

Nicholson v Sabey Data Ctr. Props., LLC

2021 NY Slip Op 31343(U)

April 12, 2021

Supreme Court, New York County

Docket Number: 156351/2012

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32

Justice

SHERLOCK NICHOLSON, Plaintiff, INDEX NO. 156351/2012 MOTION DATE MOTION SEQ. NO. 007 008 009

- v -

SABEY DATA CENTER PROPERTIES, LLC, SABEY CONSTRUCTION INC., YOUNG WOO & ASSOC., LLC,

DECISION + ORDER ON MOTION

Defendants.

SABEY CONSTRUCTION INC.

Third-Party Plaintiff,

Third-Party Index No. 590931/2013

-against-

ADCO ELECTRICAL CORP., SELECT SAFETY CONSULTING SERVICES, INC., IDEAL INTERIORS GROUP LLC, W5 GROUP LLC

Third-Party Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 287, 288, 290, 291

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 008) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 289, 292, 293, 294, 295

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 009) 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, the motions are determined as follows:

In this Labor Law case, third-party defendant Select Safety Consulting Services, Inc. (Select) moves for summary judgment dismissing the complaint and all claims insofar as asserted against it (motion sequence number 007).

Third-party defendant ADCO Electrical Corp (ADCO) moves for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it (motion sequence number 008).

Defendant Sabey Data Center Properties, LLC (Sabey Data) and defendant/third-party plaintiff Sabey Construction Inc. (Sabey Construction), together move for summary judgment dismissing the complaint insofar as asserted against them and for summary judgment on the third-party complaint insofar as asserted against ADCO and Select (motion sequence number 009).

BACKGROUND

Plaintiff Sherlock Nicholson (plaintiff) commenced this action to recover damages for personal injuries he allegedly sustained on September 4, 2012 while working as a mason tender on a construction project known as Intergate Manhattan (the Project) at 375 Pearl Street, New York, New York (the Premises). According to plaintiff, the accident occurred in a storage room off the loading dock of the Premises, when the pallet jack he was attempting to move into reverse jumped back, striking his ankle and pinning him against a pipe being stored behind him.

Sabey Data owned the Premises on the day of the accident. Sabey Construction served as the construction manager on the Project. Sabey Construction hired Select as the site safety contractor. Sabey Construction also retained ADCO to serve as one of the Project's electrical subcontractors, and Cirocco & Ozzimo, Inc. (Cirocco) to serve as the masonry subcontractor. Plaintiff was employed by Cirocco on the date of the accident.

In his complaint, plaintiff asserts causes of action against, inter alia, Sabey Data and Sabey Construction for violations of Labor Law §§ 240 (1), 241 (6), and 200 and common-law negligence. Sabey Construction commenced a third-party action against, inter alia, ADCO and Select for contractual and common-law indemnification, contribution, and to recover damages for breach of contract for failure to procure insurance.¹

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was working for Cirocco as a mason tender providing assistance to the masons on the Project. He only took instructions from his foreman, Ray Barreras. No one from any other company told him what to do on a given day, told him how to do his job, or supervised his work.

At 9:00 A.M., Barreras instructed plaintiff and his co-worker, Sonny France, to unload a shipment of cinderblocks that had arrived on the loading dock. Plaintiff explained that when a shipment arrived, it had to be moved right away in order to make room for trucks arriving with other shipments. A storage room behind the loading dock (the storage room) was used by all of the trades to temporarily store their shipments until they were able to move their materials to another location of the Premises.

On the day of the accident, Barreras told plaintiff to place the shipment of cinderblocks in the storage room. Plaintiff testified that he used a power pallet jack to move the cinderblocks, which were on wooden skids. The shipment consisted of 4 to 6 skids of cinderblocks. A pallet jack was necessary to move them because the cinderblocks on each skid weighed about 60 pounds and the skid itself weighed between 50 and 100 pounds.

¹ Sabey Construction named Endurance American Insurance Company, Gemini Insurance Company, Allied World Assurance Co., Inc. and American Guarantee & Liability (the insurance carriers) as third-party defendants. By so-ordered stipulation, dated April 9, 2014, the court severed the claims against the insurance carriers (NYSCEF Doc. No. 303). The severed claims were assigned Supreme Court, New York County, Index No. 453355/2017.

Plaintiff explained that Cirocco had two identical pallet jacks at the Premises which were kept in charging stations on the first floor. A switch moved the pallet jacks' forks up and down, and a twist-control handlebar moved the machine forwards and backwards. The speed was controlled by increasing or decreasing the amount of rotation on the handle. When the operator stopped rotating the handle, the machine went back into neutral. The pallet jacks were operated by walking behind the machine, as they did not have a platform or seat.

Plaintiff testified that nobody trained him to use the pallet jack. He worked as a mason tender for over 30 years and was an experienced operator of the type of pallet jacks used by Cirocco on the Project. He testified that he did not have an OSHA certificate to operate a pallet jack and that no such certificate exists.

Plaintiff testified that he began working on the Project about a week before the accident. He used both of the pallet jacks during the week leading up to the accident. According to plaintiff, one of them was not working properly in that he would sometimes twist the handle to put it into forward or reverse, but it would not respond. It would take a minute or two of constant revving.

