

Padron v Granite Broadway Dev. LLC

2020 NY Slip Op 33422(U)

October 15, 2020

Supreme Court, New York County

Docket Number: 157049/2013

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

CARLOS PADRON and ESTELLA PADRON,

Index No. 157049/2013

Plaintiffs

- against -

DECISION AND ORDER

GRANITE BROADWAY DEVELOPMENT LLC,
MARRIOTT INTERNATIONAL, INC., CNY
BUILDERS 1717 LLC, and PARKVIEW
PLUMBING, INC.,

Defendants

GRANITE BROADWAY DEVELOPMENT LLC and CNY
BUILDERS 1717 LLC,

Third Party Plaintiffs

- against -

PARKVIEW PLUMBING, INC.,

Third Party Defendant

GRANITE BROADWAY DEVELOPMENT LLC and CNY
BUILDERS 1717 LLC,

Second Third Party Plaintiffs

- against -

TRANSCONTINENTAL CONTRACTING, INC.,
d/b/a TRANSCONTINENTAL STEEL,

Second Third Party Defendant

-----X

PARKVIEW PLUMBING, INC.,

Third Third Party Plaintiff

- against -

PROGRESSIVE FIRE SPRINKLER CORP.
formerly known as ACTIVE FIRE SPRINKLER
CORP., ACTIVE FIRE SPRINKLER NYC, LLC,
and R & S UNITED SERVICES, INC.,

Third Third Party Defendants

-----X
-----X

GRANITE BROADWAY DEVELOPMENT LLC and CNY
BUILDERS 1717 LLC,

Fourth Third Party Plaintiffs

- against -

R & S UNITED SERVICES, INC., PROGRESSIVE
FIRE SPRINKLER CORP. formerly known as
ACTIVE FIRE SPRINKLER CORP., and ACTIVE
FIRE SPRINKLER NYC, LLC,

Fourth Third Party Defendants

-----X
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LUCY BILLINGS, J.S.C.:

In this action under the New York Labor Law, defendants
Granite Broadway Development LLC, the owner of the building under
construction where plaintiff Carlos Padron was injured, and CNY
Builders 1717 LLC, the construction manager, move for summary
judgment dismissing the complaint. C.P.L.R. § 3212(b). They
also move for summary judgment on their claims for

indemnification against third party defendant Parkview Plumbing, Inc., a plumbing contractor on the construction project, and against second third party defendant Transcontinental Contracting, Inc., Padron's employer. C.P.L.R. § 3212(b) and (e). Third third party defendant R & S United Services, Inc., a steam fitting contractor on the construction project, separately moves for summary judgment dismissing the third third party complaint against R & S United Services. C.P.L.R. § 3212(b). Second third party defendant Transcontinental Contracting separately moves for summary judgment dismissing the second third party complaint. Id. Finally, defendant-third party defendant Parkview Plumbing separately moves for summary judgment dismissing the complaint and for summary judgment on Parkview Plumbing's third third party complaint. Id.

I. BACKGROUND

Plaintiff Carlos Padron testified at his deposition that on July 19, 2013, he was an ironworker employed by Transcontinental Contracting working on defendants' construction project at 1717 Broadway, New York County. Transcontinental Contracting was installing "handrails, staircases, any type of miscellaneous iron on the project." Aff. of Steven D. Zecca Ex. N, at 19.

At approximately 8:00 a.m. that day, Padron was working on a stairwell that ascended from the fifth to the sixth floor of the building under construction. After walking up the stairs

carrying steel railings, he reached the landing on the sixth floor where he slipped and fell on a puddle of water. He testified that the staircase was dry as he walked toward the landing; the water was only on the landing, covering the entire landing area, which was not exposed to the elements. The landing area was approximately ten feet long, approximately three to four feet wide, and covered in water wall to wall about an inch high, "up to your heels." Id. at 84.

Padron seeks damages for the injuries sustained from his fall based on Labor Law §§ 200, 240(1), and 241(6) and negligence. His wife claims derivatively for the loss of his services.

Defendant owner and construction manager commenced a third party action against Parkview Plumbing for implied, non-contractual indemnification, contractual indemnification, and breach of a contract, including failure to procure contractually required insurance. Plaintiffs then amended their complaint to claim directly against Parkview Plumbing. Defendant owner and construction manager also commenced a second third party action against Transcontinental Contracting similarly claiming implied indemnification, contractual indemnification, and breach of a contract, including failure to procure insurance.

Parkview Plumbing commenced a third third party action against contractors Progressive Fire Sprinkler Corp., Active Fire

Sprinkler NYC, LLC, and R & S United Services seeking implied indemnification and contribution. Defendant owner and construction manager commenced a fourth third party action against the same parties, Progressive Fire Sprinkler, Active Fire Sprinkler, and R & S United Services, seeking, like these defendants' earlier third party actions, implied indemnification, contractual indemnification, and breach of a contract, including failure to procure insurance.

II. THE MOTION BY GRANITE BROADWAY DEVELOPMENT AND CNY BUILDERS

Granite Broadway Development and CNY Builders move for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim because Padron's fall was not from an elevation. These defendants seek summary judgment dismissing plaintiffs' Labor Law § 200 and negligence claims based on the absence of supervisory control by the owner or construction manager over Padron. Finally, these defendants seek summary judgment dismissing plaintiffs' Labor Law 241(6) claim on the grounds that the regulations under the statute on which plaintiffs rely are inapplicable to the circumstances of Carlos Padron's injury. CNY Builders has conceded that it was the owner's agent on the construction site and therefore subject to liability under the Labor Law. Granite Broadway Development and CNY Builders also move for summary judgment dismissing all cross-claims and counterclaims against these defendants and for summary judgment

on their claims for contractual and implied indemnification in their third party complaint against Parkview Plumbing and second third party complaint against Transcontinental Contracting.

