At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 28th day of September 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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ALEJANDRO LEVERATTO,

Plaintiff,

-against-

EAST 17TH STREET PROPERTIES, INC., CONTINUUM HEALTH PARTNERS, INC., and BETH ISRAEL MEDICAL CENTER

Defendants.

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EAST 17TH STREET PROPERTIES, INC., CONTINUUM HEALTH PARTNERS, INC., and BETH ISRAEL MEDICAL CENTER

Third-Party Plaintiffs,

-against-

IN HOUSE GROUP, INC., JASON PRISCO, KUSHNER STUDIOS ARCHITECTURE & DESIGN, P.C.,

Third-Party Defendants.

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Index No.: 8414/2013

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	8-27, 70-87
Opposing Affidavits (Affirmations)	91-102, 105-122, 123, 81-192
Reply Affidavits (Affirmations)	179-180, 193-194
Other Papers: In House Group's Memo of Law	104

Introduction

Upon the foregoing papers, defendants/third-party plaintiffs East 17th Street Properties, Inc., Continuum Health Partners, Inc., and Beth Israel Medical Center move (in motion sequence no. 12) for an order, pursuant CPLR 3212, granting summary judgment dismissing plaintiff Alejandro Leveratto's complaint as against them, and for an order granting summary judgment in favor of defendants/third-party plaintiffs against third-party defendant In House Group, Inc., for common-law indemnification and contribution. In the event defendants' motion is denied, defendants seek an order, pursuant to Uniform Rule Section 202.21(e) vacating the note of issue to allow for third-party discovery.

Plaintiff cross-moves (in motion sequence no. 15) for an order, pursuant to CPLR § 3025 (b), seeking leave to amend the complaint to add a Labor Law § 240 (1) cause of action, and, upon amendment, for an order, pursuant CPLR § 3212, granting plaintiff partial summary judgment as to liability on the Labor Law § 240 (1) claim against the defendants.

Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Alejandro Leveratto (plaintiff) on April 2, 2012, at premises located at 1370 East 32nd Street, Brooklyn, New York. East 17th Street Properties, Inc., was the owner of the premises on which Beth Israel Medical Center operated a medical office center. Continuum Health Partners, Inc. (Continuum), was the property manager of the premises. At the time of the accident, Benjamin Cintron was employed by Beth Israel Medical Center as the assistant property manager/superintendent of the building. During his deposition, Mr. Cintron testified that he received complaints in or about February 2012, from a tenant in the building (non-party Dr. Ailian Chen) regarding a cold draft coming through her office window. Her office had a large pane glass double insulated window, which measured six feet in height by five feet in width. Upon his inspection, Mr. Cintron noticed that the top of the window had fallen/dropped downward creating a 1-inch gap between the glass and the window frame, which allowed for cold air to come in. He further testified that he noticed rot both at the upper portion of the window frame and on the lower windowsill. Mr. Cintron claimed that he placed a piece of masking tape at the top of the window to cover the air gap. When Dr. Chen continued to complain of cold drafts, Mr. Cintron relayed these complaints to his supervisor, Vincent Lifrieri, who was the senior property manager for the premises. On February 27, 2012, the defendants contacted Adam Kushner of third-party defendant Kushner Studios Architecture & Design, P.C., and advised that they were seeking a contractor to repair the

window. Continuum subsequently hired third-party defendant, In House Group, Inc. (IHG), to repair the windowsill. Pursuant to the terms of the invoice, IHG was hired to remove the glass from the window temporarily, remove the sheet metal enclosure temporarily, reframe the wooden frame with new materials as required, silicon the existing sheet metal back onto the repaired wooden frame, reinstall the glazing and provide new caulking throughout (NYSCEF Doc. No. 77).

During his deposition, the plaintiff testified that he was employed by IHG at the time of the accident. IHG's Vice President, Jason Prisco, was the plaintiff's supervisor. On the morning of the incident, plaintiff arrived at the premises and waited for Mr. Prisco outside the building. When Mr. Prisco arrived, plaintiff began removing tools from his (Prisco's) truck, such as a sawzall, skill saw and ladder. While outside the building, Prisco and plaintiff removed an aluminum exterior cover near the bottom of the window. Mr. Prisco then left the premises to purchase more materials to complete the repair of the window. At that point, plaintiff went inside the building with Mr. Cintron and entered Dr. Chen's office where the window was located. Plaintiff described the window as being situated about three feet off the floor and measuring six feet in height and five feet in width. According to plaintiff, when he began measuring the bottom of the windowsill, Mr. Cintron stepped onto the windowsill and removed the piece of wood that stretched across most of the window. When he did so, it uncovered a small opening at the top of the window between the frame and the glass, which plaintiff described as being about half an inch in size. Plaintiff testified that immediately after Mr. Cintron stepped down

and while he (plaintiff) was still measuring the windowsill, he heard a loud sound at which point the glass of said window crashed down on his hands. Plaintiff was thereafter taken to the hospital by Mr. Cintron where he was treated for severe lacerations to both hands. Mr. Prisco did not witness plaintiff's accident. Plaintiff further testified that, aside from measuring the windowsill, he had not touched any other portion of the window prior to the accident.