Plaintiff testified that on or about his third day on the Project, he complained to Barreras that the throttle on one of the pallet jacks was not working properly, but Barreras "shrugged it off" (Plaintiff's EBT Tr [5-11-15] at 62, 168-169, NYSCEF Doc. No. 280). Barreras told plaintiff "hey, its usable. Just use it" (*id.* at 64). On another occasion when plaintiff had to use a pallet jack, he said to Barreras, that he hoped to get the "good" pallet jack because "with the bad one, it takes too much time" (*id.* at 66). Barreras responded: "look, do what you got to do" (*id.*).

Plaintiff testified that on the morning of the accident, it was up to him and his co-worker Sonny to find a spot in the storage room for the shipment of cinderblocks. Cirocco did not have a designated area in the room for storage. Entering the storage room, there was a passageway directly in front of plaintiff, which he followed for about 20 to 30 feet before he found an empty spot to his right to place the cinderblocks.

The passageway was about 10-feet wide. Plaintiff testified that there were many different types of materials stored on either side of the passageway, including sheetrock, pipes and cans. However, he did not see any pipes or other debris inside the passageway.

Plaintiff testified that before the accident, he and his co-worker had successfully transferred one or two skids of cinderblocks each into the storage room. While moving the skids, plaintiff was having issues engaging his pallet jack. But, it was still "usable" (*id.* at 74).

Plaintiff testified that when the accident occurred, he had just lowered a skid of cinderblocks into their spot in the storage room and was trying to engage the pallet jack into reverse, so that he could get it out from under the skid. However, the pallet jack would not engage. Plaintiff testified that "this particular time I really had to throttle it" and the pallet jack jumped back at him (*id.* at 82). Plaintiff testified that in the 30 years he had been operating pallet jacks, he never had one jump back at him in this way.

Plaintiff testified that the pallet jack jumped back about 6 to 8 feet and hit his ankle. He then got "caught between a pipe and the power jack" (*id.*). He explained that the pallet jack "jumped at me and I couldn't go further because the pipe that was on the floor impeded my progress" (*id.* at 87). Plaintiff testified that there were about 25 to 30 loose pipes stacked on the floor that were "supposed to be on a pallet" (*id.* at 88-89). These pipes were directly behind him when he was trying to move the pallet jack into reverse.

Plaintiff testified that the pipe that he got caught on most likely belonged to the steamfitters or plumbers because “the electricians don’t use those big wide pipes” (*id.* at 83). He testified that the pipe was black and measured about 5-feet long and 6-inches wide (*id.*).

Plaintiff was asked: “did you see this pipe at any time before your accident occurred” (*id.* at 84). He responded: “No, it wasn’t in the passageway . . . I was using” (*id.*). Plaintiff testified that the loose pipes were in a different passageway behind him (*id.* at 90, 144, 146). He had no reason to be in the passageway with the loose pipes, but the pallet jack “forced [him] back there when it jumped [him]” (*id.* at 158-159).

Plaintiff testified that after the accident, his co-worker Sonny came over and asked him “what happened” (*id.* at 98). Sonny helped him up. A laborer by the name of Owen Bedford was also in the room and “asked what happened” (*id.* at 103).

They called Barreras, but “he never came” (*id.* at 99). “The safety guy for the job . . . came down” and took plaintiff’s statement (*id.* 100, 104). Plaintiff told him that there was a defect in the handle of the pallet jack, it jumped back at him and hit his ankle.

Deposition Testimony of Marc Price (Sabey Construction’s General Superintendent)

Marc Price testified that he was Sabey Construction’s General Superintendent for the Project. Price did a walk-through of the storage room on the morning of the accident, during which he did not observe any pipes out of place. The piping was in its designated storage area and there were no obstructions of any kind on the floor. He directed all trades to make sure that when they stored materials, the walkways remained at least 8-feet wide. Price testified that from what he “personally observed,” plaintiff had “plenty of room” to move the cinderblocks (Price EBT Tr [4-26-16] at 105, NYSCEF Doc. No. 283).

Price testified that he did not witness the accident, but when he entered the storage room shortly after the accident, he observed four or five silver conduit pipes stacked in a pyramid-shape located near where the accident might have occurred. It appeared to Price that one of the pipes had rolled off the top of the pyramid into a walkway. He did not observe any pipes scattered about the access areas of the storage room. He only observed the one pipe sticking out about 6 inches into the aisle and assumed that this had become dislodged during the accident.

Price was deposed on two occasions. At his first deposition, he testified that these conduit pipes belonged to one of the five electrical contractors on the Project and that he “could not recall which one particularly owned the conduit” (Price EBT Tr [4-26-16] at 218, NYSCEF Doc. No. 283). He testified that it “had to be Unity, Adco, or E.J. Electric” (*id.* at 219). When Price was asked whether he had “any opportunity to speak with anybody from Unity, Adco, or E.J. Electric with regard to plaintiff’s accident,” he responded “No” (*id.*).

At Price’s second deposition, he testified that he was certain the conduit pipe belonged to ADCO because Sabey Construction designated this area of the storage room for ADCO to store its materials, and that after the accident, he spoke with ADCO’s foreman about whether he “was aware of what happened and that there was an incident with his pipe” (Price EBT Tr [6-24-16] at 11, 14 NYSCEF Doc. No. 293). However, Price testified during the same deposition that he could not recall whether he spoke to any of the five electrical contractors on the Project regarding the pipes involved in the accident (*id.* at 9).