A. Labor Law § 240(1) Claim

Labor Law § 240(1) requires all building owners and their agents:

in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure to 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.

This "statutory language must not be strained in order to encompass what the Legislature did not intend to include," Martinez v. City of New York, 93 N.Y.2d 322, 326 (1999), and must be construed considering the realities of the workplace where Padron's injury occurred. Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134, 140 (2011).

Labor Law § 240(1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"; the peril must be attributable to a difference between the elevation of Padron's required work and a lower level. Buckley v. Columbia Grammar & Preparatory, 44 A.D.3d 263, 267 (1st Dep't 2007). See Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d 90, 97 (2015); Brown v. New York-

Presbyt. HealthCare Sys., Inc., 123 A.D.3d 612, 612 (1st Dep't 2014). Therefore,

Not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240(1). Rather, 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 N.Y.2d 259, 267 (2001). See Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d at 97; Brown v. New York-Presbyt. HealthCare Sys., Inc., 123 A.D.3d at 612-13.

To constitute a violation of § 240(1), Padron's injury must fit within the "special hazards" contemplated by the statute.

Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d at 97; Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 916 (1999);

Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501

(1993); Buckley v. Columbia Grammar & Preparatory, 44 A.D.3d at

267. The "special hazards" to which § 240(1) applies "do not encompass any and all perils that may be connected in some

tangential way with the effects of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height" Ross v. Curtis-

Palmer Hydro-Electric Co., 81 N.Y.2d at 501. See Nicometi v.

Vineyards of Fredonia, LLC, 25 N.Y.3d at 97; Brown v. New York-

Presbyt. HealthCare Sys., Inc., 123 A.D.3d at 612.

Finally, an injury covered by Labor Law § 240(1) must flow directly not only "from the application of the force of gravity

to an object or person," but also from a harm against which an adequate "scaffold, hoist, stay, ladder or other protective device" would have shielded the injured worker. Salazar v. Novalex Contracting Corp., 18 N.Y.3d at 139. See Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 604 (2009); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 501. Plaintiffs insist that defendants failed to provide an adequate device to prevent or break Carlos Padron's fall. Even if plaintiffs may not be required to identify such a device, such a failure in any event does not "establish liability if the statute is intended to protect against a particular hazard," directly flowing from the force of gravity, but "a hazard of a different kind is the occasion of the injury." Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513 (1991).

Plaintiffs allege that Carlos Padron was injured from slipping on water and falling when walking on a wet landing. No risk from an elevation was involved. He slipped and fell from the ground level to the same ground he was standing on. He did not fall from a height. Although he testified that he was stepping up to the landing from the staircase when he slipped, he lost his footing on the landing and fell on the flooded landing, not down the staircase that he had ascended before he reached the landing. Therefore his injury simply does not fit within the ambit of Labor Law § 240(1) as delineated above. Nicometi v.

Vineyards of Fredonia, LLC, 25 N.Y.3d at 99-100; Reyes v. Magnetic Constr., Inc., 83 A.D.3d 512, 513 (1st Dep't 2011); Cabrera v. Sea Cliff Water Co., 6 A.D.3d 315, 316 (1st Dep't 2004).

Plaintiffs also must demonstrate that defendants' failure to provide Carlos Padron an adequate safety device was the proximate cause of his injury. Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d at 98-99; Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc., 1 N.Y.3d 280, 289 (1st Dep't 2003); Brown v. New York-Presbyt. HealthCare Sys., Inc., 123 A.D.3d at 612-13. Liability may be imposed only if his task created an elevation related risk against which the safety devices listed in Labor Law § 240(1) protect. Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y.3d at 98-99; Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 681 (2007); Brown v. New York-Presbyt. HealthCare Sys., Inc., 123 A.D.3d at 612-13. Nothing in the circumstances causing Padron to fall suggests that a safety device to protect against an injury from an elevation or from the force of gravity would have prevented his fall. His testimony establishes that a wall-to-wall water condition on a floor surface, due to a leak, caused him to slip and fall. For all these reasons, the circumstances of Padron's injury do not afford him Labor Law § 240(1)'s protections. Therefore the court grants summary judgment

dismissing his claim under Labor Law § 240(1). C.P.L.R. § 3212(b).

B. Labor Law § 200 and Negligence

Labor Law § 200 codifies the duty of an owner of a construction site and the owner's agent to maintain the site safely. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d 343, 352 (1998); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877-78 (1993). Claims under Labor Law § 200 fall into one of two categories: where a dangerous condition on the work site premises causes a worker's injury, Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 352; Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d at 877; Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 626 (1st Dep't 2015); Ocampo v. Bovis Lend Lease LMB, Inc., 123 A.D.3d 456, 457 (1st Dep't 2014), and where dangerous performance of the work causes the injury. Jaycoxe v. VNO Bruckner Plaza, LLC, 146 A.D.3d 411, 412 (1st Dep't 2017); Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 626; Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144 (1st Dep't 2012).

