

Gomes v Vornado 640 Fifth Ave. LLC

2021 NY Slip Op 30460(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 155216/2017

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

-----X

ANTHONY GOMES,

Plaintiff,

- v -

INDEX NO. 155216/2017

MOTION DATE

MOTION SEQ. NO. 006 007

VORNADO 640 FIFTH AVENUE LLC., SHAWMUT WOODWORKING & SUPPLY, INC., DAL ELECTRICAL CORPORATION, TOUCHTEL TECHNOLOGY GROUP & ELECTRICAL SERVICES, INC., VICTORIA'S SECRECT STORES, LLC, L BRANDS STORE DESIGN & CONSTRUCTION, INC.,

Defendants.

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DECISION + ORDER ON MOTION

SHAWMUT WOODWORKING & SUPPLY, INC.,

Third-party Plaintiff,

-against-

Third-Party Index No. 595669/2017

CURTIS PARTITION CORPORATION,

Third-party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 138-162, 167-177, 182, 184-191

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 207-233, 235-271 were read on this motion to/for summary judgment.

By notice of motion, defendant Dal Electrical Corporation moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims asserted against it.

Defendants Shawmut Woodworking & Supply, Inc., Vornado 640 Fifth Avenue LLC, Victoria's

Secret Stores, LLC (VSS), and L Brands Store Design & Construction, Inc. (collectively, VS defendants) oppose and cross move pursuant to CPLR 3025 for an order permitting Shawmut and Vornado to serve cross claims against Dal. Dal opposes. (Mot. seq. six).

By notice of motion, VS defendants move pursuant to CPLR 3025 for an order permitting Vornado, VSS, and L Brands to serve cross claims against third-party defendant Curtis and pursuant to CPLR 3212 for an order dismissing the complaint and awarding them summary judgment against third-party defendant Curtis Partition Corporation. Curtis and plaintiffs oppose. (Mot. seq. seven).

I. BACKGROUND

By contract dated November 11, 2009, Shawmut hired Dal as a subcontractor for various construction projects. The contract provides:

To the full extent permitted by applicable law, [Dal] agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of [Dal] or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder.

The parties also agreed that Dal would maintain commercial general liability insurance with coverage for contractual indemnification claims with limits of \$1 million per occurrence, excess umbrella coverage of \$5 million per occurrence, and additional insured coverage naming the contractor, owner, and any other parties required by the contract documents. Should Dal fail to procure such insurance, they also agreed that it may be held liable for any liabilities, claims, damages, losses and costs incurred as a result of that failure. (NYSCEF 157)

By contract dated April 27, 2016, L Brands hired Shawmut to serve as the general contractor for a construction project at the VS store located at 640 Fifth Avenue in Manhattan.

(NYSCEF 158).

By job order dated May 3, 2016, Shawmut hired Dal to work on the VS project. The job order incorporates the terms and conditions of the November 2009 contract and reflects that “Limited Brands” is the owner of the site. Rider D of the job order reflects that Shawmut, L Brands, and Vornado are additional insureds. (NYSCEF 157).

By contract dated June 6, 2016, Shawmut hired Curtis to complete work at the VS project. The contract contains an indemnification provision identical to that set forth in the November 2009 contract. (NYSCEF 228).

A Shawmut incident report dated August 25, 2016, completed by Shawmut’s superintendent, reflects that plaintiff was injured in front of the freight elevator on the third floor of the VS project. The report reflects that the site was clean of debris and well lit, that plaintiff was using an A-frame cart loaded with drywall boards, and that he was injured when his shoulder hit a structural column. (NYSCEF 152). Attached to the report is a photograph of the accident location. (NYSCEF 147).

A Curtis incident report dated August 25, 2016 reflects that on that day, plaintiff was injured while working at the VS project at 640 Fifth Avenue in Manhattan. According to the report, plaintiff was injured while “unloading sheetrock on the 3rd floor when he tripped on some wires and debris, causing him to crash into a column.” (NYSCEF 153).