In addition, during his second deposition, Price testified that he could not recall whether there was any black piping of the type plaintiff described in the area of the accident. He testified that these types of pipes would be used by either plumbers, sprinkler fitters, or steam fitters (*id.* at 17-18). However, he testified later on in the same deposition that there were black pipes located in the storage room used by either the sprinkler fitters or steam fitters, but he could not recall the "position" of these pipes in the storage room (Price EBT Tr [6-24-16] at 73, NYSCEF Doc. No. 293).

Deposition Testimony of Richard Assini (General Foreman for ADCO)

Richard Assini was a general foreman for ADCO. He testified that ADCO did not store conduit pipe in the storage room off the loading dock. ADCO stored them in pipe trees on the third floor of the Premises.

Assini testified that the storage room was used by all trades to store things temporarily until an elevator became available. ADCO would store equipment, such as power distribution units and uninterruptable power supply parts, in the storage room. Rarely would it store electrical or conduit pipes in the storage room. ADCO would place pipes directly on pipe trees once they arrived on the loading dock. When ADCO did use the storage room, Price would tell ADCO where to put things in order to keep the room organized.

Assini testified that he did not hear about plaintiff's accident until he was told he had to appear for his deposition. He never had a discussion with Price about the accident. Assini testified that ADCO did not use black pipe at the job site. ADCO only used conduit pipe, which was silver tubing with a diameter of 3/4 to 4 inches in diameter.

Raymond Barreras (Foreman for Cirocco)

Raymond Barreras testified that he was a foreman for Cirocco on the Project. He explained that in September 2012, Cirocco had two pallet jacks at the Premises. It maintained the pallet jacks by charging them at the end of every day and checked to make sure they were functioning properly once per week. Barreras never found a problem with the pallet jacks during weekly maintenance. Barreras testified that no employee made a complaint about the pallet jacks on this job site. He also testified that someone without an OSHA 30 card would not be permitted to operate the pallet jacks. The plaintiff did not have an OSHA 30 card and was not authorized to operate the pallet jack. When a delivery came in, Barreras would assign one of the two men who had OSHA 30 cards to take care of the delivery. Plaintiff was not one of these two men and Barreras did not direct plaintiff to do so.

Barreras testified that he knew of only one accident involving a Cirocco employee and a pallet jack. However, he did not know whether the plaintiff was the individual involved in this accident, which occurred on the loading dock, not in the storage room. Barreras did not witness the accident. He was in the storage room when it happened. The men on the loading dock came to the storage room to get him. Within a minute, Barreras was on the loading dock. He told the worker involved, "You are not supposed to use the equipment, you don't know what you're doing" (Barreras EBT Tr at 84, NYSCEF Doc. No. 285). The worker looked at Barreras with a "blank stare" (*id.* at 88).

Barreras testified that there were no materials being delivered at that time and there were no trucks at the loading dock when the accident occurred. There was nothing on the pallet jack. There were several witnesses to the accident who told Barreras that the injured worker was "trying to operate the jack and hit the wrong button and ran his foot over" (*id.* at 35).

Barreras testified that he did not inspect the power jacks after the accident because they were running fine. After the injured worker left the loading dock, the pallet jack involved in the accident was used to transport three separate loads of materials without incident. Barreras testified that there were no pipes involved in the accident.

Craig Inman (Senior Manager for Crown Equipment Corporation)

Craig Inman is a senior manager for Crown Equipment Corporation (Crown). He testified that at the time of the accident, Crown owned the two pallet jacks Cirocco kept at the Premises and that Crown leased them to Cirocco.

Deposition Testimony of Joseph O'Rourke (Site Safety Manager for Select)

Joseph O'Rourke testified that he was one of two Site Safety Managers working for Select on the Project. He and the other Site Safety Manager, Robert Quinn, worked different shifts. Since the accident did not occur during O'Rourke's shift, he had no familiarity with the accident or the Accident Report prepared by Quinn.

Select's Accident Report

Select's accident report, completed by Quinn, states that the cause of the accident was "Operator error" and that there were no witnesses to the accident (Select Accident Report, NYSCEF Doc. No. 62). The first page of the report describes the accident as follows: "While backing up an electric jack, worker pinned his foot against a stack of pipe." However, on the third page, the report states: "Gentleman was operating an electric pallet jack and pinned himself against the hallway wall, pinching his right chin against the frame of the jack and wall."

DISCUSSION

On a motion for summary judgment, the "movant bears the heavy burden of establishing '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'" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing 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" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d at 562). On the motion, the "facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

The court's function on a motion for summary judgment "is issue finding rather than issue determination" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]). The motion "should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

Select's Motion for Summary Judgment (Mot Seq No 007)

Select moves for summary judgment “dismissing plaintiff’s complaint and any and all claims and cross-claims” (Notice of Motion, NYSCEF Doc. No. 258). All of the arguments in Select’s supporting affidavit and memorandum of law are directed at the dismissal of the complaint. There are no arguments addressing the third-party complaint.

With certain exceptions not relevant here, CPLR 1008 permits a third-party defendant to assert against the plaintiff “any defenses which the third-party plaintiff has to the plaintiff’s claim.” Therefore, as a third-party defendant, Select is entitled to seek summary judgment dismissing the complaint in the main action (*see Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 986-987 [2d Dept 2012]; *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 881 [2d Dept 2009]; *Stamboulis v Stefatos*, 256 AD2d 328, 329 [2d Dept 1998]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102 [1st Dept 1997]; *De Pan v First Natl. Bank*, 98 AD2d 885, 885 [3d Dept 1983]). However, rather than asserting defenses that Sabey Construction has to plaintiff’s claims, Select proffers arguments to support the proposition that Select is not a proper defendant with respect to the claims in the main action. In other words, the crux of Select’s motion is that Select cannot be held liable for plaintiff’s damages under the theories set forth in the complaint. But Select Safety is not a defendant in the main action, and since it sets forth no basis for dismissing the complaint against Sabey Construction, it fails to meet its prima facie burden.

Thus, Select’s motion for summary judgment is denied without regard to the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

ADCO's Motion for Summary Judgment (Mot Seq No 008)

ADCO moves for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it. In the third-party complaint, Sabey Construction asserts claims against ADCO for contractual and common-law indemnification, contribution, and to recover damages for breach of contract for failure to procure insurance.

Contractual Indemnification

“The right to contractual indemnification depends upon the specific language of the contract” (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). The indemnification provision in the subcontract between Sabey Construction and ADCO provides that ADCO must, inter alia, indemnify Sabey Construction against all claims, liabilities, losses and expenses “to the extent caused by the negligence, breach of contract, breach of warranty . . . , violation of applicable law, or other improper conduct of” ADCO, its agents, employees, subcontractors and suppliers, or anyone for whose acts ADCO is responsible (Sabey/ADCO Subcontract at ¶ 11.1, NYSCEF Doc. No. 278).

ADCO maintains that the indemnification provision is not applicable here because plaintiff’s injuries were not caused by any negligence or improper conduct on its part. ADCO asserts that it had nothing to do with the pallet jack plaintiff was operating at the time of the accident and that the pipe to which plaintiff was allegedly pinned did not belong to ADCO. Moreover, the location of the pipe was not a proximate cause of the accident. Rather, the improper operation and/or malfunction of the pallet jack caused the accident.

In support, ADCO points out with respect to the pallet jack that plaintiff testified that his employer, Cirocco, provided him with the pallet jack involved in the accident. Also, Craig Inman, a senior manager for Crown, testified that Crown owned the pallet jack and leased it to Cirocco. As to the pipes, ADCO points out that plaintiff testified that after the pallet jack jumped back and hit his leg, he was pinned between the pallet jack and a black metal pipe that was six inches in diameter and five feet in length. Plaintiff testified that these were pipes used by steamfitters and/or plumbers. Furthermore, Assini testified that ADCO's piping was silver and that it did not use black piping of the kind plaintiff described as being involved in the accident. He also testified that ADCO rarely stored piping in the room where plaintiff alleges the accident occurred, and that ADCO's pipes were always stored on pipe trees.

The foregoing testimony establishes ADCO's prima facie entitlement to judgment as a matter of law by demonstrating that there are no triable issues of fact as to whether plaintiff's accident was caused in whole or in part by ADCO's negligence or other improper conduct on the part of ADCO, its agents, employees, subcontractors, suppliers, or anyone for whose acts ADCO was responsible.

In opposition, Sabey Construction argues that issues of fact exist as to whether ADCO's negligence and/or breach of contract contributed to plaintiff's injuries. In support, Sabey Construction relies on Price's testimony to establish that ADCO's pipes was involved in the accident. It highlights Price's testimony that when he entered the storage room after plaintiff's accident, he observed four or five silver, electrical conduit pipes belonging to electricians, stacked in a pyramid-shape located near where the accident might have occurred. It appeared to Price that during the accident, a pipe may have rolled off the pyramid and landed outside of the walkway.

Sabey Construction asserts that this testimony contradicts plaintiff's testimony that the piping against which plaintiff was pinned belonged to the steamfitters and/or plumbers, not electricians. It asserts that the testimony also contradicts Assini's testimony that ADCO was not storing conduit piping in the storage room at the time of the accident. Sabey Construction argues, therefore, that it cannot be determined as a matter of law that ADCO is not required to indemnify Sabey Construction pursuant to the contract between them.

Contrary to Sabey Construction's contention, Price's testimony fails to raise an issue of fact. His testimony was internally inconsistent and speculative with regard to whether ADCO's pipes were involved in the accident (*see Zuckerman v City of New York*, 49 NY2d at 562 ["one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"]; *Warden v Orlandi*, 4 AD3d 239, 242 [1st Dept 2004] ["rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment"] [internal quotation marks and citation omitted]). Indeed, Price testified he was not present when the accident occurred and that he had no idea what the pipes looked like at the time of the accident. He was also uncertain about the precise location of the accident. As such, Price's testimony is insufficient to raise a triable issue of fact as to whether the pipes allegedly involved in plaintiff's accident belonged to ADCO.

Sabey Construction also asserts that summary judgment is unwarranted because Barreras' testimony raises an issue of fact as to how the accident occurred. However, even crediting Barreras' version of events, he testified that there were no pipes involved in the accident. Therefore, his testimony is not sufficient to raise an issue of fact in this regard.

Thus, the cause of action in the third-party complaint for contractual indemnification is dismissed insofar as asserted against ADCO.