Padron's injury fits in the first category: his injury arose from a dangerous condition on the work site premises. Pursuant to Labor Law § 200 and principles of liability for ordinary negligence, Granite Broadway Development and CNY Builders owed plaintiff a duty to provide him a safe work environment. Where a dangerous condition caused his injury,

liability attaches if the owner or its agent created the condition or received actual or constructive notice of the condition. Armental v. 401 Park Ave. S. Assocs., LLC, 182 A.D.3d 405, 407 (1st Dep't 2020); DeMercurio v. 605 W. 42nd Owner LLC, 172 A.D.3d 467, 467 (1st Dep't 2019); Prevost v. One City Block LLC, 155 A.D.3d 531, 534 (1st Dep't 2017).

Plaintiffs claim that the very extent and depth of the water on the landing where Carlos Padron fell show that Granite Broadway Development and CNY Builders allowed the water to remain long enough to provide them notice of the dangerous condition that caused his fall and time to correct it before he was injured. While no evidence indicates that Granite Broadway Development or CNY Builders created the wet condition that caused Padron's injury, Bradley v. HWA 1290 III LLC, 157 A.D.3d 627, 631 (1st Dep't 2018), aff'd, 32 N.Y.3d 1010 (2018); Prevost v. One City Block LLC, 155 A.D.3d at 534; DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 626 (1st Dep't 2015), the evidence does raise a factual question whether CNY Builders received constructive notice of condition. DeMercurio v. 605 W. 42nd Owner LLC, 172 A.D.3d at 467-68; DaSilva v. Everest Scaffolding, Inc., 136 A.D.3d 423, 424 (1st Dep't 2016); Rainer v. Gray-Line Dev. Co., LLC, 117 A.D.3d 634, 635 (1st Dep't 2014).

Jan Grimsland, CNY Builders' Vice President of Risk Management and Safety, testified at his deposition that CNY

Builders conducted daily walk-throughs of the construction site to ensure compliance with safety requirements. He testified that CNY Builders conducted these inspections between 8:00 and 10:00 a.m. each morning, but plaintiffs maintain that, to ensure safety, these inspections were required before any workers were allowed on the construction site as Padron was when he was injured at 8:00 a.m. Granite Broadway Development and CNY Builders protest that their agents could not cover a construction project of 65 stories all at once, but do not show that work was in progress on all 65 stories at once and that their agents could not at least cover the areas where workers were deployed.

In any event, no witness or document ever indicates that, when CNY Builders or its agent conducted its walk-through July 19, 2013, or even the day before, the sixth floor landing was dry. Pereira v. New Sch., 148 A.D.3d 410, 412-13 (1st Dep't 2017); Graham v. YMCA of Greater N.Y., 137 A.D.3d 546, 547 (1st Dep't 2016); Pineda v. 1741 Hone Realty Corp., 135 A.D.3d 567, 567 (1st Dep't 2016); Velez v. City of New York, 134 A.D.3d 447, 447 (1st Dep't 2015). See Hill v. Manhattan N. Mgt., 164 A.D.3d 1187, 1187 (1st Dep't 2018); Socorro v. New York Presbyt. Weill-Cornell Med. Ctr., 160 A.D.3d 544, 544 (1st Dep't 2015); Sada v. August Wilson Theater, 140 A.D.3d 574, 574 (1st Dep't 2016); Dylan P. v. Webster Place Assoc., L.P., 132 A.D.3d 537, 538 (1st Dep't 2015). Although a record by Granite Broadway Development's

safety contractor indicates there was no water anywhere on any floor at 7:00 a.m. July 19, 2013, this record is unauthenticated either pursuant to C.P.L.R. § 4540-a or otherwise by any witness, and no witness lays a foundation for the record's admissibility as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012).

The parties stipulated that the court consider the CNY Builders Project Manager's Daily Log for July 19, 2013, as authenticated and admissible for purposes of the pending motions. It recorded leaks on the fifth floor and sixth floor, where Padron was injured. The Daily Log also recorded that Parkview Plumbing was performing work on the fifth and sixth floors and that R & S United Services was performing duct work on the fifth floor, working on heat pumps from the 33rd floor down, and installing diffusers on stairwells from the 43rd floor down. A water condition of the extent Padron depicted, one to two inches in depth across a landing that was ten by three to four feet, raises a factual question whether the condition was apparent long enough before Padron's injury to permit defendants' employees to discover and remedy the condition, establishing constructive

notice. Hill v. Manhattan N. Mgt., 164 A.D.3d at 1187-88; Sada v. August Wilson Theater, 140 A.D.3d at 574; Jackson v. Whitson's Food Corp., 130 A.D.3d 461, 462 (1st Dep't 2015); Munoz v. Uptown Paradise T.P. LLC, 69 A.D.3d 401, 401-402 (1st Dep't 2010).

Granite Broadway Development's Vice President Ronnie Gross testified at his deposition that the owner visited the construction site only once or twice per week to monitor the project's progress and was notified only of conditions that might involve a change to contract terms, correction of a defect, or an impact on the project's progress. The owner did not regularly walk through the work site, was not kept apprised of any unsafe conditions, and never received any notice of a leak around the sixth floor or the stairwell that Padron was ascending. Gross did not recall visiting those areas July 19, 2013, or any other time in 2013. No other evidence shows that the owner's employees were at the site to receive notice of any dangerous condition. Prevost v. One City Block LLC, 155 A.D.3d at 534; DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d at 626; Phillip v. 525 E. 80th St. Condo., 93 A.D.3d 578, 579 (1st Dep't 2012); Rich v. 125 W. 31st St. Assocs., LLC, 92 A.D.3d 433, 435 (1st Dep't 2012). See Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 627. Therefore Granite Broadway Development is not liable for a violation of Labor Law § 200 or for negligence.