A State of New York Workers’ Compensation Board employee claim form dated August 31, 2016, filled out and signed by plaintiff, reflects that he was employed by Curtis as a carpenter-apprentice and tasked with unloading trucks, moving material, and assisting other carpenters. While working on the 3rd floor of 640 Fifth Avenue in Manhattan, he was injured while pushing an A-frame cart full of sheet rock on a “crowded floor.” He wrote that his foot got

caught on an extension cord while pushing the cart and that he fell into a concrete column, causing him to sustain injury. (NYSCEF 154).

By summons and verified complaint dated June 7, 2017, plaintiff commenced this action against Vornado and Shawmut, advancing causes of action for violations of Labor Law §§ 200 and 241(6), negligence, and negligent hiring/retention. (NYSCEF 140).

By third-party summons and complaint dated August 17, 2017, Shawmut advances causes of action against Curtis for common-law contribution and indemnification, contractual indemnification, and breach of contract for failure to procure insurance. (NYSCEF 141).

By summons and verified complaint dated January 16, 2018, plaintiff commenced another action in this court against Dal, VSS, and L Brands, advancing causes of action for violations of Labor Law §§ 200 and 241(6), negligence, and negligent hiring/retention. In relation to his claim under Labor Law § 241(6), plaintiff alleges violations of 12 NYCRR §§ 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a)(1), and 23-1.22(b)(3). (NYSCEF 142).

By verified answer dated February 23, 2018, Dal advances cross claims against VSS and L Brands for common-law indemnification and contribution. (NYSCEF 143).

By verified answer dated April 27, 2018, VSS and L Brands advance cross claims against Dal for common-law indemnification, contractual indemnification, contribution, and “insurance coverage.” In advancing its claim for insurance coverage, VSS and L Brands allege, as pertinent here, that if Dal failed to procure insurance coverage for them, then Dal must indemnify and hold them harmless for any amount awarded to plaintiff. (NYSCEF 156).

By order dated July 17, 2018, the two actions were consolidated under this action’s index number. (NYSCEF 144).

In his verified bill of particulars dated July 30, 2018, plaintiff alleges that his accident

was caused when his foot got caught on a red extension cord while pushing an A-frame cart loaded with sheet rock panels. He describes the floor as having been covered with material and debris, which required him to use force in pushing the cart, and that when he tripped, the force he used in pushing the cart caused him to fall and strike a nearby pole. (NYSCEF 145).

On November 22, 2019, VS defendants served cross claims against Dal for common-law indemnification, contribution, contractual indemnification, and breach of contract for failure to procure insurance. (NYSCEF 175). By letter dated November 22, 2019, Dal rejected the cross claims as “untimely, improperly served, meritless and prejudicial.” (NYSCEF 176).

A. Plaintiff’s deposition and affidavit (NYSCEF 146 and 261)

Plaintiff testified that on the day of his alleged injury he was employed by Curtis to work at a construction project on the third floor of the VS project. He was responsible for unloading trucks, moving materials, and assisting mechanic carpenters. His sole supervisor was a Curtis foreperson; Curtis provided plaintiff with equipment and tools to complete his work. According to plaintiff, the job site was “poorly kept” and full of dirt and debris. He admitted having never complained about it.

That morning, plaintiff was to unload metal and sheet rock from a truck parked on the side of the building and bring it to the third floor. He first unloaded the sheet rock onto an A-frame cart and, with the help of another Curtis employee, moved the cart onto a freight elevator. Upon reaching the third floor, plaintiff exited, turned left, and dropped off the sheet rock. When he returned to the elevator, plaintiff noticed that the area was full of dirt, debris, wires, and clutter; he again admitted that he made no complaint about the conditions.