Common-Law Indemnification and Contribution

“A party can establish its prima facie entitlement to judgment as a matter of law dismissing a claim for common-law indemnification and contribution asserted against it by establishing that it was not negligent, and that it did not have the authority to direct, supervise, or control the work giving rise to the injury” (*Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1402, 1404 [2d Dept 2018], quoting *State of New York v Defoe Corp.*, 149 AD3d 889, 889 [2d Dept 2017]). Here, ADCO established that the pipes allegedly involved in the accident did not belong to it and that it lacked the authority to direct, supervise or control either the placement of those pipes or plaintiff’s operation of the pallet jack.

In opposition, Sabey Construction failed to produce evidentiary proof sufficient to rebut ADCO’s prima facie showing. As discussed above, it failed to raise an issue of fact as to whether the pipe allegedly involved in the accident belonged to ADCO. Further, there is no evidence in the record to suggest that ADCO had any authority to direct, supervise, or control the work giving rise to the injury.

Thus, the causes of action in the third-party complaint for common-law indemnification and contribution are dismissed insofar as asserted against ADCO.

Breach of Contract for Failure to Procure Insurance Coverage

The elements of a breach of contract “claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A plaintiff cannot prevail on a breach of contract theory unless he or she “sustained ‘actual damages as a natural and probable consequence’ of the defendant’s breach” (*Family Operating Corp. v Young Cab Corp.*, 129 AD3d 1016, 1017 [2d Dept 2015], quoting *Rakylar v Washington Mut. Bank*, 51 AD3d 995, 996 [2d Dept 2008]).

Here, the third-party complaint alleges that the insurance procurement clause contained in the agreement between Sabey Construction and ADCO requires that ADCO purchase insurance naming Sabey Construction as an additional insured. The third-party complaint asserts that ADCO failed and/or refused to procure such insurance.

ADCO’s obligation under the clause at issue was to procure insurance covering Sabey Construction against

“liability arising out of (a) completed operations, (b) Operations performed for Contractor or Owner by subcontractor, (c) acts or omissions of Contractor or Owner in connection with general supervision of Subcontractor’s operations, and (d) claims for bodily injury, death or property damage brought against Contractor or Owner by Subcontractor’s employees or the employees of Subcontractor’s subcontractors of any tier, however caused or related to the performance of the of the work under the Prime Contract”

(Sabey/ADCO Subcontract at ¶ 13.1, NYSCEF Doc. No. 278).

In this case, even assuming ADCO did not procure the coverage contemplated by the contract, such failure would not be the proximate cause of any damages to Sabey Construction. Plaintiff was not an employee of ADCO or of one of ADCO’s subcontractors and, for reasons already discussed, ADCO established prima facie that plaintiff’s injuries did not arise from ADCO’s operations. Therefore, even assuming ADCO

maintained the required policy on the date of the accident, the policy would not have afforded coverage for plaintiff's claim against Sabey Construction (*see New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540, 542 [1st Dept 2007]).

Thus, the cause of action in the third-party complaint for failure to procure insurance is dismissed insofar as asserted against ADCO. Accordingly, ADCO's motion to dismiss the third-party complaint and all cross claims insofar as asserted against it is granted.

Sabey Data and Sabey Constructions' Motion for Summary Judgment (Mot Seq No 009)

Sabey Data and Sabey Construction move for summary judgment dismissing the complaint insofar as asserted against them and for summary judgment on Sabey Construction's third-party complaint insofar as asserted against ADCO and Select Safety.

The Main Action

In the main action, plaintiff asserts claims against Sabey Data and Sabey Construction for violations of Labor Law §§ 240 (1), 241 (6), and 200 and common-law negligence.

The Labor Law § 240 (1) Claim

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011][internal quotation marks and citations omitted]). To be entitled to recovery, the injury sustained must be "the type of elevation-related hazard to which the statute applies" (*id.*). Here, plaintiff does not dispute that this case does not involve the type of elevation-related hazard to which the statute applies.

Thus, the Labor Law § 240 (1) claim is dismissed insofar as asserted against Sabey Data and Sabey Construction.

The Labor Law § 241 (6) Claim

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

"All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

The statute "imposes a nondelegable duty on owners and contractors to comply with the Commissioner of Labor's regulations. And to the extent that [a] plaintiff . . . assert[s] a viable claim under Labor Law § 241 (6), he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery" (*Morton v State of New York*, 15 NY3d 50, 55 [2010][internal quotations marks and citations omitted]).

Labor Law § 241 (6) is not self-executing. To show a violation of this statute, a plaintiff must show that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503-505 [1993]). In addition, the plaintiff must also show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Here, plaintiff's bill of particulars and supplemental bill of particulars allege violations of the following provisions of the Industrial Code: 12 NYCRR 23-1.5 (c)(1), (c)(2) and (c)(3), 12 NYCRR 23-1.7 (d)(1) and (d)(2), 12 NYCRR 23-1.8, 12 NYCRR 23-2.1, 12 NYCRR 23-1.30, 12 NYCRR 23-1.27, and 12 NYCRR 23-9.2 (a) (Bill of Particulars, NYSCEF Doc. 300; Supplemental Bill of Particulars, NYSCEF Doc. No. 310).