Granite Broadway Development and CNY Builders insist that neither of them could have received constructive notice of this condition, relying on Gunzburg v. Quality Bldg. Servs. Corp., 137 A.D.3d 424, 424 (1st Dep't 2016), where the plaintiff slipped and fell on water and testified that, despite looking at the floor where she was walking, she did not discern the wet spots on the floor until after she fell. She described the wet spots as clear droplets in a small area less than two feet in diameter that were "hard to have seen . . . when I was standing up." Id. This testimony established that the water on which she slipped was not visible or apparent and therefore did not give the defendants constructive notice. Id.

The contrast between this testimony and Padron's testimony is stark. The area where Padron fell that he depicted, ten feet by three to four feet, covered in water up to his heels, is not comparable to the water condition depicted in Gunzburg. Because the evidence here raises a factual question whether CNY Builders was charged with constructive notice of the water condition, the court denies summary judgment dismissing plaintiffs' Labor Law § 200 and negligence claims against CNY Builders. C.P.L.R. § 3212(b).

C. Labor Law § 241(6)

Granite Broadway Development and CNY Builders move for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim

based on each of the regulations plaintiffs claim was violated: 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.30, 23-2.1, and 23-2.7, as well as federal regulations. Plaintiffs do not oppose dismissal of their claim based on violations of these regulations except 12 N.Y.C.R.R. § 23-1.7(d) and (f). Therefore the court considers plaintiffs' claim based on violations of all regulations other than 12 N.Y.C.R.R. § 23-1.7(d) and (f) abandoned. Norris v. Innovative health Sys., Inc., 184 A.D.3d 471, 471 (1st Dep't 2020); Leveron v. Prana Growth Fund I L.P., 181 A.D.3d 449, 450-51 (1st Dep't 2020); Henry v. Carr, 161 A.D.3d 424, 425 (1st Dep't 2018); Ng v. NYU Langone Med. Ctr., 157 A.D.3d 549, 550 (1st Dep't 2018). While plaintiffs' claim that Granite Broadway Development and CNY Builders violated 29 C.F.R. part 1926 under the federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-78, does not form the basis for a violation of Labor Law § 241(6), Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 351 n.; Jerez v. Tishman Constr. Corp. of N.Y., 118 A.D.3d 617, 618 (1st Dep't 2014); Garcia v. 225 E. 57th St. Owners, Inc., 96 A.D.3d 88, 90-91 (1st Dep't 2012); Schiulaz v. Arnell Constr. Corp., 261 A.D.2d 247, 248 (1st Dep't 1999), defendants' violations of regulations under OSHA may constitute evidence of their negligence. Flores v. Infrastructure Repair Serv. LLC, 52 Misc. 3d 664, 670-71 (Sup Ct. N.Y. Co. 2015). See Ganci v. Port Auth. Trans-Hudson Corp., 258

A.D.2d 386, 386 (1st Dep't 1999); Gammons v. City of New York, 109 A.D.3d 189, 201-202 (2d Dep't 2013); Murdoch v. Niagara Falls Bridge Commn., 81 A.D.3d 1456, 1457 (4th Dep't 2011); Khan v. Bangla Motor & Body Shop, Inc., 27 A.D.3d 526, 528-29 (2d Dep't 2006).

The remaining bases for plaintiffs' claim under Labor Law § 241(6), 12 N.Y.C.R.R. §§ 23-1.7(d) and 23-1.7(f), provide:

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

(f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Neither the complaint nor plaintiffs' bill of particulars mentions § 23-1.7(d) or 23-1.7(f); their bill of particulars cites only § 23-1.7. Plaintiffs cite specifically to § 23-1.7(d) and (f) only in opposition to defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim. As long as plaintiffs' belated specification of these regulatory provisions does not depend on new factual allegations, raise a new theory of liability, or prejudice defendants, plaintiffs may rely on these provisions to oppose defendants' motions, although plaintiffs

must amend their bill of particulars to include these provisions as plaintiffs claim they now have done. Leveron v. Prana Growth Fund I, L.P., 181 A.D.3d at 450; Flynn v. 835 6th Ave. Master L.P. 107 A.D.3d 614, 614 (1st Dep't 2013); Burton v. CW Equities, LLC, 97 A.D.3d 462, 462-63 (1st Dep't 2012); Harris v. City of New York, 83 A.D.3d 104, 111 (1st Dep't 2011).

The evidence set forth above unquestionably raises a factual issue whether Granite Broadway Development and CNY Builders permitted Padron to work in a walkway or passageway that was in a slippery condition caused by water that had not been removed or covered. This slippery walkway or passageway caused by water that had not been removed or covered does not depend on new factual allegations or raise a new theory of liability and thus does not prejudice defendants. To the extent that Granite Broadway Development and CNY Builders contend that liability premised on 12 N.Y.C.R.R. § 23-1.7(d) depends on an owner's, agent's, or contractor's negligence in failing to prevent or remedy the slippery wet condition, the evidence regarding CNY Builders' potential negligence discussed above sustains the claim premised on this regulatory provision. Rizzuto v. L.A. Wegner Contr. Co., 91 N.Y.2d at 351; Booth v. Seven World Trade Co., L.P., 82 A.D.3d 499, 501 (1st Dep't 2011). Therefore the court denies summary judgment dismissing plaintiffs' claim under Labor

Law § 241(6) to the extent that the claim is based on 12 N.Y.C.R.R. § 23-1.7(d). C.P.L.R. § 3212(b).

12 N.Y.C.R.R. § 23-1.7(f), however, is inapplicable to the circumstances of Padron's injury. Subsection (f) applies to vertical passage. Sawczynszyn v. New York Univ., 158 A.D.3d 510, 511 (1st Dep't 2018); Molloy v. Long Is. R.R., 150 A.D.3d 421, 422 (1st Dep't 2017); Miranda v. NYC Partnership Hous. Dev. Fund Co., Inc., 122 A.D.3d 445, 446 (1st Dep't 2014); Lelek v. Verizon N.Y., Inc., 54 A.D.3d 583, 584-85 (1st Dep't 2008). No evidence indicates that plaintiff was injured while ascending or descending a vertical passage. Padron testified that he fell while traversing a level landing on the sixth floor of the building. Even if he fell while still ascending the stairway, he was provided the stairway as the means of access to the working level on the sixth floor above. The stairway was not unsafe; only the sixth floor was unsafe. In any event, while an unsafe stairway might violate Labor Law § 200, such a condition would not violate 12 N.Y.C.R.R. § 23-1.7(f), as it does not require stairways to be safe; it requires only that another safe means of access be provided if a stairway, ramp, or runway is not provided.

Moreover, 12 N.Y.C.R.R. § 23-1.7(f) applies to areas under construction where a temporary vertical passage provides a means of access to a level above or below. Sawczynszyn v. New York

Univ., 158 A.D.3d at 511; Miranda v. NYC Partnership Hous. Dev. Fund Co., Inc., 122 A.D.3d at 446; Lelek v. Verizon N.Y., Inc., 54 A.D.3d at 584-85. Plaintiff fell on a level landing that was a permanent part of the structure. Even if the stairway was temporary, again it was provided to him as the means of access to the working level on the sixth floor above. Therefore the court grants summary judgment dismissing plaintiffs' claim under Labor Law § 241(6) to the extent that the claim is based on 12 N.Y.C.R.R. § 23-1.7(f). C.P.L.R. § 3212(b) and (e).

D. Indemnification

As set forth above, Granite Broadway Development and CNY Builders seek summary judgment on their contractual indemnification claims in their third party complaint against third party defendant Parkview Plumbing and in their second third party complaint against second third party defendant Transcontinental Contracting. An agreement to indemnify in connection with a construction contract is void and unenforceable to the extent that the agreement allows indemnification of a party for its own negligence. N.Y. Gen. Oblig. Law § 5-322.1; Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 795 (1997); Nielson v. Vornado Forest Plaza, L.L.C., 155 A.D.3d 424, 425 (1st Dep't 2017); 11 Essex St. Corp. v. Tower Ins. Co. of N.Y., 153 A.D.3d 1190, 1197-98 (1st Dep't 2017); Picasso v. 345 E. 73 Owners Corp., 101 A.D.3d 511, 512 (1st Dep't

2012). An indemnification agreement that provides for indemnification to the extent that the indemnitee was not negligent and thus only "to the fullest extent permitted by law" does not violate New York General Obligations Law § 5-322.1. Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008); Guzman v. 170 W. End Ave. Assoc., 115 A.D.3d 462, 464 (1st Dep't 2014). See Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018).

The parties also stipulated that Granite Broadway Development's trade contracts, also signed by CNY Builders on the owner's behalf, with Parkview Plumbing and with Transcontinental Contracting were authenticated and admissible for purposes of the pending motions. These contracts provide that both Parkview Plumbing and Transcontinental Contracting are to indemnify Granite Broadway Development and CNY Builders to the fullest extent permitted by law. Specifically, Article 16 of each contract provides:

16.02 To the fullest extent permitted by law, the Trade Contractor shall defend, indemnify and hold harmless the Owner, Construction Manager and Additional Insureds . . . from and against all claims, demands, causes of action, suits, costs, penalties, attorney's fees, expert fees, consultant fees, expenses, damages, liens, judgments, decrees, losses and/or liabilities arising out of the Trade Contractor's Work provided that any such claim, damage, loss and/or expense is attributable to bodily injury

16.03 To the fullest extent permitted by law, the Trade Contractor shall defend, indemnify and hold harmless the Owner, Construction Manager and Additional Insureds . . . from and against all claims, demands, causes of action, suits, costs, penalties, attorney's fees, expert fees, consultant fees, expenses, damages, liens, judgments, decrees, losses and/or liabilities arising out of or in any way connected with or incidental to, the performance of the Work by Trade Contractor, its Subcontractors, suppliers, materialmen and/or vendors of any tier including anyone directly or indirectly employed by any of them and for whose acts they may be liable.

Zecca Aff. Ex. V, at 34, Ex. X, at 33.

Padron's injury that arose from his work for Transcontinental Contracting triggers the indemnification provisions in Granite Broadway Development's contract with Transcontinental Contracting. If Padron's injury also arose from work performed by Parkview Plumbing, a plumbing contractor, because it created the water condition or at least was responsible for cleaning it up, his injury also will trigger the indemnification provisions in Granite Broadway Development's contract with Parkview Plumbing. Therefore, while Granite Broadway Development and CNY Builders may not be indemnified for their own negligence, to the extent that they are not at fault due to their negligence, Transcontinental Contracting owes and Parkview Plumbing may owe Granite Broadway Development and CNY Builders indemnification. Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d 411, 413-14 (1st Dep't 2019); Adagio v. New York State Urban Dev. Corp., 168 A.D.3d 602, 603 (1st Dep't 2019); Wilk v. Columbia Univ., 150 A.D.3d 502, 503 (1st Dep't 2017); Best v.

Tishman Constr. Corp. of N.Y., 120 A.D.3d 1081, 1082 (1st Dep't 2014). Until a determination that Parkview Plumbing created the water condition or failed in a duty to clean it up, however, Granite Broadway Development and CNY Builders are not entitled to contractual indemnification against Parkview Plumbing.

Since no factual issue remains whether Granite Broadway Development was at fault, Granite Broadway Development is entitled to summary judgment against Transcontinental Contracting on the second third party contractual indemnification claim. C.P.L.R. § 3212(b) and (e); Ajche v. Park Ave. Plaza Owner, LLC, 171 A.D.3d at 413-14; Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d at 538; Wilk v. Columbia Univ., 150 A.D.3d at 503. Since a factual issue remains whether CNY Builders was at fault, CNY Builders is entitled to summary judgment against Transcontinental Contracting on the second third party contractual indemnification claim to the extent that CNY Builders was not at fault. Ohadi v. Magnetic Constr. Group Corp., 182 A.D.3d 474, 477 (1st Dep't 2020); Higgins v. TST 375 Hudson, L.L.C., 179 A.D.3d 508, 511 (1st Dep't 2020). Since a factual issue remains whether Padron's injury even triggers the indemnification provision in Granite Broadway Development's contract with Parkview Plumbing, the court denies Granite Broadway Development and CNY Builders summary judgment against Parkview Plumbing on their third party contractual indemnification claim. C.P.L.R. § 3212(b); DeMaria

v. RBNB 20 Owner, LLC, 129 A.D.3d at 626-27; King v. City Bay Plaza, LLC, 118 A.D.3d 476, 477 (1st Dep't 2014); Gell-Tejada v. Macy's Retail Holding, Inc., 116 A.D.3d 594, 595 (1st Dep't 2014); Beltran v. Navillus Tile, Inc., 108 A.D.3d 414, 416 (1st Dep't 2013).

Because CNY Builders has failed to demonstrate that it was free from fault, it fails to establish its entitlement to summary judgment on its implied indemnification claims against either Parkview Plumbing or Transcontinental Contracting. Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 479-80 (1st Dep't 2013); Martins v. Little 40 Worth Assoc., Inc., 72 A.D.3d 483, 484 (1st Dep't 2010). Although Granite Broadway Development has demonstrated that it was free from fault, because it has failed to demonstrate that Parkview Plumbing created the water condition or failed in a duty to clean it up, Granite Broadway Development still is not entitled to implied indemnification against Parkview Plumbing. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 378 (2011); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 479-80; Muriqi v. Charmer Indus. Inc., 96 A.D.3d 535, 536 (1st Dep't 2012); Landgraff v. 1579 Bronx Riv. Ave. LLC, 18 A.D.3d 385, 387 (1st Dep't 2005). Transcontinental Contracting presents plaintiffs' verified bill of particulars claiming that Carlos Padron suffered severe

abdominal, testicular, knee, and emotional injuries, but none qualifying as a "grave injury" under New York Workers' Compensation Law § 11, also barring any implied indemnification claim against Transcontinental Contracting, Padron's employer. N.Y. Workers' Comp. Law § 29; Isabella v. Hallock, 22 N.Y.3d 788, 793 (2014); New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d 501, 505 (2014); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d 599, 601 (1st Dep't 2020).

E. Dismissal of Cross-Claims and Counterclaims

Parkview Plumbing cross-claims in the main action and counterclaims in the third party action, and Transcontinental Contracting counterclaims in the second third party action, for implied indemnification and contribution against Granite Broadway Development and CNY Builders. Due to the factual questions regarding CNY Builders' liability for negligence and violations of Labor Law §§ 200 and 241(6), the court denies its motion for summary judgment dismissing all cross-claims and counterclaims against CNY Builders. C.P.L.R. § 3212(b); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 456; Buscemi-Sanz v. Hudson-Meridian Constr. Group, LLC, 159 A.D.3d 402, 403 (1st Dep't 2018); Wunderlich v. Turner Constr. Co., 147 A.D.3d 598, 598-99 (1st Dep't 2017); Ausby v. 365 W. End LLC, 135 A.D.3d 481, 482 (1st Dep't 2016). Since no factual questions remain regarding

Granite Broadway Development's liability for negligence and violation of Labor Law § 200, and its liability for violation of Labor Law § 241(6) would be only vicarious, the court grants its motion for summary judgment dismissing all cross-claims and counterclaims against Granite Broadway Development. C.P.L.R. § 3212(b) and (e); Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Wilk v. Columbia Univ., 150 A.D.3d at 503-504.

III. R & S UNITED SERVICES' MOTION

R & S United Services, a steam fitting contractor, moves for summary judgment dismissing Parkview Plumbing's third third party complaint seeking implied indemnification and contribution, based on the absence of evidence that the pipes R & S United Services was working on leaked and caused the wet floor on which Padron fell. R & S United Services maintains that, since none of the witnesses deposed identified the source of the water that caused Padron's fall, no evidence indicates R & S United Services' negligence as is necessary to support the third third party claims.

Upon R & S United Services' motion for summary judgment, R & S United Services bears the burden to establish that R & S United Services was not negligent. It may not simply point to Parkview Plumbing's lack of evidence. Hairston v. Liberty Behavioral Mgt.