During his deposition Mr. Cintron testified that, contrary to plaintiff's testimony, he was not in the room when the accident occurred. He further testified that he did not remove any wood or any other object from the top of the window on the date of the incident, and that he never stood on the windowsill. According to Mr. Cintron, when he came back into the room immediately after the accident, he observed the plaintiff standing by the window with shattered glass and debris on the floor, with his hands bleeding. He then assisted the plaintiff and walked with him to a nearby hospital.

Plaintiff subsequently commenced an action on or about April 25, 2013 against 17th Street Properties, Beth Israel Medical Center, and Continuum (collectively, defendants), seeking to recover for personal injuries he sustained as a result of the accident, asserting Labor Law §§ 241 (6), 200, as well as common-law negligence claims. On or about July 24, 2013, issue was joined when defendants interposed their verified answer. The parties thereafter engaged in discovery and, plaintiff filed the note of issue with the Court on January 3, 2019 (NYSCEF Doc. No. 185). Shortly thereafter, on or about January 14, 2019, defendants filed a third-party action against IHG, Jason

Prisco, individually, and Kushner Studios seeking common-law indemnification and/or contribution. By order of this court dated April 17, 2019, the claims against Prisco were dismissed.

Discussion

Defendants' Summary Judgment Motion

Defendants' motion, which is timely, seeks summary judgment dismissing plaintiff's complaint as against them. In his complaint, the plaintiff alleges that the defendants, East 17th Street Properties, as the owner, and Beth Israel Medical Center/Continuum, as agents of the owners and as the entities that contracted out the repair work and handled property management issues, are liable under Labor Law §§ 200, 241 (6) and common-law negligence. Plaintiff opposes defendants' motion, and cross-moves seeking leave to amend his complaint to assert a Labor Law § 240 (1) claim, and, upon amendment, seeks summary judgment in his favor as to liability on that claim.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2 Dept., 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been

made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law § 241 (6) Claim

As to plaintiff's Labor Law § 241 (6) claim, defendants argue that the claim should be dismissed as the plaintiff was engaged in a simple window repair in an area where no construction or demolition work was being performed. As such, defendants contend that the activity in which the plaintiff was engaged at the time of the accident was not the type of work covered by the statute, and thus Labor Law § 241 (6) does not apply. In support of this contention, defendants submit the affidavit of Mr. Cintron, the property manager for Beth Israel Medical Center, who averred that there was no construction or demolition work taking place at the premises on the date of the accident (NYSCEF Doc. No. 21, Cintron Aff, at ¶ 15). Additionally, assuming plaintiff was involved in "covered work," defendants maintain that he still cannot recover under section 241 (6) because the Industrial Code regulations upon which he relies (12 NYCRR §§ 23-1.4, 23-1.5 and 23-1.7) are either too general or inapplicable to the facts of this case.

In opposition, plaintiff argues that the defendants have failed to meet their burden in establishing that Labor Law § 241 (6) does not apply. The scope of the contracted window repair work involved, among other things, removing the glass and sheet metal enclosure temporarily, reframing the wooden sub frame with new materials, and

reinstalling the glazing and new caulking throughout. Plaintiff maintains that such work is covered under Labor Law § 241 (6).

"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 . . . construction, excavation or demolition work" (*Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 983 [2 Dept., 2014]; *Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2 Dept., 2007]). "[T]he courts have generally held that the scope of Labor Law § 241 (6) is governed by 12 NYCRR 23-1.4 (b) (13), which defines construction work expansively" (*Wass v County of Nassau*, 173 AD3d 933, 935 [2 Dept., 2019], quoting *De Jesus v Metro-North Commuter R.R.*, 159 AD3d 951, 953 [2 Dept., 2018]; *see Joblon v Solow*, 91 NY2d 457, 466 [1998]). Under that regulation, construction work consists of "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (*Wass v County of Nassau*, 173 AD3d at 935 [internal quotation marks omitted]; *De Jesus v Metro–North Commuter R.R.*, 159 AD3d 951, 953 [2 Dept., 2018]).

Here, while the work in which the plaintiff was engaged arguably appears to have been a "repair" of the window, rather than routine maintenance, Labor Law § 241 (6) is expressly limited to workers involved in construction, excavation or demolition (*see Esposito v N.Y. City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Sotomayer v Metropolitan Transp. Auth.*, 92 AD3d 862, 864 [2d Dept 2012]). Since the defendants have sufficiently established that the

plaintiff's work was not performed within the context of ongoing "construction, excavation or demolition" work at the site, Labor Law § 241 (6) does not apply (*see Esposito*, 1 NY3d at 528). Indeed, a review of the record reveals that no "construction, excavation or demolition work" was underway at the time of the accident, so as to fall within the purview of the statute (*see Reyes v Arco Wentworth Mgmt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]; *Bedneau v New York Hosp. Med. Ctr. of Queens*, 43 AD3d 845, 846 [2d Dept 2007]).