Plaintiff and his coworker returned to the third floor and upon exiting the freight elevator, turned right. Plaintiff pushed the cart and his coworker pulled it. As they passed through a metal

doorway, plaintiff's left foot got caught on an "[o]rangish-red extension cord" and he fell, knocking into a concrete column, which caused his injury. Plaintiff had not seen the cord until after the accident, had seen no markings on it, and could not determine where it was plugged in or to whom it belonged.

At the time and location of his accident, the lighting was dim, as the sun was still coming up and there was no artificial light. While it was not pitch black, plaintiff claimed that he had trouble seeing the floor in the area before the accident, and had registered no complaints to anyone about the lighting before the accident. He was shown a photograph of the location of his accident (NYSCEF 147), which he confirmed was accurate, and was unable to identify the cord on which he had tripped. He stated that the lighting conditions depicted in the photograph were the same as those at the time of his accident, although the photograph was inaccurate as the floor appears to have been swept, whereas at the time of the accident, it had not been. (NYSCEF 139).

By affidavit dated September 8, 2020, plaintiff reiterates the description he gave at his deposition of how the accident occurred, adding that he was pushing between 800 and 1,000 pounds of sheet rock in the A-frame cart and that sheetrock dust on the floor was getting caked onto the wheels, which required greater force to push the cart. Thus, he explains how his foot got caught on the cord which was run through the doorway, and claims that he could not catch himself from tripping and being launched into the nearby column. Plaintiff denies that either he or his partner created the dust, or that the dust could have been created that morning as his accident had occurred between 7 and 7:30am, minutes after the jobsite had opened. He neither saw nor heard any other workers near the freight elevator that morning, and he confirms that the photograph depicts the area where his accident occurred, although it must have been taken long after his fall because all of the sheetrock dust had been cleaned up. He saw no one using the

extension cord and denies that the cord had anything to do with his work.

B. Deposition of Dal's president (NYSCEF 148)

At his deposition, Dal's president admitted that Dal was responsible for all of the electrical, power, lighting, and fire alarm wiring at the VS project, and that he was at the site three times a week. As the project executive, he also allowed that he was responsible for going over the work with the project manager and foreperson, and would discuss with them the workweek tasks, but he did not attend safety meetings. All Dal workers reported daily to Dal's foreperson.

Dal's president confirmed that Dal's work on the third floor required the use of extension cords and asserted that Dal used only black, not red, extension cords at the site, although he could not recall if Dal used or owned orange extension cords at the site. When shown the photograph of the accident site (NYSCEF 147), he was unable to locate it within the building and whether the extension cords depicted therein were Dal's. To the extent that the photograph depicts the freight area, he testified that the cords could not have belonged to Dal, because Dal did not work in or near that area on the day of the accident. While there was a procedure for cleaning debris, the president never instructed his workers as to how to lay extension cords, and he claimed that Dal's extension cords are not marked and that Dal does not use equipment or cords belonging to the other trades. Moreover, all of Dal's equipment, including cords, is locked up at the end of each day, pursuant to the policy that cords not be left out and plugged in. While Dal used PVC-coated cables, such cables are not extension cords.

C. Deposition of Shawmut's superintendent (NYSCEF 149)

At his deposition, Shawmut's superintendent testified that he was responsible for organizing and coordinating all of the subcontractors at the VS project, and that he constantly

walked through the site. On the day of plaintiff's accident, carpenters were building walls and installing drywall, and electricians and "data guys" were "pulling the wires."

The superintendent described the morning of plaintiff's accident as follows: He arrived at the site at 6:15am, and at approximately 7am, he was told of plaintiff's accident. At approximately 8am, he photographed the area (NYSCEF 147), and an hour or two later, filled out an accident report (NYSCEF 152). Having walked through the area of plaintiff's accident earlier that morning, had he observed cords obstructing the area, he would have pushed them away.