Corp., 157 A.D.3d 404, 405 (1st Dep't 2018); Belgium v. Mateo Prods., Inc., 138 A.D.3d 479, 480 (1st Dep't 2016); Dylan P. v. Webster Place Assoc., L.P., 132 A.D.3d at 538; McCullough v. One Bryant Park, 132 A.D.3d 491, 492 (1st Dep't 2015). In support of the motion, R & S United Services relies on the affidavit of Donna Skoczylas, who attests that, based on her review of the drawings for the project, none of R & S United Services' vertical or horizontal pipes were in the stairwell where plaintiff fell. R & S United Services fails to present the drawings, however, on which Sloczylas bases this conclusion, so all her attestations based on the drawings are hearsay. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014). See B.P. AC Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Residential Credit Solutions, Inc. v. Gould, 171 A.D.3d 638, 642 (1st Dep't 2019); Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); Adriana G. v. Kipp Wash. Hgts. Middle Sch., 165 A.D.3d 469, 470 (1st Dep't 2018); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014).

Skoczylas also relies on the same CNY Builders Project Manager's Daily Log for July 19, 2013, that recorded R & S United Services performing duct work on the fifth floor, working on heat pumps from the 33rd floor down, and installing diffusers on stairwells from the 43rd floor down. Therefore the Daily Log and

Skoczylas's inadmissible account of the drawings fail to meet R & S United Services' burden to establish entitlement to summary judgment, requiring denial of its motion for that relief.

C.P.L.R. § 3212(b); Residential Credit Solutions, Inc. v. Gould, 171 A.D.3d at 642; Clarke v. American Truck & Trailer, Inc., 171 A.D.3d at 406; Adriana G. v. Kipp Wash. Hgts. Middle Sch., 165 A.D.3d at 470.

IV. TRANSCONTINENTAL CONTRACTING'S MOTION

Transcontinental Contracting moves for summary judgment dismissing the second third party complaint by Granite Broadway Development and CNY Builders for implied indemnification as well as contractual indemnification and breach of a contract, including failure to procure insurance.

A. Timeliness

When Transcontinental Contracting's attorney prepared its motion for summary judgment, he expected it to be timely served on the deadline June 17, 2019, and therefore did not excuse its lateness. He then encountered difficulty e-filing the motion, so that it was approximately 50 minutes late, early in the morning of June 18, 2019. In reply to second third party plaintiffs' opposition, raising the lateness of the motion, Transcontinental Contracting then explains the circumstances outlined above, excusing the lateness. Significantly, second third party plaintiffs did not contest this excuse at oral argument or

otherwise and do not claim prejudice due to this minimal delay.

In an order dated September 27, 2019, the court already granted Parkview Plumbing an extension of time to file its motion for summary judgment from June 17, 2019, to June 19, 2019, when the court accepted Parkview Plumbing's motion, which Parkview Plumbing actually filed June 18, 2019. The court found that Parkview Plumbing presented good cause for this minimal delay: a family emergency that prevented Parkview Plumbing's attorney from filing its motion June 17, 2019. Transcontinental Contracting likewise presents good cause for an even more minimal delay: a computer malfunction that prevented Transcontinental Contracting's attorney from filing its motion until very early June 18, 2019. Therefore the court similarly excuses the late filing of Transcontinental Contracting's motion for summary judgment. C.P.L.R. §§ 2004, 3212(a); Lewis v. Rutkovsky, 153 A.D.3d 450, 453-54 (1st Dep't 2017); Kase v. H.E.E. Co., 95 A.D.3d 568, 569 (1st Dep't 2012); Butt v. Bovis Lend Lease LMB, Inc., 47 A.D.3d 338, 339-40 (1st Dep't 2007); Mayer v. New York City Tr. Auth., 39 A.D.3d 349, 349 (1st Dep't 2007).

B. Merits

Since the court has granted Granite Broadway Development and CNY Builders summary judgment against Transcontinental Contracting on their contractual indemnification claim to the extent that these defendants were not at fault, Ohadi v. Magnetic

Constr. Group Corp., 182 A.D.3d at 477; Higgins v. TST 375 Hudson, L.L.C., 179 A.D.3d at 511, the court denies Transcontinental Contracting's motion for summary judgment dismissing their contractual indemnification claim. C.P.L.R. § 3212(b). Transcontinental Contracting's showing that Padron did not suffer a "grave injury" under New York Workers' Compensation Law § 11 bars any claim for implied indemnification against Transcontinental Contracting. N.Y. Workers' Comp. Law § 29; Isabella v. Hallock, 22 N.Y.3d at 793; New York Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp., 22 N.Y.3d at 505; Fleming v. Graham, 10 N.Y.3d at 299; Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d at 601. Therefore the court grants Transcontinental Contracting's motion for summary judgment dismissing the implied indemnification claims by Granite Broadway Development and CNY Builders against Transcontinental Contracting. C.P.L.R. § 3212(b) and (e).

Granite Broadway Development and CNY Builders now concede that Transcontinental Contracting procured the contractually required insurance and do not rebut Transcontinental Contracting's showing of compliance with all other terms of its trade contract. Therefore the court also grants its motion for summary judgment dismissing the claims by Granite Broadway Development and CNY Builders for breach of the trade contract and for failure to procure insurance. C.P.L.R. § 3212(b) and (e).

V. PARKVIEW PLUMBING'S MOTION

Parkview Plumbing moves for summary judgment dismissing plaintiffs' claims; dismissing co-defendants' third party complaint seeking contractual and implied indemnification and damages for breach of a contract, including by failing to procure insurance; and R & S United Services' counterclaims for implied indemnification and contribution. Given the dismissal of plaintiff's Labor Law §§ 240(1) and 241(6) claims, except to the extent that the § 241(6) claim is based on 12 N.Y.C.R.R. § 23.1-7(d), the court grants Parkview Plumbing's motion for summary judgment dismissing the same claims in the complaint against Parkview Plumbing.