In any event, the court notes that the Industrial Code provisions upon which the plaintiff relies cannot support his Labor Law § 241 (6) claim. To prevail under this section of the Labor Law, the rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.,* 35 AD3d 378, 379 [2d Dept 2006]). In this regard, the court notes that Section 23-1.4, and the subdivisions contained therein, set forth the "Definitions" of the terms within the statute and does not provide specific directives for recovery under section 241 (6). Further, Industrial Code § 23-1.5 relates to the general responsibilities of employers and, thus, is too general and cannot be a basis for liability under Labor Law § 241 (6) (*see Opalinski v City of New York,* 164 AD3d 1354, 1355 [2d Dept 2018]; *Spence v Island Estates at Mt. Sinai, II, LLC*, 79 AD3d 936, 937-938 [2d Dept 2010]; *Maday v Gabe's Contracting, LLC.*, 20 AD3d 513 [2 Dept., 2005]; *Cun-En Lin v Holy Family Monuments,* 18 AD3d 800, 802 [2 Dept., 2005] [". . . defendants'

alleged violation of 12 NYCRR 23-1.5 did not provide a basis for liability under Labor Law § 241 (6), as such Industrial Code provision merely sets forth a general safety standard."]; *Sparkes v Berger*, 11 AD3d 601, 602 [2 Dept., 2004]).

As to section 23-1.7, although plaintiff does not specify which of the seven subsections was violated, none of them are applicable herein and may not support plaintiff's Labor Law § 241(6) claim. This accident arose from a glass window falling on plaintiff's hands. It was not due to his fall through a hazardous opening or during bridge or highway overpass construction; nor was it due to drowning hazards; slipping hazards; tripping hazards, vertical passages; air-contaminated work areas; or corrosive substances (*see* Industrial Code § 23-1.7 [b]-[f]).

Subsection (a)(1) of 23-1.7 pertaining to "overhead hazards" is also not applicable. That provision provides in relevant part: "(a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength." Under the factual circumstances presented here, it cannot be said that the area where plaintiff was injured was normally exposed to falling objects so as to require the overhead protections set forth in 23-1.7 (a) (1) (*Marin v AP-Amsterdam 1661 Park LLC.*, 60 AD3d 824, 826 [2 Dept., 2009]; *Mercado v TPT Brooklyn Assocs., LLC,* 38 AD3d 732, 733

[2007]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2006]). Accordingly, that branch of defendants' motion to dismiss plaintiff's Labor Law § 241 (6) claim is granted.

Labor Law § 200/Common-law Negligence Claims

In seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims, defendants argue that they owed no duty to plaintiff because the alleged incident was caused by the manner and means of his work, and since plaintiff was supervised and controlled by IHG exclusively, they (defendants) cannot be liable. To the extent plaintiff alleges that a dangerous condition (unstable window/glass) existed, defendants argue that he cannot recover where he was injured by the very condition he had undertaken to fix. Defendants additionally argue that they did not create the alleged dangerous condition in that they could not have affirmatively caused the windowsill to become rotted. Further, defendants point out that they hired IHG to remedy the condition. Defendants maintain that the plaintiff and his supervisor, Mr. Prisco, manipulated the window on the date of the accident, which caused it to fall. Lastly, defendants argue that they had no actual or constructive notice of the alleged dangerous condition and note that there is no evidence that the subject window, or any other window at the premises, fell from its frame as it did here. In support of their contentions, the defendants primarily rely upon the deposition testimony of plaintiff, Mr. Cintron and Mr. Prisco, as well as Mr. Cintron's affidavit.

In opposition, plaintiff argues that many issues of fact exist as to how the accident occurred, whether the defendants created the defective condition (unstable window/glass) by modifying/altering the top of the window, and whether defendants had actual or

constructive notice that the window was in a defective/unstable condition. In this regard, plaintiff notes that defendants' employee, Mr. Cintron, testified that, about two months before the accident occurred, he noticed that the glass had fallen down from the top of the window frame creating a 1-inch gap, and that he only placed tape over the gap to prevent cold air from coming in (NYSCEF Doc. No. 26, Cintron tr at 45-47). However, plaintiff testified that just before the window/glass fell on him, he saw Mr. Cintron stand on the windowsill that he was in the process of measuring and remove a long piece of wood, not tape, from the top of the window (NYSCEF Doc. No. 15, Leveratto tr at 101-102). Mr. Cintron denied standing on the windowsill or that he removed any wood from the window on the day of the accident (NYSCEF Doc. No. 26, Cintron tr at 142). Plaintiff notes that Mr. Cintron also denied being present in the room when his accident occurred, which conflicts with plaintiff's testimony that he was there when plaintiff was injured (NYSCEF Doc. No. 26, Cintron tr at 106-107; NYSCEF Doc. No. 15, Leveratto tr at 100). Plaintiff additionally notes that Mr. Cintron testified that based on his observation of the window two months before the accident, he found rot at the upper and lower portion of the window frame (NYSCEF Doc. No. 26, Cintron tr at 88). Based upon the foregoing conflicting testimony, plaintiff argues that numerous issues of fact preclude granting summary judgment in defendants' favor on his Labor Law § 200 and common-law negligence claims.