Industrial Code 12 NYCRR 23-1.5 (c)(1), (c)(2) and (c)(3)

Plaintiff's opposition to the branch of the motion seeking dismissal of the section 241(6) claim does not address the claims predicated on 12 NYCRR 23-1.5 (c)(1) or (c)(2). Thus, those claims are dismissed as abandoned (see *Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

As to the claim predicated on section 23-1.5 (c) (3) of the Industrial Code, that subsection provides: "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." 12 NYCRR 23-1.5 (c)(3) is sufficiently specific to support a claim under the statute (see *Contreras v 3335 Decatur Ave. Corp.*, 173 AD3d 496, 497 [1st Dept 2019]).

Sabey Data and Sabey Construction argue that this section of the Industrial Code is inapplicable because there is no support for the proposition that the pallet jack plaintiff was using at the time of the accident was not "sound" or "operable" or that it was "damaged" in any way. However, plaintiff testified that he had problems with the pallet jack on prior occasions and that he complained about this to his foreman.

Thus, the claims predicated on 12 NYCRR 23-1.5 (c)(1) and (c)(2) are dismissed as abandoned, but Sabey Data and Sabey Construction are not entitled to summary judgment dismissing so much of the Labor Law § 241 (6) cause of action as is premised on an alleged violation of 12 NYCRR 23-1.5 (c)(3) insofar as asserted against them.

Industrial Code 12 NYCRR 23-1.7

In the supplemental bill of particulars, plaintiff alleges violations of 12 NYCRR 23-1.7 (d)(1) and (d)(2). However, there are no subsections listed under 12 NYCRR 23-1.7 (d), which pertains to slipping hazards and is inapplicable to the facts of this case.

In opposition, plaintiff does not dispute that 12 NYCRR 23-1.7 (d) is inapplicable. He explains that this was a typographical error and that he intended set forth a claim predicated on 12 NYCRR 23-1.7 (e)(1) and (e)(2). Those sections provide:

"(e) Tripping and other hazards.

(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.”

12 NYCRR 23-1.7 (e)(1) and (e)(2) are sufficiently specific to impose liability under the statute (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]; *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]).

“Provided that the description of the place of injury is consistent and sufficient, the court may determine whether it was a passageway or working area on a motion for summary judgment” (*Humala v City of New York*, 9 Misc 3d 1130 [A], *4 [Sup Ct, NY County 2005, Doris Ling-Cohan, J.]). Here, the evidence shows that plaintiff’s accident occurred in a passageway. Therefore, 12 NYCRR 23-1.7 (e)(1) applies. Plaintiff’s own deposition testimony establishes that the 10-foot wide passageway in which he was operating the pallet jack was clear of any obstruction or debris, demonstrating that the condition of that passageway complied with 12 NYCRR 23-1.7 (e)(1).

Thus, Sabey Data and Sabey Construction are entitled to summary judgment dismissing so much of the Labor Law § 241 (6) cause of action as is premised on an alleged violation of 12 NYCRR 23-1.7 insofar as asserted against them.

Industrial Code 12 NYCRR 23-1.8

Plaintiff does not address 12 NYCRR 23-1.8 in his opposition papers. Therefore, so much of the section 241 (6) claim as is predicated on this section of the Industrial Code is dismissed (*see Perez v Folio House, Inc.*, 123 AD3d at 520; *Kempisty v 246 Spring St., LLC*, 92 AD3d at 475).

Industrial Code 12 NYCRR 23-2.1

12 NYCRR 23-2.1 provides:

“(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.”

As an initial matter, 12 NYCRR 23-2.1 (a)(2) is inapplicable because plaintiff's accident was unrelated to the weight of any of the materials being stored in the area of his accident. And, "12 NYCRR 23-2.1 (b) lacks the specificity required to support a cause of action under Labor Law § 241 (6)" (*Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 582 [2d Dept 2008]).

Section 23-2.1 (a)(1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417, 417 [1st Dept 2007]). Sabey Data and Sabey Construction argue that subsection (a)(1) is inapplicable because, as just noted, plaintiff testified that the 10-foot-wide passageway in which he was operating the pallet jack was not obstructed by any material. However, the evidence in the record does not establish as a matter of law that the pipes involved in plaintiff's accident were stored in a safe and stable manner or that the manner in which they were stored did not contribute to plaintiff's injuries.

Thus, the claims predicated on 12 NYCRR 23-2.1 (a)(2) and (b) are dismissed, but Sabey Data and Sabey Construction are not entitled to summary judgment dismissing so much of the Labor Law § 241(6) cause of action as is predicated on an alleged violation of 12 NYCRR 23-2.1 (a)(1) insofar as asserted against them.

Industrial Code 12 NYCRR 23-1.30

Plaintiff's opposition papers do not address the claims predicated on 12 NYCRR 23-1.30. Therefore, those claims are dismissed as abandoned (*see Perez v Folio House, Inc.*, 123 AD3d at 520; *Kempisty v 246 Spring St., LLC*, 92 AD3d at 475).

Industrial Code 12 NYCRR 23-1.27

12 NYCRR 23-1.27 is entitled "Mechanical, hydraulic and pneumatic jacks." Plaintiff clarifies in his opposition papers that he is specifically relying on 12 NYCRR 23-1.27 (e), which provides: "The use of any jack shall be at all times under the direct supervision of a designated person."

This court is not aware of any caselaw deciding whether or not this provision of the Industrial Code is a sufficient predicate for a cause of action under Labor Law § 241 (6). The term "designated person" is defined under 12 NYCRR 23-1.4 (b) (17) as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty." In *Sawicki v AGA 15th St., LLC* (143 AD3d 549 [1st Dept 2016]), the First Department "implied that Industrial Code § 23-9.5 (c) which requires, in pertinent part, that excavating machines 'be operated only by designated persons' was sufficiently specific by analyzing whether the employee was a 'designated person' and citing to the definition in Industrial Code § 23-1.4 (b) (17)" (*Toussaint v Port Auth. of N.Y. & N.J.*, 174 AD3d 42, 44 [1st Dept 2019]). Given that the term "designated person" has been held to be sufficiently specific, this court concludes that a violation of 12 NYCRR 23-1.27 (e) may support a cause of action under Labor Law § 241 (6) (*see id.* at 45).

In any event, plaintiff's own deposition testimony establishes that the pallet jack was operated by a person "selected and directed by his employer." Plaintiff testified in this regard that his supervisor instructed him to operate the pallet jack on the day of the accident. Therefore, plaintiff qualifies as a "designated person" within the meaning of the Code.

In opposition to the motion, plaintiff argues that defendants violated section 23-1.27 (e) because plaintiff was not certified by OSHA to operate the pallet jack and he was not being supervised by a competent person

while operating the pallet jack. However, sections 23-1.27(e) and 23-1.4 (b) (17) mention nothing about supervising the operation of jacks or OSHA certification.

Thus, Sabey Data and Sabey Construction are entitled to summary judgment dismissing so much of the Labor Law § 241(6) cause of action as is premised on an alleged violation of 12 NYCRR 23-1.27 insofar as asserted against them.

Industrial Code 12 NYCRR 23-9.2 (a)

12 NYCRR 23-9.2 (a) states:

“Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest.”

The Court of Appeals has held that a plaintiff claiming “to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law § 241 (6) based on an alleged violation of 12 NYCRR 23-9.2 (a)” (see *Misicki v Caradonna*, 12 NY3d 511, 520-521 [2009]).

Sabey Data and Sabey Construction argue that this claim should be dismissed because there is no evidence of a failure to comply with section 23-9.2 (a). They also contend that actual notice is required for claims under section 23-9.2 (a), and since there is no proof that they had actual notice of a structural defect or unsafe condition with regard to the pallet jack, this claim should be dismissed. Plaintiff testified, however, that he complained to his supervisor that the subject pallet jack was malfunctioning in the week leading up to the accident. Therefore, plaintiff’s employer did have notice the pallet jack was allegedly not in proper operating condition. Further, according to plaintiff, the problem was not resolved and constituted a proximate cause of his injuries (see *Misicki v Caradonna*, 12 NY3d at 521).

Thus, Sabey Data and Sabey Construction are not entitled to the dismissal of the Labor Law § 241(6) cause of action insofar as it is premised on an alleged violation of 12 NYCRR 23-9.2 (a).

The Common-Law Negligence and Labor Law § 200 Claims

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

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

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

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Indeed, establishing liability under Labor Law § 200 “requires actual supervisory control or input into how the work is performed” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012][“liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work”]). Even where an entity “may have coordinated the subcontractors at the work site or told them where to work on a given day, and had the authority to review onsite safety . . . those responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff’s injuries under Labor Law § 200” (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *see Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210 [1st Dept 1998]; *O’Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]).

Where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 when it “‘created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice’” (*Mendoza v Highpoint Assoc, IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, the accident was allegedly caused when the pallet jack plaintiff was using to transport concrete slabs, suddenly jumped back, hitting plaintiff’s leg, and pinning him against one of the loose allegedly improperly stored pipes being stored behind him. Thus, plaintiff’s claim implicates both the means and methods of his work and a dangerous condition at the premises.

Sabey Data and Sabey Construction argue they are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them, because plaintiff’s testimony established that he only took directions or instructions on how to perform his work from his employer and that no one other than Ray Barreras gave him instructions or told him how to do his job. However, there is testimony in the record, including that of Price, which demonstrates that Price controlled the manner in which materials were being stored in the storage room. Since it cannot be determined as a matter of law whether the manner in which the loose pipes behind plaintiff were being stored contributed to his injuries, Sabey Data and Sabey Construction failed to make a prima facie showing in this regard.

Thus, Sabey Data and Sabey Construction are not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims insofar as asserted against them.

The Third-Party Complaint

Sabey Construction moves for summary judgment on the causes of action in its third-party complaint seeking contractual and common-law indemnification and damages for breach of contract for failure to procure insurance insofar as asserted against ADCO and Select (Third-Party Complaint, NYSCEF Doc. No. 301). The

court has already granted ADCO's motion for summary judgment dismissing the third-party complaint insofar as asserted against it, as ADCO made a prima facie showing of entitlement to judgment as a matter of law and the record is devoid of any evidence raising a triable issue of fact in this regard.

Contractual Indemnification

As to Select, the indemnification provision in the subcontract between it and Sabey Construction provides that Select must, inter alia, indemnify Sabey Construction against all claims, liabilities, losses and expenses "to the extent caused by the negligence, breach of contract, breach of warranty . . . , violation of applicable law, or other improper conduct of" Select, its agents, employees, subcontractors and suppliers, or anyone for whose acts Select is responsible (Sabey/Select Subcontract at ¶ 11.1, NYSCEF Doc. No. 312).

In support of this branch of the motion, Sabey Construction argues that Select was responsible for conducting walk-throughs and inspections of the storage room where the accident occurred, at least three times per day and that it had the authority to stop any contractor's work, at any time, if it observed unsafe conditions. It argues, therefore, that should this court find that plaintiff's accident was caused due to an unsafe condition in the storage room, including the placement of loose pipes, then Sabey Construction would be entitled to summary judgment on its contractual indemnification claim against Select. However, Sabey Construction failed to establish, as a matter of law, that the accident was caused by an unsafe condition in the storage room and, therefore, cannot be determined at this juncture.

Moreover, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 774 [2d Dept 2010][quotation marks and citation omitted]; see *Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, [1st Dept 2020]; *Jackson v. Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013]). Here, Sabey Construction failed to establish that it was free from negligence.

Thus, Sabey Construction is not entitled to summary judgment on its contractual indemnification claims insofar as asserted against Select.

Common-Law Indemnification

In support of the motion, Sabey Construction argues that if this court finds that it is statutorily liable under the Labor Law, its liability would be merely secondary or vicarious and it would be entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused plaintiff's injuries, and whose liability to plaintiff is therefore primary. Therefore, it contends that it would be entitled to summary judgment on its common-law indemnification claims against Select for the same reasons stated in support of its contractual indemnification claims.

However, "[i]n order to establish a claim for common-law indemnification, a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mohan v Atlantic Ct., LLC*, 134 AD3d 1075, 1078-1079 [2d Dept 2015]). Here, there are questions of fact as to whether Sabey Construction was free from negligence with regard to the accident. Further, Sabey Construction fails to establish as a matter of law that Select's negligence contributed to the accident or that it had the authority to direct, supervise or control the work giving rise to the injury.

Thus, summary judgment on the cause of action for contractual indemnification is not warranted.

Breach of Contract for Failure to Procure Insurance Coverage

The third-party complaint alleges that the insurance procurement clause contained in Sabey Construction's agreement with Select requires that Select purchase insurance naming Sabey Construction as an additional insured. The third-party complaint asserts that Select failed and/or refused to procure such insurance.

The agreement at issue obliges the procurement of insurance covering Sabey Construction against

"liability arising out of (a) completed operations, (b) Operations performed for Contractor or Owner by subcontractor, (c) acts or omissions of Contractor or Owner in connection with general supervision of Subcontractor's operations, and (d) claims for bodily injury, death or property damage brought against Contractor or Owner by Subcontractor's employees or the employees of Subcontractor's subcontractors of any tier, however caused or related to the performance of the of the work under the Pime Contract"

(Sabey/Select Subcontract at ¶ 13.1, NYSCEF Doc. No. 312).

In support of this branch of its motion, Sabey Construction contends that Select failed to procure the requisite insurance on its behalf and therefore it is entitled to summary judgment on its claims against it for breach of contract for failure to procure insurance naming it as an additional insured. In opposition, Select does not dispute that the provision applies or that it failed to procure the requisite insurance. Rather, it contends that Sabey Construction is not entitled to summary judgment on this cause of action because Sabey Construction purchased its own insurance and is only entitled to the cost of premiums and other possible out of pocket expenses. Select asserts that since Sabey Construction failed to provide proof of insurance payments and any claimed out of pocket expenses as a result of Select's failure to procure insurance on its behalf, Sabey Construction failed to establish a prima facie case as to its damages.

Select's undisputed failure to comply with the insurance procurement provision constitutes a breach of the contract. Therefore, Sabey Construction is entitled to summary judgment as to liability on its breach of contract claim insofar as asserted against Select. In the event Sabey Construction had its own insurance coverage, the measure of damages recoverable by Sabey Construction will be governed by *Inchaustegui v 666 5th Ave. Ltd. Partnership* (96 NY2d 111 [2001])[holding that since landlord had obtained its own liability insurance, landlord's recovery for tenant's breach of agreement to procure insurance on landlord's behalf was limited to the loss that landlord actually suffered by reason of tenant's breach]; see also *Wong v N.Y. Times Co.*, 297 AD2d 544, 547-548 [1st Dept 2002]).

Thus, Sabey Construction is entitled to partial summary judgment on the issue of liability on its breach of contract claim insofar as asserted against Select.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby:

ORDERED that Select Safety Consulting Services, Inc.'s motion for summary judgment dismissing the complaint and all claims insofar as asserted against it is denied (motion sequence number 007); and it is further

ORDERED that ADCO Electrical Corp's motion for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it is granted and the third-party complaint and all cross claims insofar as asserted against it are dismissed (motion sequence number 008) ; and it is further

ORDERED that Sabey Data Center Properties, LLC and Sabey Construction Inc.'s motion for summary judgment is granted to the extent that (1) the complaint is dismissed insofar as asserted against them except for the causes of action alleging a violation of Labor Law § 200 and common-law negligence, and so much of the cause of action alleging a violation of Labor Law § 241 (6) as is predicated upon 12 NYCRR 23-1.5 (c)(3), 12 NYCRR 23-2.1 (a)(1), and 12 NYCRR 23-9.2(a), and (2) Sabey Construction Inc. is granted partial summary judgment as to liability on its third-party breach of contract claim insofar as asserted against Select Safety Consulting Services, Inc., and their motion is otherwise denied (motion sequence number 009).

4/12/2021

DATE

FRANCIS A. KAHN III, J.S.C.

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: