claims against Humboldt is granted and said third-party claims are severed and dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of Defendants 200 Park L.P. ("200 Park") and Structure Tone LLC's ("Structure Tone") motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment dismissing Plaintiffs' Labor Law claims, is granted to the extent that Plaintiff's Labor Law § 240(1) claim and Labor Law § 241(6) claims pursuant to Industrial Code Section 23-1.7(b)(1) and the Industrial Code provisions abandoned by Plaintiffs are dismissed; and Plaintiffs' remaining Labor Law claims are severed and continue against 200 Park LP and Structure Tone, and it is further

ORDERED that the branch of 200 Park and Structure Tone's motion (Motion Seq. 005), pursuant to CPLR 3212, for summary judgment on their Third-Party Complaint and crossclaims against co-defendants Four Daughters, LLC and Four Daughters NY, LLC (collectively, "Four Daughters") and third-party defendant Humboldt Woodworking Installations, Inc. ("Humboldt") for contractual defense, indemnification, and insurance procurement, is denied; and it is further

ORDERED that Plaintiffs Jaroslaw Pawlicki and Edyt Pawlicki's motion (Motion Seq. 006), pursuant to CPLR 3212, for summary judgment as to liability on their Labor Law claims against Defendants 200 Park, Structure Tone, and Four Daughters (collectively, Defendants) is denied in its entirety; and it is further

ORDERED that the branch of Defendant Four Daughters and Third-Party Defendant Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment dismissing Plaintiffs' Labor Law claims as against Four Daughters, is granted to the extent that Plaintiff's Labor Law § 240(1) claim and Labor Law § 241(6) claims pursuant to Industrial Code Section 23-1.7(b)(1) and the Industrial Code provisions abandoned by Plaintiffs are dismissed; and Plaintiffs' remaining Labor Law claims are severed and continue against Four Daughters, and it is further

ORDERED that the branch of Four Daughters and Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, seeking summary judgment on the Third-Party Complaint and crossclaims against Four Daughters is granted to the extent that 200 Park and Structure Tone's breach of contract for the failure to procure insurance claim against Four Daughters is granted, and the remaining crossclaims continue against Four Daughters; and it is further

ORDERED that the branch of Four Daughters and Humboldt's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment dismissing the Third-Party Complaint and all crossclaims against Humboldt is granted, and this action is discontinued as against Humboldt; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for Four Daughters and Humboldt shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

HON. CAROL R. EDMEAD J.S.C.

7/27/2020
DATE

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