Plaintiff also submits an expert affidavit by Michael R. Gianatasio, a professional engineer (NYSCEF Doc. No. 97, Gianatasio Affidavit). After reviewing the pleadings,

depositions of the parties, the photographs of the job site, and discovery responses, Mr. Gianatasio opines that the window, the top of which was about nine feet above the floor, should have been secured and that Mr. Cintron's removal of a piece of wood from the top of it, as plaintiff claims, further altered the structural integrity and stability of the window and glass, thereby contributing to the accident. He concludes that the accident would not have occurred if the defendants had secured the glass in the window. Mr. Gianatasio further opines that the defendants should have provided plaintiff with safety devices, such as cut/slash proof gloves, to prevent his injuries.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe place to work (*see Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876, 877 [1993]; *Cooper v State of New York,* 72 AD3d 633, 635 [2 Dept., 2010]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2 Dept., 2015]; *see Ortega v Puccia,* 57 AD3d 54, 61 [2 Dept., 2008]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work" (*Torres*, 127 AD3d at 1165 [internal quotation marks omitted]; *see Forssell v Lerner*, 101 AD3d 807, 808 [2 Dept., 2012]; *Ortega,* 57 AD3d at 61). Where, as here, plaintiff alleges that a dangerous condition (unstable/unsecured glass window) on the premises caused his injuries, the

property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of same (*Ortega* , 57 AD3d at 61; *see Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801, [2 Dept., 2013]; *Sanders v St. Vincent Hosp.*, 95 AD3d 1195 [2 Dept., 2012]; s*ee also Nicoletti v Iracane*, 122 AD3d 811, 812 [2 Dept., 2014]; *Ventimiglia v Thatch, Ripley & Co.*, LLC, 96 AD3d 1043, 1046 [2 Dept., 2012]; *Rodriguez v BCRE 230 Riverdale,* LLC, 91 AD3d 933, 934 [2 Dept., 2012]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rendon v Broadway Plaza Assoc. Ltd. Partnership*, 109 AD3d 975, 977 [2 Dept., 2013]). "When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" (*Schnell v Fitzgerald*, 95 AD3d 1295, 1295 [2 Dept., 2012]; *see Lal v Ching Po Ng*, 33 AD3d 668 [2 Dept., 2006]).

Furthermore, as defendants point out, an exception applies and the plaintiff cannot recover under Labor Law § 200 and common-law principles where he was injured by the very condition he had undertaken to remedy (*see Kowalsky v Conreco Co.,* 264 NY 125, 128 [1934]; *Skinner v G & T Realty Corp. of N.Y.,* 232 AD2d 627 [2 Dept., 1996]; *see also Bedneau v New York Hosp. Med. Ctr. of Queens*, 43 AD3d 845, 846 [2 Dept., 2007]; *McCullum v Barrington Co. & 309 56th St. Co.*, 192 AD2d 489 [1 Dept., 1993]). However, to relieve the landowner of its duty of care, the dangerous condition must be

within the scope of the work the employee or contractor was hired to perform. If an employee is injured by some defective condition he was not specifically hired to remediate, the exception will not apply (*see Colello v T.J. Stevenson & Co., Inc.,* 284 AD 805 [2 Dept., 1954], *affd.* 308 NY 935 [1955]; *Colombo v City of New York,* 216 AD2d 27, 27 [1 Dept., 1995]).

Here, defendants contend that plaintiff's employer (IHG) was hired to repair the window, and plaintiff therefore cannot recover under Labor Law § 200 for injuries arising out of that work. Defendants, however, point to no evidence that the plaintiff, or his employer, were aware of the particular hazard (unsecured/unstable window/glass) that existed on the premises before they commenced any repair work. Although plaintiff's supervisor, Mr. Prisco, testified that he knew they were supposed to replace the windowsill, he claimed he was not made aware of the unstable condition of the window, or that there was any danger that it could completely fall from its frame (NYSCEF Doc. No. 93, Prisco tr at 157). He further testified that such information would have been necessary to know prior to working on the window (*id.* at 157-158). In addition, the plaintiff testified that he was in the process of measuring the windowsill and had not started working on any portion of the window when the glass came crashing down on his hands. Under these circumstances, defendants' have failed to establish, as a matter of law, that the plaintiff's injuries were due to the unsafe nature of the work he was hired to perform, rather than defendants' failure to furnish a reasonably safe place in which to perform the work (*see Scott v Redl*, 43 AD3d 1031, 1032 [2 Dept., 2007] [issue of fact

existed as to scope of the work plaintiff was hired to perform, and whether she was injured by the same dangerous condition she was hired to remedy"];*Colello v T.J. Stevenson & Co.*, 284 AD at 806-807; *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 44 F. Supp. 3d 409, 427 [S.D.N.Y. 2014][holding exception to landowner duty of care inapplicable where issues of fact existed as to whether the hazard posed by the "alkaline-based" dust, which injured the plaintiff, was inherent to the specific asbestos abatement work plaintiff was hired to perform]).

Moreover, the court finds that defendants' own submissions raise issues of fact as to whether there existed a separate condition or whether an affirmative act or omission taken by defendants, other than the dangerous condition within plaintiff's work purview, caused or was a contributing factor in causing plaintiff's accident (*see Wray v 654 Madison Ave. Assocs., L.P.,* 253 AD2d 394, 394 [1 Dept., 1998] [elevator mechanic plaintiff hired to repair an elevator's pulley was injured by the elevator's lack of a safety switch, not his work related to the pulley]; *Strauss v Original Consumers Oil Heating Corp.*, 9 Misc.3d 57, 59 [App. Term 2005] [affirming judgment after trial in the plaintiff's favor where accident was caused not only by the presence of an oil puddle plaintiff was assigned to clean up, but also by defendant's attempt to address the leak by having wood planks placed on the floor]; *see also Patalano v Am. President Lines, Inc.*, 322 F. Supp. 2d 293, 295–97 [E.D.N.Y. 2004] [holding exception to negligence liability inapplicable where question of fact existed as to whether workers injured by damaged container door were in the specific act of repairing the defective door when injured]). As noted above,

there is conflicting testimony as to what object (tape or piece of wood) Mr. Cintron placed at the top of the window, whether he removed it just before the accident occurred, and if so, whether such removal altered/modified the structural integrity of that window thereby causing the glass to fall on plaintiff's hands (*see Gray v Air Excel Serv. Corp.*, 171 AD3d 1026, 1028 [2 Dept., 2019] ["Where there are conflicting versions of events, it is for the trier of fact to evaluate credibility and determine what happened"]; *Brown v Kass*, 91 AD3d 894, 895 [2 Dept., 2012]; *see also Quituizaca v Tucchiarone*, 115 AD3d 924, 926, 982 [2 Dept., 2014]; *Wray v 654 Madison Ave. Assocs., L.P.,* 253 AD2d 394, 394 [1 Dept., 1998]).

Furthermore, issues of fact also exist as to whether defendants had notice of the alleged dangerous condition. During his deposition, Mr. Cintron admitted that he observed, as early as two months before the accident, rot in the top and bottom of the window frame and that the window's glass had visibly dropped down out of the frame creating a 1-inch gap, which he claimed he covered with masking tape to prevent cold air from coming in. He also testified that he continued to receive complaints of cold drafts related to the window from the tenant who occupied that office. Under these circumstances, defendants have failed to eliminate all triable issues of fact as to whether they had actual or constructive notice that the window/glass was unstable and/or likely to fall out of its frame (*see Caiazzo v Mark Joseph Contracting, Inc.*, 119 AD3d 718, 722 [2 Dept., 2014]). Accordingly, that branch of defendants' motion to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Common-Law Indemnification/Contribution Claims

The court now turns to that branch of defendants' motion seeking summary judgment in their favor on their common-law indemnity and contribution third-party claims against IHG. In support, defendants argue that they were neither negligent nor supervised the plaintiff's work, and that IHG, as plaintiff's employer, exercised such control and supervision over plaintiff's work. Defendants further argue that their third-party claims are not barred by Workers Compensation Law § 11 as the plaintiff has sustained a "grave injury" within the meaning of that provision.

Workers' Compensation Law § 11 "permits an alleged tortfeasor in an action arising from a workplace accident to assert a claim against the plaintiff's employer sounding in common-law indemnity or contribution only where the plaintiff has suffered a "grave injury" (*see Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412 [2004]; *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 876 [2 Dept., 2006]). "By statute, 'grave injury' is 'both narrowly and completely described' . . . as 'death, permanent and *total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers*, loss of multiple toes, paraplegia, quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability'" (*Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 716-717 [2 Dept., 2006], *quoting Rubeis v Aqua Club, Inc.*, 3 NY3d at 415-416 [emphasis added]; Workers' Compensation Law § 11).

The term "grave injury" has been defined as a "statutorily defined threshold for catastrophic injuries" and includes only those injuries which are listed in the statute and determined to be permanent (*Ibarra v Equip. Control, Inc.*, 268 AD2d 13, 17-18 [2 Dept., 2000]).

Here, in support of their motion, defendants have submitted, *inter alia*, the plaintiff's deposition testimony and bills of particulars, which established that the plaintiff was employed by IHG at the time of the accident, and that he sustained various injuries including, but not limited to: bilateral tendon lacerations and wounds which required surgical intervention on April 19, 2012, May 1, 2012 and March 6, 2013; bilateral hand lacerations with tendon injury; complete lacerations of both index finger extensor digitorum communis and extensor indicis proprius tendons and left long finger extensor digitorum communis tendon; left hand wound dehiscence and infection, post repair of lacerations and extensor tendons; left hand stiffness with extensor tendon scarring; and significant pip joint stiffness of all the digits with some dip joint stiffness (NYSCEF Doc No. 12, Verfied Bill of Pariculars, ¶ 7). It is undisputed that the plaintiff applied for and received Workers' Compensation benefits related to the incident. Thus, for IHG, as plaintiff's employer, to be held liable in common-law indemnification, it must be shown that the plaintiff suffered from a "grave injury" (*see* Workers' Compensation Law § 11; *see Poalacin v Mall Properties*, Inc., 155 AD3d 900, 910 [2 Dept., 2017]; *Benedetto v Carrera Realty Corp.,* 32 AD3d at 876).

Defendants maintain that the plaintiff has sustained a grave injury in that he has loss of use of three fingers in his left hand which has rendered a total loss of use of that hand. In support of this contention, defendants refer to plaintiff's deposition testimony that he has undergone three surgeries to his left hand and was unable to move that hand prior to and after the third surgery (NYSCEF Doc. No. 15, Leveratto tr at 142, 146-147). He testified that his left hand felt weak and hard (*id.* at 161), and that he could not make a fist with that hand (*id.* at 148). Plaintiff also testified that one of his doctors', Dr. Lacari, told him that his left hand was going to get worse over time, and have less movement (*id.* at 154). Although defendants also submit copies of plaintiff's medical records from Beth Israel Medical Center and Dr. Roger J. Ziets, they do not specifically reference any portions in support of their contention that the plaintiff has sustained a "grave injury."

In opposition, IHG argues that the defendants have failed to establish, as a matter of law, that the plaintiff has in fact sustained a "grave injury." IHG contends that a review of the record demonstrates that while plaintiff's hands are weakened, especially his left hand, he can still use them for "some" tasks and therefore, has not sustained a "total loss" of use of either hand. In support of this contention, IHG refers to various medical records which document the three surgeries (April 19, 2012, May 1, 2012 and March 6, 2013), plaintiff underwent on his hands and his progress thereafter (NYSCEF Doc. Nos. 109-119). In particular, approximately six and a half months after the third and last surgical procedure, plaintiff's treating physician, Dr. Robert J. Ziets, noted in a report, dated September 26, 2013, that plaintiff complained of discomfort and stiffness,

but "admit[ed] that the [left] hand is moving better" (NYSCEF Doc. No. 119). Dr. Ziets further noted that the plaintiff's left hand's range of motion is improved, that "passive motion of the thumb, index and small fingers is full to the distal palmar crease (DPC)," "composite flexion of the long and ring fingers lacks only a few mm from the DPC with soft endpoint," and that "there is strong active extension of all digits" (*id.*).

In addition, IHG submits an affirmed report by plaintiff's own expert, Dr. Gabriel L. Dassa, wherein he noted that he examined the plaintiff on March 11, 2019, who at the time complained of pain and numbness in both his hands (NYSCEF Doc. No. 121). Although Dr. Dassa opined that the plaintiff has lost significant use of both his left and right hands, range of motion measurements (using a handheld gonimeter) indicated that the plaintiff's right hand second, fourth and fifth digit fingers were close to or within normal ranges, and that the right hand had a grip strength of thirty pounds. While range of motion measurements of the left hand's second and third digit fingers have significantly limited motion, the fourth and fifth digit fingers are close to normal ranges and the grip strength is five pounds.

IHG also refers to plaintiff's deposition testimony that he can make a partial fist with his right hand, but not his left, that he sometimes needs help getting dressed, and that he has to be careful when picking up heavy items (NYSCEF Doc. No. 15, Leveratto tr at 148-149, 153). However, IHG notes that the plaintiff never stated that he always needs assistance dressing, that he cannot lift lighter objects, or that he cannot use his hands at all.

Based upon the foregoing, although the evidence demonstrates that the plaintiff has significant dysfunction of his left hand, it cannot be said, as a matter of law, that the plaintiff has lost "total use" of it (*see Maxwell v Rockland County Community College*, 78 AD3d 793 [2 Dept., 2010]). Indeed, even though plaintiff's injury sometimes limits his ability to perform certain activities like dressing or cleaning, and prevents him from resuming work as a carpenter, it does not rise to the level of "grave injury" because the evidence indicates that the plaintiff has some use of his left hand (*see Kraker v Consol. Edison Co.*, 23 AD3d 531, 533 [2 Dept., 2005] [no grave injury where plaintiff "could type with his right hand one key at a time, could brush his hair with his right hand, and could carry his shoes in his right hand"]; *Aguirre v Castle Am. Const., LLC*, 307 AD2d 901, 901 [2 Dept., 2003] [while plaintiff severely injured his arm, he still had "some movement in his arm" and, as a result, did not sustain an injury constituting a permanent and total loss of use of that arm as required under Workers' Compensation Law § 11]; *Trimble v Hawker Dayton Corp.*, 307 AD2d 452, 453 [3 Dept., 2003] [plaintiff's injury, though severe and disabling, did not rise to the level of a grave injury where he had some use of his right hand]).

Moreover, the court rejects defendants' contention that plaintiff's injuries constitute the loss of multiple fingers under the statute. Workers' Compensation Law § 11 provides an exhaustive list of grave injuries and the statute does not equate the loss of a finger with the loss of use of a finger (*see Rubeis v Aqua Club, Inc.*, 3 NY3d at 416; *Dunn v Smithtown Bancorp*, 286 AD2d 701 [2d Dept 2001]). Accordingly, the court

finds as a matter of law that, despite the serious nature of his injuries, the plaintiff did not sustain a grave injury as defined by the statute. As such, that branch of defendants' motion for summary judgment on the issue of common law indemnification and/or contribution as against IHG is denied. The remainder of defendants' motion to the extent is has not been addressed is hereby denied.

Plaintiff's Cross-Motion to Amend the Complaint and for Summary Judgment

In his cross motion, the plaintiff seeks to amend the complaint to add a Labor Law § 240 (1) cause of action and, upon amendment, seeks summary judgment in his favor on said claim.[1]

In so moving, plaintiff maintains that his delay in seeking this amendment is reasonable in light of the recent (June 7, 2019) deposition of Mr. Cintron, the former Beth Israel Medical Center employee and, in any event, the proposed Labor Law § 240 (1) claim is based on the same relevant facts as set forth in his original complaint – that while performing repair/construction work he sustained injuries when the glass window fell on his hands. Plaintiff notes that the defendants are not prejudiced by such an amendment in that their former employee, Mr. Cintron, had issued two (2) incident/accident reports – one on the date of the accident and one the day after indicating that plaintiff "hired by us

[1] The court notes that the plaintiff has failed to submit a proposed amended complaint in his cross motion as required by CPLR 3025(b). The court, however, will overlook the technical defect since the limited proposed amendment, which is largely based on the same facts as alleged in plaintiff's original complaint, is clearly described in plaintiff's moving papers (*see* CPLR 2001; *Medina v City of New York*, 134 AD3d 433, 433 [1 Dept., 2015]).

to repair the damaged windowsill . . . suffered injury to his hands while working." "Somehow the glass came down on his hands" (NYSCEF Doc. No. 74, Incident/Accident Emails/Reports from Benjamin Cintron). Plaintiff contends that this documentation regarding the mechanism of the injury gave defendants knowledge of the basis of this Labor Law § 240 claim, as well as the § 241 (6) and § 200 claims. Therefore, plaintiff argues that such an amendment creates no prejudice to the defendants.

Defendants oppose plaintiff's cross motion seeking to amend his complaint arguing, *inter alia*, that plaintiff failed to provide a reasonable excuse for the delay, that the cross motion is untimely because it is made after the note of issue was filed, and that the plaintiff had knowledge of the facts underling the proposed section 240 (1) claim at the time the action was initially commenced six years ago. Additionally, defendants claim they are prejudiced by the late amendment in that at least five depositions were conducted without any notice of a Labor Law § 240 (1) claim. Defendants argue that the questions and strategy for each deposition would have been different had such a claim been asserted earlier.

It is well settled that leave to amend pleadings pursuant to CPLR 3025 (b) should be freely given, provided that the proposed amendment does not prejudice or surprise the opposing party and is not palpably insufficient or patently devoid of merit (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Schelchere v Halls*, 120 AD3d 788 [2 Dept., 2014]). "Lateness alone is not a barrier to the amendment" (*Carducci v Bensimon*, 115 AD3d 694, 695 [2d Dept., 2014]; *see also Myung Hwa Jang v Mang*, 164

AD3d 803, 804 [2 Dept., 2018], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2 Dept., 2008]; *see* CPLR 3025 [b]; *US Bank N.A. v Murillo*, 171 AD3d 984, 985 [2019]).). "It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v City of New York*, 60 NY2d at 959 [internal quotation marks omitted]; *see Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767, 767–68 [2 Dept., 2015]). Indeed, leave to amend pleadings may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, and causes no prejudice to the defendant (*Ortiz v Chendrasekhar,* 154 AD3d 867, 869 [2 Dept., 2017]; *see Tuapante v LG-39, LLC*, 151 AD3d 999, 1000 [2 Dept., 2017]). Furthermore, "[n]o evidentiary showing of merit is required under CPLR 3025(b). The court need only determine whether the proposed amendment is 'palpably/insufficient' to state a cause of action or defense or is patently devoid of merit" (*Lucido v Mancuso,* 49 AD3d 220 at 229).

Here, contrary to defendants' contention, plaintiff's proposed Labor Law § 240 (1) claim is not palpably insufficient or patently devoid of merit (*see Clarke v Acadia-Washington Square Tower 2, LLC*, 175 AD3d 1240, 1241 [2 Dept., 2019]; *Ramos v Baker*, 91 AD3d 930, 932 [2d Dept 2012]). Plaintiff contends that his Labor Law § 240 (1) cause of action is based upon the same factual allegations set forth in his original complaint–that while performing repair work upon the defendant's premises, the glass window fell on him and the defendants did not provide him with adequate protection to prevent his injuries. In this regard, he argues that the glass was an integral part of the

repair of the window itself, and its securing was both required and expected for this undertaking. As such, plaintiff contends that the glass was a "falling object" within the meaning of Labor Law § 240 (1) even though it was not actually being hoisted or secured at the time of the accident, but because it required securing for the purpose of his repair work.

In opposition, defendants argue that Labor Law § 240 (1) is inapplicable to the facts of this case. They contend that this provision applies only to work-site injuries that occur as a result of falling from an elevated-height or being struck by a falling object that was improperly raised or inadequately secured above the ground. Thus, defendants contend the instant case falls outside of the purview of Labor Law§ 240 (1). Defendants additionally argue that the plaintiff was a recalcitrant worker in that he failed to follow his supervisor's instructions to wait until he (Mr. Prisco) returned with the necessary materials before commencing work, thereby precluding liability under Labor Law § 240 (1).

Labor Law § 240 (1) imposes a non-delegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). To recover under the statute, a plaintiff must demonstrate that he or she was engaged in a covered activity -- "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240[1]); *see Panek v County of Albany,* 99 NY2d 452, 457

[2003]) – and must have suffered an injury as "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). With respect to a worker's injury from a falling object, liability is not limited to objects falling while in the process of being hoisted or secured, nor is it necessary that the object fall from a level higher than the level at which the work is being performed (*see Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758–759 [2008]). An object needs to be secured if the nature of the work performed at the time of the accident posed a significant risk that the object would fall (*see Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 731 [2 Dept., 2011]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004, 1006 [2 Dept., 2009]).

Upon the within submissions, it cannot be conclusively determined that the glass that struck the plaintiff was not an object that required securing for the purposes of his repair work within the meaning of Labor Law § 240(1), or that a statutorily enumerated protective device would not have been 'necessary or even expected' to shield plaintiff" from such harm (*see Outar v City of New York*, 5 NY3d 731, 732 [2005]; *Ginter v Flushing Terrace,* LLC, 121 AD3d 840, 843 [2 Dept., 2014] [triable issues of fact as to whether the object that struck the decedent was an object that was being hoisted or secured" or required securing for the purposes of the undertaking pursuant to Labor Law § 240(1)]). Thus, the court finds that plaintiff's proposed amendment is not devoid of merit. In so holding, the court notes that "[n]o evidentiary showing of merit is required

under CPLR 3025(b)" *(Lucido v Mancuso*, 49 AD3d at 229, [2 Dept., 2008] *see also 1259 Lincoln Place Corp. v Bank of New York*, 159 AD3d 1004, 1006 [2 Dept., 2018]).

Furthermore, the court does not find that the defendants were unduly prejudiced or surprised by the timing of plaintiff's cross motion to amend (*see Ramos v Baker*, 91 AD3d at 932). Although plaintiff's cross motion was not made until after the parties had completed discovery and the note of issue had been filed, mere lateness is not a barrier to the amendment, but must be coupled with significant prejudice to the other side (*see Henry v MTA*, 106 AD3d 874, 875 [2 Dept., 2013]; *Aurora Loan Servs., LLC v Dimura*, 104 AD3d 796, 797 [2 Dept., 2013]). Inasmuch as the proposed amendment arises out of the same facts as those set forth in plaintiff's original complaint, defendants cannot legitimately claim significant prejudice or surprise (*see Ciminello v Sullivan,* 120 AD3d 1176, 1177 [2 Dept., 2014][no prejudice or surprise where proposed amendments to pleading arose out of the same facts as those underlying the action]; *Koenig v Action Target, Inc.*, 76 AD3d 997, 997–998 [2 Dept., 2010]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558 [2 Dept., 2007]; *Whitehorn Assoc. v One Ten Brokerage*, 264 AD2d 516, 517 [2 Dept., 1999]). Accordingly, that branch of plaintiff's cross motion to amend the complaint to include a cause of action under Labor Law § 240 (1) is granted.

However, since issue has not yet been joined on this new cause of action, that part of plaintiffs' cross motion seeking summary judgment on their Labor Law § 240 (1) claim is denied as premature (*see R&G Brenner Income Tax Consultants v Gilmartin*,

166 AD3d 685, 688 [2 Dept., 2018]; *Bd. of Managers of Bayberry Greens Condo. v Bayberry Green Assocs.*, 174 AD2d 595, 596 [2 Dept., 1991]).

Conclusion

Accordingly, based upon the above, it is

Motion Sequence No. 12

ORDERED that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) cause of action as against them is granted; and it is further

ORDERED that branch of defendants' motion seeking to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims as against them is denied; and it is further

ORDERED that branch of defendants' motion seeking summary judgment on their third-party claims against IHG for common-law indemnity and contribution is denied; and it is further

Motion Sequence No. 15

ORDERED that branch of plaintiff's cross motion seeking leave to amend his complaint to assert a Labor Law § 240 (1) cause of action against defendants is granted, and plaintiff may serve upon defendants an amended complaint within 20 days hereof, provided that such amended complaint shall not include any cause of action dismissed in this decision and order; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within 20 days of said service; and it is further

ORDERED that plaintiff's motion seeking partial summary judgment as to liability as based upon Labor Law § 240 (1) cause of action is denied as premature; and it is further

ORDERED that plaintiff, within 20 days, is directed to serve a copy of this order upon all parties, with notice of entry.

The foregoing constitutes the decision and order of the court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.