Parkview Plumbing's potential liability for a violation of Labor Law § 241(6) based on 12 N.Y.C.R.R. § 23.1-7(d) or a violation of Labor Law § 200 depends on whether the plumbing contractor was co-defendants' statutory agent. It would be a statutory agent under Labor Law §§ 200 and 241(6) if it maintained the authority to control the activity that caused Padron's injury. Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 434 (2015); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005); Santos v. Condo 124 LLC, 161 A.D.3d 650, 653 (1st Dep't 2018); Coretto v. Extell W. 57th St., LLC, 137 A.D.3d 677, 678 (1st Dep't 2016). Since the accumulated water on the sixth floor landing caused Padron's injury, the pertinent inquiry

is control over the source of the water that created that condition and control over cleaning up the water on the sixth floor. Given the absence of evidence identifying the source of the water condition and the evidence that Parkview Plumbing, a plumbing contractor, was working July 19, 2013, in the area of the water, Parkview Plumbing fails to demonstrate that it lacked control over the source of the water condition or over cleaning it up and thus fails to establish that it was not a statutory agent. Lind v. Tishman Constr. Corp. of N.Y., 180 A.D.3d 505, 505 (1st Dep't 2020); Sanchez v. 404 Park Partners, LP, 168 A.D.3d 491, 492 (1st Dep't 2019); Johnson v. City of New York, 120 A.D.3d 405, 406 (1st Dep't 2014). Therefore, for the same reasons that co-defendants are not entitled to dismissal of plaintiffs' Labor Law § 241(6) claim based on 12 N.Y.C.R.R. § 23.1-7(d), neither is Parkview Plumbing entitled to that relief. C.P.L.R. § 3212(b).

The absence of evidence identifying the source of the water condition that caused Padron's injury and the evidence that Parkview Plumbing was working in the area where Padron fell similarly raise a factual question whether Parkview Plumbing's negligence caused the leak that created the accumulated water. Parkview Plumbing's contract with CNY Builders, moreover, imposed on Parkview Plumbing the duty to clean up any leak for which the plumbing subcontractor was responsible. While its admission that

it cleaned up the leak on the sixth floor landing after Padron's injury there does not amount to an admission that it was responsible for the leak, that admission is enough to raise a factual issue to that effect. Therefore Parkview Plumbing is not entitled to dismissal of plaintiffs' Labor Law § 200 and negligence claims. C.P.L.R. § 3212(b); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d at 505; Armental v. 401 Park Ave. S. Assocs., LLC, 182 A.D.3d at 407.

These factual questions whether Parkview Plumbing created the water condition or was responsible for cleaning up or at least warning of the condition and failed to do so timely raise the further issue whether Padron's injury arose from work performed by Parkview Plumbing, which would entitle co-defendants to contractual indemnification. Therefore the court denies Parkview Plumbing's motion for summary judgment dismissing the third party claim for contractual indemnification. C.P.L.R. § 3212(b); Adagio v. New York State Urban Dev. Corp., 168 A.D.3d at 603; McCullough v. One Bryant Park, 132 A.D.3d at 493; DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d at 626; Robbins v. Goldman Sachs Headquarters, LLC, 102 A.D.3d 414, 415 (1st Dep't 2013). These same factual questions bearing on Parkview Plumbing's fault require denial of its motion for summary judgment dismissing the third party claim for implied indemnification and breach of its trade contract and R & S United Services' counterclaims for

implied indemnification and contribution. C.P.L.R. § 3212(b); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 456; Buscemi-Sanz v. Hudson-Meridian Constr. Group, LLC, 159 A.D.3d at 403; Wunderlich v. Turner Constr. Co., 147 A.D.3d at 598-99; Ausby v. 365 W. End LLC, 135 A.D.3d at 482.

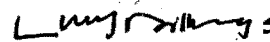
Finally, Parkview Plumbing fails to show either that its trade contract did not require the procurement of insurance or that Parkview Plumbing procured the contractually required insurance. Nielson v. Vornado Forest Plaza, L.L.C., 155 A.D.3d at 425-26; Ortega v. Goldman Sachs Headquarters LLC, 150 A.D.3d 469, 470-71 (1st Dep't 2017). Therefore the court also denies Parkview Plumbing's motion for summary judgment dismissing the claim by Granite Broadway Development and CNY Builders that Parkview Plumbing failed to procure insurance. C.P.L.R. § 3212(b).

VI. CONCLUSION

For the reasons explained above, the court grants the motion by Granite Broadway Development and CNY Builders for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim and Labor Law § 241(6) claim, except based on violation of 12 N.Y.C.R.R. § 23-1.7(d), and dismissing plaintiffs' Labor Law § 200 and negligence claims against Granite Broadway Development. C.P.L.R. § 3212(b) and (e). The court also grants the motion by Granite Broadway Development and CNY Builders for summary

judgment on the second third party complaint for contractual indemnification, except to the extent that CNY Builders was at fault. Id. The court grants Transcontinental Contracting's motion for summary judgment dismissing the second third party complaint to the extent of dismissing the claims for implied indemnification, breach of a contract, and failure to procure insurance. Id. Finally, the court grants Parkview Plumbing's motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim and Labor Law § 241(6) claim, except based on violation of 12 N.Y.C.R.R. § 23-1.7(d). C.P.L.R. § 3212(b) and (e). The court otherwise denies the parties' motions. C.P.L.R. § 3212(b).

DATED: October 15, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.