The superintendent also testified that he considers cords that are bundled and laying unevenly on the floor an obstruction, and that as the cords in the photograph are laid flat on the floor, they did not constitute an obstruction. He did not know who owned the cords in the photograph. After the accident, the superintendent checked where the extension cords were running, and observed that one was plugged into a fan, which was on when he was at the location, although he could not recall which cord. While he stated that Shawmut is responsible for the fan, he did not know who owned the extension cord, and explained that laborers could use that cord if necessary. He saw no issues with lighting in the area and was able to see clearly. Shawmut was responsible for cleaning the area of plaintiff's accident, which had been cleaned up the night before.

D. Deposition of Curtis's foreperson (NYSCEF 151)

At his deposition, Curtis's foreperson testified that Curtis was simultaneously working on all three floors, that he directed Curtis workers in their daily tasks, and that Curtis provided all tools, including power saws and extension cords, for its workers. He did not walk through the site each morning before Curtis employees started work, but he had been to the third floor the

day before plaintiff's accident. According to him, plaintiff delivered materials, including sheet rock, to various areas at the job site. Although Curtis had no policy against using extension cords owned by other contractors, the foreperson stated that Curtis supplied its own cords which it stored on all three floors, that Curtis employees used Curtis cords only, and that Curtis was not responsible for cleaning the job site of dirt and debris.

That day, Curtis's foreperson instructed plaintiff and another Curtis employee to deliver sheetrock to a specified area of the site. After learning of plaintiff's accident, and upon arriving at the location, he saw plaintiff sitting with his back against a column. Plaintiff told him that he had stepped on a cord. The foreperson recalled having seen cords in the area, but he does not know who owned them or for how long they had been there. He observed no issues with lighting in the area and had received no worksite complaints.

After the accident, the foreperson called the Curtis office to file a report, and after the report was finalized, he confirmed its accuracy. Had there been an issue with lighting, he would have included it in the report.

E. Affidavit of Dal's former foreperson (NYSCEF 160)

By affidavit dated November 20, 2019, Dal's former foreperson, no longer employed by Dal, states that he worked on the VS project in 2016 and that Dal was responsible for providing temporary power and lighting. He asserted his familiarity with the tools, material, and equipment used by Dal for the VS project and alleges that Dal neither owned nor used red or orange extension cords.

F. Affidavit of Shawmut third-floor superintendent (NYSCEF 231)

By affidavit dated June 18, 2020, Shawmut's superintendent of the third floor for the VS project states that VSS was a tenant in the building. Neither the building owner/manager nor

VSS supervised the work at the site or directed its means and methods, nor was either responsible for job site safety, cleaning, or personnel. According to the third-floor superintendent, on August 25, 2016, no Vornado, VSS, or L Brands representatives were on site from the time he had arrived at the job site until plaintiff's accident. No complaints were lodged about extension cords on the floor anywhere on the third floor, and before plaintiff's accident, including that morning and at all times, the cords were organized and tucked to the side whenever he walked through the site. When he passed by the area of the accident that day, the area was well lit both before and after the accident.

G. Affidavit of plaintiff's expert (NYSCEF 258)

By affidavit dated September 8, 2020, plaintiff's expert opines that based on his review of the parties' depositions and affidavits, and the photograph of the site of plaintiff's accident, the presence of cords lying unprotected on the floor in an area where workers walk constitutes a violation of industry standards, even when moved to the side, as workers may nonetheless walk on them and they may move if pulled.

As pushing a loaded A-frame cart requires a clean and clear walking surface, the expert maintains that all cords should have been elevated above the floor, running along the ceiling or high up on the walls, or taped down in a manner that would prevent them from being moved. He opines that drywall dust on the floor exacerbated plaintiff's accident, as the dust may bind cart wheels and render the cart difficult to push. And, as more force was needed to push the cart, plaintiff's fall was harder. The presence of dust, he contends, is a violation of Industrial Code § 23-1.7(e)(2), and the area through which he walked is a passageway "where persons work or pass."

II. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

III. DAL’S MOTION FOR SUMMARY JUDGMENT AND VS DEFENDANTS’ CROSS MOTION FOR LEAVE TO SERVE CROSS CLAIMS (Mot. seq. six)

By stipulation dated February 4, 2020, plaintiff discontinued his claims against Dal and Dal withdrew its motion to the extent that it had sought dismissal of plaintiff’s claims against it. (NYSCEF 191). Consequently, only the cross claims asserted against Dal are addressed.

A. Common-law indemnification and contribution

Liability for common-law indemnification and contribution may not be imposed against parties that are not negligent and do not exercise actual supervision and control over the injury-producing work. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-78 [2011]; *Ausby v 365 W. End LLC*, 135 AD3d 481, 482 [1st Dept 2016]). While it is undisputed that Dal did not control or supervise plaintiff’s work, Dal must also demonstrate its freedom from negligence, and although it is undisputed that Dal was not responsible for cleaning or maintaining the area of plaintiff’s accident, the pertinent question is whether Dal created the condition which caused

plaintiff's accident.

Dal's president testified that Dal used only black extension cords and expressly denied the use of red cords, and Dal's foreperson states in his affidavit that Dal used neither red nor orange extension cords. They do not contradict one another.

Even though plaintiff testified that the lighting was dim in the area, he does not attribute his fall to it. Rather, he expressly and exclusively alleges in his bill of particulars that it was the debris and a red extension cord that caused his fall. Moreover, the photograph, deemed accurate by plaintiff, shows that the lighting was sufficient.

For all of these reasons, VS defendants fail to raise a factual issue as to Dal's negligence.

B. Contractual indemnity

While the contract between Shawmut and Dal only requires that plaintiff's claims arise from or result from and be caused by Dal's work, and thus that Dal need not be negligent to be liable (*see Adagio v New York State Urban Dev. Corp.*, 168 AD3d 602, 603 [1st Dept 2019] [contracts requiring indemnification for claims arising out of or resulting from work do not require claim be attributable to negligence]), as Dal demonstrates that plaintiff's claim did not arise from its work, VS defendants fail to raise a factual issue (*see supra* at III.A.).

C. Failure to procure insurance

Although Dal's evidence that it procured the required insurance policy may not be considered, having been submitted only in reply (*L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692, 692 [2d Dept 2013]), the contract provides a basis for holding Dal liable for its failure to procure insurance only where any liabilities, claims, damages, losses and costs incurred result from such a failure. As Dal demonstrates that plaintiff's claim did not arise from its work, any liability imposed on VS defendants is not due to Dal's failure, and as VS defendants fail to

raise a factual issue, Dal cannot be held liable for the failure to procure insurance. (*See New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540, 542 [1st Dept 2007] [dismissing cause of action for failure to procure insurance where damages did not result from that failure, because even if required insurance was maintained, coverage would not have been afforded]).

D. Motion to amend

Pursuant to CPLR 3025(b), leave to amend pleadings shall be freely given where “the amendment is not patently lacking in merit” and the nonmoving party suffers no prejudice. (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015], quoting *Pink v Ricci*, 100 AD3d 1446 [4th Dept 2012]). The movant bears the burden of establishing that the proposed amendments are “not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Grey stone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]).

It is undisputed that Shawmut’s and Vornado’s proposed cross claims are identical to those advanced by L Brands and VSS, and as those claims lack merit (*see supra*, at III.), so do the proposed cross claims.

IV. VS DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT AND FOR LEAVE TO SERVE CROSS CLAIMS (mot. seq. seven)

A. Labor Law § 200 and common-law negligence

Labor Law § 200 provides that:

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

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas*

Corp., 82 NY2d 876, 877 [1993]).

Pursuant to Labor Law § 200, an owner may be held liable for a dangerous condition on the premises if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546, 548 [1st Dept 2018]). Likewise, a contractor may be held liable if it had actual or constructive notice of the dangerous condition and had control over the worksite. (*Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009], quoting *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

VS defendants' evidence reflects that Vornado, L Brands, and VSS were not present at the site and did not work there. In opposition, plaintiff offers no argument or evidence to the contrary, and thus, Vornado, L Brands, and VSS may not be held liable for common-law negligence or a violation of section 200.

While Shawmut's superintendent stated that there was no obstruction, he did not deny having seen extension cords on the ground on the morning of plaintiff's accident. Moreover, he confirmed that Shawmut was responsible for cleaning the area and for the fan, and that the fan was plugged in at the time of plaintiff's accident. While there is a dispute as to the accuracy of the photograph, Shawmut's superintendent confirmed that he took it and that it shows that the presence of extension cords that may have posed a tripping hazard to those traversing the area. Accordingly, defendants fail to meet their *prima facie* burden of establishing that Shawmut lacked notice of the hazardous condition. As defendants fail to establish Shawmut's lack of notice of the extension cords, the presence of dust need not be addressed.

B. Labor Law § 241(6)

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of

this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating the violation of such a regulation, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

As plaintiff does not address 12 NYCRR §§ 23-1.7(d), 23-2.1(a)(1), and 23-1.22(b)(3), they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [deeming abandoned industrial code provisions that plaintiff did not address in opposition to summary judgment motion]).

Sections 23-1.7(e)(1) and (2), which cover “[t]ripping and other hazards,” provide:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed

Electrical cords constitute a tripping hazard and are actionable under both sections 23-

1.7(e)(1) and (2). (*Best v Tishman Const. Corp. of New York*, 120 AD3d 1081, 1081 [1st Dept 2014]). While VS defendants deny such an obstruction, Shawmut's superintendent does not deny that cords were present on the floor on the morning of plaintiff's accident. Moreover, plaintiff's testimony and the photograph reflect that there is at least an issue of fact as to the existence of such a hazard. Accordingly, VS defendants fail to demonstrate, *prima facie*, that they did not violate these industrial code provisions, and consequently, Labor Law § 241(6).

C. Cross claims against Curtis

1. Leave to file cross claims

While VS defendants seek leave to file cross claims, Curtis is not a codefendant in this action, and thus, cross claims may not be asserted against it. (CPLR 3019[b] [cross claims are those asserted by one defendant against another]).

2. Contractual indemnification

While Shawmut need not establish that Curtis was negligent to be entitled to contractual indemnification (*see Adagio*, 168 AD3d at 603 [indemnitor need not be found negligent where contract obliges indemnification for all claims "arising out of" or "resulting from" work]; *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018] [indemnitor need not be found negligent where contract mandates that damages or injury be "caused by" indemnitor]), Shawmut fails to demonstrate that it was not negligent (*see supra*, at IV.A.), and thus, VS defendants fail to establish Shawmut's entitlement to contractual indemnification (*see Davies v Simon Prop. Grp., Inc.*, 174 AD3d 850, 855 [2d Dept 2019] [party seeking contractual indemnification must prove itself free from negligence]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Dal Electrical Corporation’s motion for summary judgment is granted in its entirety, and all claims and cross claims asserted against it are severed and dismissed, and that defendants Shawmut Woodworking & Supply, Inc.’s, Vornado 640 Fifth Avenue LLC’s, Victoria’s Secret Stores, LLC’s, and L Brands Store Design & Construction, Inc.’s cross motion is denied in its entirety (motion sequence six); it is further

ORDERED, that Shawmut Woodworking & Supply, Inc.’s, Vornado 640 Fifth Avenue LLC’s, Victoria’s Secret Stores, LLC’s, and L Brands Store Design & Construction, Inc.’s motion is granted to the extent that plaintiff’s common-law negligence and Labor Law § 200 claims against Vornado 640 Fifth Avenue LLC, Victoria’s Secret Stores, LLC, and L Brands Store Design & Construction, Inc. are dismissed, and is otherwise denied (motion sequence seven); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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BARBARA JAFFE, J.S.C.

2/18/2021
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE