SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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YAMIL RIVERA,

Plaintiff,

- v -

JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, ROGERS ELECTRICAL CONTRACTORS, INC.,JONES LANG LASALLE AMERICAS, INC.,J.P. MORGAN CHASE,

Defendant.

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INDEX NO. 156677/2016

MOTION DATE 06/17/2021, 06/17/2021, 06/17/2021, 06/17/2021

MOTION SEQ. NO. 010 011 012 013

DECISION + ORDER ON MOTION

JONES LANG LASALLE AMERICAS, INC.

Plaintiff,

-against-

ROGERS ELECTRIC CONTRACTORS, INC.

Defendant.

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Third-Party
Index No. 595917/2019

JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, J.P. MORGAN CHASE

Plaintiff,

-against-

FOREST ELECTRIC CORP.

Defendant.

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Second Third-Party
Index No. 595466/2020

JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, J.P. MORGAN CHASE

Plaintiff,

-against-

JAMES F. VOLPE ELECTRICAL CONTRACTING CORP.

Defendant.

Third Third-Party
Index No. 595332/2021

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 353, 356, 370, 391, 394, 395, 406, 407, 413, 414, 420, 422

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

The following e-filed documents, listed by NYSCEF document number (Motion 011) 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 354, 357, 371, 387, 393, 408, 409, 417, 418, 419, 423

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

The following e-filed documents, listed by NYSCEF document number (Motion 012) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 355, 358, 372, 388, 389, 390, 410, 411, 424, 427, 428

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

The following e-filed documents, listed by NYSCEF document number (Motion 013) 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 359, 360, 373, 385, 386, 392, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 415, 416, 425

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

Upon the foregoing documents, it is

ORDERED that the motion (sequence number 010) of defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric and second third-party defendant Forest Electric Corp. for summary judgment is granted to the extent of dismissing:

(1) plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21,

(2) defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc.'s claims for contractual indemnification and breach of contract against defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric,

(3) defendant/second third-party plaintiff JPMorgan Chase Bank, N.A.'s contractual indemnification claim against second third-party defendant Forest Electric Corp., and

(4) defendant/second third-party plaintiff JPMorgan Chase Bank, N.A.'s common-law indemnification and contribution claims against second third-party defendant Forest Electric Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 011) of plaintiff is granted on the issue of liability under Labor Law §§ 240 (1) and 241 (6), based upon a violation of 12 NYCRR 23-1.13 (b) (4), as against defendants JPMorgan Chase Bank, N.A. and Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric, with the issue of plaintiff's damages to be determined at the trial of this action, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 012) of defendant/second third-party plaintiff JPMorgan Chase Bank, N.A. is granted to the extent of granting leave to amend its answer to assert a cross claim for contractual indemnification against Jones Lang LaSalle Americas, Inc., and granting summary judgment as to liability on its breach of contract claims against defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc. and second third-party defendant Forest Electric Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 013) of defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc. is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21, and is otherwise denied; and it is further

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

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within ten (10 days.

MEMORANDUM DECISION

CAROL R. EDMEAD, J.S.C.:

Motion sequence numbers 010, 011, 012, and 013 are consolidated for disposition.

In this Labor Law action, plaintiff Yamil Rivera (plaintiff), an electrician, alleges that he was injured on July 13, 2016 at a Chase Bank branch located at 1051 Jackson Avenue in Long Island City. Plaintiff alleges that while he was performing electrical work, he fell from a ladder after receiving an electric shock.

Defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric (hereinafter, Rogers) and second third-party defendant Forest Electric Corp. (Forest) move, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint as against Rogers, the third-party complaint, and the second third-party complaint and all cross claims against them with prejudice (motion sequence number 010).[1]

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6) as against defendants JPMorgan Chase Bank, N.A. (hereinafter, JP Morgan), Rogers, and Jones Lang LaSalle Americas, Inc. (hereinafter, JLL), and against JLL pursuant to the doctrine of res ipsa loquitur (motion sequence number 011).

[1] The caption has been amended to reflect that the original third-party action has been discontinued.

JP Morgan moves for an order: (1) pursuant to CPLR 3025 (b), granting leave to correct a typographical error with respect to its cross claim for contractual indemnification against JLL; (2) pursuant to CPLR 3212, granting summary judgment on its cross claims for common-law indemnification, contractual indemnification, and breach of contract against JLL; (3) pursuant to CPLR 3212, granting summary judgment on its cross claim for common-law indemnification against Rogers; and (4) pursuant to CPLR 3212, for summary judgment on its third-party claims for common-law indemnification, contractual indemnification, and breach of contract against Forest (motion sequence number 012).

JLL moves, pursuant to CPLR 3212, for: (1) summary judgment dismissing the second amended complaint and all cross claims against it; and (2) summary judgment on its contractual indemnification, contribution, and common-law indemnification claims against Rogers (motion sequence number 013). By amended affirmation, JLL also seeks summary judgment against Forest and JP Morgan.

BACKGROUND

On the date of the accident, JP Morgan owned the premises (NY St Cts Elec Filing [NYSCEF] Doc Nos. 274, 275, 276). Pursuant to Master Agreement # CW 534285, JP Morgan hired Rogers Electric Service Corporation to perform, among other things, lighting installation services (NYSCEF Doc No. 277). Under a Master Subcontract Agreement effective May 1, 2016, Rogers Electric Lighting Corporation retained Forest to perform electrical work at the subject premises (NYSCEF Doc No. 278). JLL entered into a Master Services Agreement, Contract # CW605414, with JP Morgan to perform various work at the subject location, including performing facilities management services and delivering building electrical systems

(NYSCEF Doc No. 279). It is undisputed that Forest employed plaintiff as an electrician on the date of the accident.

Plaintiff testified at his deposition that he was injured on July 13, 2016 while working as an electrician for Forest (NYSCEF Doc No. 250, plaintiff 2/15/18 tr at 11, 19, 25). James Caputo (Caputo) was his foreperson that day (*id.* at 26). His accident occurred at about 10:20 p.m. in the parking lot of a JP Morgan Chase bank location in Queens, New York (*id.* at 27, 42-43). The project consisted of retrofitting lights at the bank; Forest was changing the fluorescent light system to an LED light system (*id.* at 35). Durrell from Rogers was there that day (*id.* at 36-37). While plaintiff was working inside the bank, Durrell told plaintiff that there was a problem with one of the light fixtures in the parking lot (*id.* at 60). The fixture needed to be reinstalled because one of plaintiff's coworkers had poorly installed the fixture (*id.* at 61-62). Plaintiff went to fix the light with one of his coworkers, "Big Dan" (*id.* at 63). Plaintiff brought a ladder and a pair of pliers (*id.* at 72). Forest provided the ladder (*id.* at 52-53).

According to plaintiff, as he climbed the ladder, Big Dan held the ladder (*id.* at 96). At the time of the accident, plaintiff was on the third or fourth rung from the top of the ladder (*id.* at 83). He reached for the light pole with his left hand (*id.* at 142). Plaintiff testified that "at that point [he] felt the ladder moving a little bit. And because [he] felt [he] was losing his balance, [he] grabbed onto the fence. And that's when [he] felt the shock" (NYSCEF Doc No. 251, plaintiff 3/5/18 tr at 26). Plaintiff yelled, and then fell off the ladder (NYSCEF Doc No. 250, plaintiff 2/15/18 tr at 110-111). Plaintiff did not know how long the fence had been electrified before the accident, and had not made any complaints about the fence (*id.* at 209). Plaintiff further testified that he did not have a multimeter on the day of the accident, and did not use a multimeter because he "didn't require one" (NYSCEF Doc No. 251, plaintiff 3/5/18 tr at 70).

Caputo testified that he was employed as a general foreman by Forest in July 2016 (NYSCEF Doc No. 252, Caputo tr at 12). According to Caputo, Forest was working at a Chase branch location at 1051 Jackson Avenue in Long Island City in July 2016 (*id.* at 15). The project lasted three days (*id.* at 27). Forest removed old fluorescent lights and replaced them with LED lights inside and outside the bank (*id.* at 16-17). Caputo testified that an electrician had to perform a lockout/tagout procedure at the electrical panel to de-energize the circuit (*id.* at 86, 90-91). During the project, Forest employees also had to "test their own equipment they're working on [with a multimeter]; it's a requirement" and make sure "everything is dead prior to working on it" (*id.* at 41, 86). If an electrician discovered that there was live electricity, the electrician had to tell a supervisor to make sure that it was turned off (*id.* at 45). The electricity is shut off at a breaker (*id.*). Caputo recalled that, on the night of the accident, plaintiff was working with Dan McCauley in the parking lot of the bank adjusting a previously-installed light fixture (*id.* at 116-117). Forest had a scaffold on site that was not being used (*id.* at 187-189). In addition, Forest employees were provided with harnesses on the job site (*id.* at 57).

After Caputo learned about the accident, he went to talk with plaintiff, who was in an ambulance (*id.* at 107-108). Plaintiff told Caputo that he received an electric shock from the fence (*id.* at 131-132). Caputo confirmed that plaintiff had correctly performed the lockout/tagout procedure (*id.* at 132-133). He tested the junction box and determined that "it was dead; the light pole was dead" (*id.* at 135). However, when he tested the fence with a multimeter, Caputo found that the fence was electrified (*id.* at 138). Caputo did not determine why it was electrified (*id.*). Forest tested the light pole with a multimeter and determined that it was not grounded (*id.* at 139-140). Caputo testified that a post-accident investigation determined that the fence was electrified from a breaker in the basement of the bank, which was different

from the one that Forest had been working on (*id.* at 156-157). Forest's electrician removed wires from the breaker (*id.* at 158).

Durrell Hall-Brooks (Hall-Brooks) testified that, in July 2016, Rogers employed him as a lighting technician (NYSCEF Doc No. 256, Hall-Brooks tr at 11-12). JP Morgan hired Rogers to perform lighting work at various branches in New York City (*id.* at 16). Rogers, in turn, hired Forest to retrofit the lights inside and outside the bank (*id.* at 18-20, 24). Hall-Brooks testified that he was not required to shut off the power so that Forest's electricians could do their work (*id.* at 22). Rather, Forest's electricians had to shut off the power (*id.*). At the time of the accident, Hall-Brooks was in the parking lot of the bank (*id.* at 55). He did not see plaintiff receive the electric shock, but he did see plaintiff fall and heard him scream (*id.* at 55, 68, 74). Hall-Brooks went over to plaintiff and called 911 (*id.* at 77). The ladder did not fall with plaintiff (*id.* at 78). Plaintiff told Hall-Brooks that he received an electric shock when he touched the fence (*id.* at 83). Forest conducted an investigation after the accident (*id.* at 96). Forest concluded that the "power from the gate was coming out of a piece of conduit that was coming closer to the building" (*id.*). Hall-Brooks took photographs of the conduit that energized the fence (*id.* at 102; NYSCEF Doc No. 269 at 3-4).

Fany Maleganos (Maleganos), the branch manager of the JP Morgan branch, testified that if she detected a defective condition on the property, she would call the facility manager (NYSCEF Doc No. 255, Maleganos tr at 15). She never learned that there was an electrified fence at the bank (*id.* at 25-26).

Robert Walsh (Walsh), JLL's facility manager, testified he visited the branch once every two months to address complaints (NYSCEF Doc No. 260, Walsh tr at 11, 12). Walsh inspected the parking lot and the electrical components at the branch location (*id.* at 16-18, 25). If there

was an electrical problem such as a short or improper grounding, Walsh would "get it fixed" (*id.* at 30, 36). JLL was required pursuant to its contract to ensure that the electrical systems were properly grounded (*id.* at 44). JLL used Volpe Electric for all electrical issues at the building (*id.* at 42). He did not receive any complaints about live current at the premises prior to July 2016 (*id.* at 34).

PROCEDURAL HISTORY

Plaintiff commenced this action on August 10, 2016, naming JP Morgan and Rogers as defendants (NYSCEF Doc No. 1). Plaintiff thereafter filed an amended complaint and second amended complaint, adding JLL as a defendant, and seeking recovery against all defendants under Labor Law §§ 200, 240, and 241 (6) and under principles of common-law negligence (NYSCEF Doc Nos. 91, 136).

Rogers commenced a third-party complaint against Forest, seeking: (1) contractual indemnification; (2) common-law indemnification and/or contribution; and (3) damages for failure to procure insurance (NYSCEF Doc No. 21). Rogers subsequently discontinued the third-party action against Forest (NYSCEF Doc No. 248).

JLL commenced a second third-party complaint against Rogers, asserting causes of action for: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) damages for failure to procure insurance (NYSCEF Doc No. 162).

JP Morgan brought a third third-party complaint against Forest, seeking: (1) contractual indemnification; (2) contribution; (3) common-law indemnification; and (4) damages for failure to procure insurance (NYSCEF Doc No. 226).

By stipulation dated November 16, 2020, the parties agreed to amend the caption to remove defendants/third-party plaintiffs JP Morgan Chase & Co., JP Morgan Chase Bank, and J.P. Morgan Chase and replace them with JPMorgan Chase Bank, N.A. (NYSCEF Doc No. 276).

DISCUSSION

"The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function on a motion for summary judgment is "'issue-finding, rather than issue-determination'" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Timeliness of JLL's Motion on its Cross Claims Against JP Morgan and Forest

JLL originally moved for summary judgment dismissing plaintiff's claims and on its cross claims for contractual indemnification, breach of contract, common-law indemnification, and contribution against Rogers (NYSCEF Doc No. 335). On December 21, 2020, JLL filed an amended affirmation in support of its motion, also seeking summary judgment on its claims against JP Morgan and Forest (NYSCEF Doc No. 359).

JP Morgan argues, in opposition, that the branch of JLL's motion seeking summary judgment on its cross claims against JP Morgan is untimely.

On November 11, 2020, the court so-ordered a stipulation extending the time to file dispositive motions to December 4, 2020 (NYSCEF Doc No. 397). Thus, JLL's request for summary judgment against JP Morgan and Forest is untimely.

Here, JLL has failed to establish any good cause for the delay in moving for summary judgment against JP Morgan and Forest (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004] ["'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness . . ."]). JLL does not provide any explanation in its moving papers or reply as to why its request for relief against JP Morgan and Forest is untimely. "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652). Accordingly, the part of JLL's motion seeking summary judgment against JP Morgan and Forest is denied.

B. Labor Law § 240 (1)

Rogers and Forest move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, arguing that the electrified fence was a superseding, intervening cause that broke the chain of causation. Furthermore, Rogers and Forest contend that the ladder was adequate for plaintiff's task, and that the accident did not occur as a result of improper equipment or because the ladder was improperly secured.

Plaintiff moves for partial summary judgment under section 240 (1) as against JP Morgan, Rogers, and JLL. According to plaintiff, the retrofit involved covered work under the statute. Moreover, plaintiff argues that he has demonstrated a statutory violation, which served as a proximate cause of the accident, inasmuch as the ladder moved and failed to support him,

causing him to fall. Further, plaintiff asserts that the electric shock was not an extraordinary or superseding event, and the ladder was inadequate to prevent his fall after he received the electric shock.

JLL contends that section 240 (1) does not apply as a matter of law. JLL maintains that there were no defects in the ladder and there is no evidence that the ladder had any role in the accident. It argues that no safety device would have prevented the accident, because the electric shock caused the accident.

In opposition to plaintiff's motion, JP Morgan argues that plaintiff's accident did not result from an elevation-related hazard, but rather, from a separate and unrelated risk. Additionally, JP Morgan asserts that there are issues of fact as to whether section 240 (1) was violated, as plaintiff failed to show that the ladder was inadequate. JP Morgan further argues that there are questions of fact as to whether plaintiff was the sole proximate cause of his accident by misusing the ladder, and by failing to perform the lockout/tagout procedure and de-energize the electrical currents leading to the parking lot.

Labor Law § 240 (1) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) imposes absolute liability on building owners, contractors and agents "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], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). Essentially, "Labor Law § 240 (1) was designed to prevent those types of accidents in which the

scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis in original]). To prevail on liability under Labor Law § 240 (1), the plaintiff must establish a violation of the statute, and that the violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015] [internal quotation marks and citation omitted]).

Proper Defendants

1. JP Morgan

At the outset, the court notes that JP Morgan admitted ownership of the premises (NYSCEF Doc Nos. 274, 275, 276). "Liability rests upon the fact of ownership and whether [JP Morgan] had contracted for the work or benefitted from it are legally irrelevant" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]). Accordingly, JP Morgan is subject to liability under the Labor Law.

2. Rogers

It is undisputed that Rogers was not an owner or a contractor. Thus, Rogers may only be held liable as an agent of either an owner or contractor.

> "When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]).

It is undisputed that JP Morgan hired Rogers to perform lighting installation work (NYSCEF Doc No. 277). Pursuant to its contract, Rogers was "responsible for the safety of all its personnel and for assuring the continuing safety of JPMC facilities" and "will adhere to industry standards, federal, state, and local codes, ordinances and shall follow maintenance and repair practices that will benefit the long-term interests of JPMC" (*id.* at 4-5). Rogers subsequently retained plaintiff's employer, Forest, to perform electrical work (NYSCEF Doc No. 278). Thus, Rogers had contractual authority to supervise and control the electrical work. Whether Rogers actually supervised plaintiff is irrelevant (*Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]). In opposition to plaintiff's motion, Rogers does not argue that it cannot be held liable under section 240 (1) or 241 (6), and has, therefore, failed to raise an issue of fact. Therefore, Rogers is also subject to liability under the Labor Law.

3. JLL

Plaintiff also contends that JLL should be held liable as a statutory agent. In support of his motion, plaintiff points to sections 3.21.3 and 3.21.4 in the Statement of Work annexed to

JLL's contract, which delineate JLL's scope of work for Project Execution and Project Risk Management for facilities management services (NYSCEF Doc No. 279 at 169-170). However, JLL's contract limited its responsibilities to general supervisory duties (*see Russin*, 54 NY2d at 317; *Betancur v Lincoln Ctr. for the Performing Arts, Inc.*, 101 AD3d 429, 430 [1st Dept 2012]). Nor is there any evidence that JLL supervised or directed Forest's work. Thus, plaintiff has not demonstrated that JLL is a statutory agent, and is not entitled to summary judgment against JLL under section 240 (1) or 241 (6).

Statutory Violation and Proximate Cause

Labor Law § 240 (1) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 833-834 [1996]). It is well established that the "failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Bruce v 182 Main St. Realty Corp.*, 83 AD3d 433, 437 [1st Dept 2011] [internal quotation marks and citation omitted]).

Here, plaintiff has established prima facie entitlement to summary judgment under section 240 (1) (*see Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424, 425 [1st Dept 2019]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [1st Dept 2009]). Plaintiff testified that the ladder "mov[ed] a little bit," and that he grabbed onto the fence to support himself and received an electric shock, which caused him to fall to the ground (NYSCEF Doc No. 251, plaintiff 3/5/18 tr at 26-29).

Plaintiff was not required to prove that the ladder was defective (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]). Further, plaintiff did not have

to show that the ladder fell to the ground; he has demonstrated that his injuries flowed directly from the application of the force of gravity to his person.

The court rejects Rogers' and JLL's contention that the electrified fence was a superseding, intervening cause.

> "Defendants are liable for all normal and foreseeable consequences of their acts. To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable. An independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them"

(*Gordon*, 82 NY2d at 562).

In this case, defendants' failure to provide plaintiff with a safe and stable ladder was a substantial factor leading to his fall from the ladder. Plaintiff's injury was a foreseeable result of performing electrical work at an elevated height (*see id.*; *see also Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 175 [1st Dept 2004] ["because the actions of Montalvo and his coworker with respect to the plenum in this case were not a superseding cause under the circumstances, proximate cause is established as a matter of law"]; *DaSilva v A.J. Contr. Co.*, 262 AD2d 214, 214-215 [1st Dept 1999] ["(t)he striking of the ladder by a pipe cut . . . was not such an extraordinary event as to constitute a superceding cause"]).

Although defendants rely on *Hajderlli v Wiljohn 59 LLC* (71 AD3d 416, 416 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]), the court finds this case to be distinguishable. In *Hajderlli*, a worker's supervisor pulled away a ladder while the worker was using the ladder (*id.*). The First Department held that "[t]hat act was not foreseeable in the normal course of events, and was so far removed from any conceivable violation of the statute due to the failure to use, or inadequacy of, a safety device of the kind enumerated in the statute as to constitute, as a

matter of law, a superseding act that broke any causal connection between any such violation of the statute and plaintiff's injuries" (*id.* at 416-417). In contrast, in this case, the electrified fence was not so removed from any statutory violation that it would constitute a superseding cause.

Moreover, while JP Morgan argues that plaintiff's accident resulted from a separate and unrelated hazard, plaintiff fell off an inadequately-secured ladder, which falls within the scope of the covered risks under the statute (*cf. Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 99 [2015], *rearg denied* 25 NY3d 1195 [2015] [where plaintiff slipped on ice while using stilts, "plaintiff's accident was plainly caused by a separate hazard – ice – unrelated to any elevation risk"]).

JP Morgan also contends that there are issues of fact as to liability and as to plaintiff's credibility. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]). Here, however, JP Morgan has failed to raise an issue of fact as to whether plaintiff fell off a ladder or as to any material fact (*see Klein*, 89 NY2d at 835; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]).

Furthermore, JP Morgan's, Rogers', and Forest's argument that plaintiff was the sole proximate cause of his accident is without merit.

> "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *see e.g. Gallagher*, 14 NY3d at 88 [ironworker was not

the sole proximate cause of his accident where there was no evidence in the record that he knew where to find other safety devices or that he was expected to use them]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006] [plaintiff's choice to use a six-foot ladder that he knew was too short for the work and standing on ladder's top cap were the sole proximate cause of his accident]).

Even if a scaffold and harness were available on the site, JP Morgan, Rogers, and Forest have failed to establish that plaintiff knew that he was expected to use them to perform his work, or that he chose for no good reason not to use them (*see Kuras v Cornell Univ.*, 118 AD3d 488, 489 [1st Dept 2014] ["regardless of whether a lift and another ladder were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those [devices] and for no good reason chose not to do so"] [internal quotation marks and citation omitted]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012] ["Even if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so"]). Plaintiff testified that Forest did not have harnesses "at that moment," and that using harnesses was "not required" when working on a 12-foot ladder (NYSCEF Doc No. 250, plaintiff 2/15/18 tr at 97). Additionally, even if plaintiff failed to wear his rubber gloves and failed to de-energize the electrical currents running to the parking lot, those actions would constitute, at most, comparative negligence, which is not a defense to liability under section 240 (1) (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). There is also no evidence that plaintiff failed to perform the lockout/tagout procedure (NYSCEF Doc No. 252, Caputo tr at 135). Therefore, plaintiff was not the sole proximate cause of his accident.

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability under section 240 (1) is granted as against JP Morgan and Rogers.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides:

> "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, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . , shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. This statute is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross*, 81 NY2d at 503). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing a "specific standard of conduct" rather than a provision reiterating common-law safety standards (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Ross*, 81 NY2d at 505). In addition, the plaintiff must show that "the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]).

Defendants move for summary judgment dismissing plaintiff's section 241 (6) claim, arguing that plaintiff has failed to identify a specific or applicable Industrial Code section. Plaintiff moves for partial summary judgment on his section 241 (6) claim as predicated on a

violation of 12 NYCRR 23-1.13 (b) (4). In opposition to defendants' motions, plaintiff also relies upon 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21. Therefore, plaintiff has abandoned reliance on the other Industrial Code provisions cited in his bill of particulars (*see Kempisty v 246 Spring St. LLC*, 92 AD3d 474, 475 [1st Dept 2012]). Therefore, the court shall only consider the alleged violations of 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21.

12 NYCRR 23-1.13 (b) (4)

Section 23-1.13, entitled "Electrical hazards," provides in subdivision (b) (4) that:

> "(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear"

(12 NYCRR 23-1.13 [b] [4]).

Rogers, Forest, and JLL contend that section 23-1.13 (b) (4) is inapplicable because the fence was not part of an electrical power circuit. Further, Rogers, Forest, and JLL point out that there is no evidence that wiring with cracked insulation or deteriorated insulation caused the accident.

For his part, plaintiff contends that defendants failed to ensure that he would not be working in close proximity to an electric power circuit, and failed to protect him from electric shock by either de-energizing the circuit or grounding it.

As a preliminary matter, the court notes that section 23-1.13 has been held to be a sufficiently specific provision of the Industrial Code (*see Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006]; *Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept 1998]).

Although section 23-1.13 refers to "employers," courts have held that the Industrial Code "applies to persons employed in construction, demolition and excavation operations, to their employers and to owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work" (*Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1421 [4th Dept 2009] [internal quotation marks and citation omitted]; *see also Rice v City of Cortland*, 262 AD2d 770, 770 [3d Dept 1999]). Moreover, the First Department has held that section 23-1.13 (b) (4) "commands that before work is started, it is to be ascertained whether the work will bring a worker into contact with an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized" (*DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [1st Dept 2013]).

Defendants contend that section 23-1.13 is inapplicable because the fence was not part of an electrical circuit. Nevertheless, the evidence clearly shows that plaintiff was permitted to come into contact with an electrical circuit that had not been de-energized (NYSCEF Doc No. 250, plaintiff 2/5/18 tr at 107; NYSCEF Doc No. 251, plaintiff 3/5/18 tr at 26). Thus, section 23-1.13 (b) (4) was violated as a matter of law. Furthermore, the electrified fence was not a superseding, intervening cause. Whether plaintiff was comparatively negligent must await the trial on damages (*Cutaia*, 172 AD3d at 426, citing *Rodriguez v City of New York*, 31 NY3d 312 [2018]). Consequently, plaintiff is entitled to partial summary judgment under section 241 (6) as to liability based on a violation of 12 NYCRR 23-1.13 (b) (4) as against JP Morgan and Rogers (*see Wolodin v Lehr Constr. Corp.*, 177 AD3d 496, 497 [1st Dept 2019]).

12 NYCRR 23-1.21

12 NYCRR 23-1.21 governs ladders and ladderways.

Rogers, Forest, and JLL argue, in a conclusory manner, that the "ladder was not defective." Therefore, the court finds that they have failed to meet their burden of establishing that section 23-1.21 is inapplicable.

In sum, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-1.13 (b) (4) as against JP Morgan and Rogers. Rogers, Forest, and JLL are entitled to dismissal of plaintiff's section 241 (6) claim except as to the violation of 12 NYCRR 23-1.13 (b) (4) and alleged violation of 12 NYCRR 23-1.21.

D. Labor Law § 200 and Common-Law Negligence

Rogers moves for summary judgment dismissing plaintiff's section 200 and common-law negligence claims, arguing that it did not have actual or constructive notice of the ungrounded electrified fence or fence pole located on the premises.

Similarly, JLL argues that it neither had actual nor constructive notice of the ungrounded electrified fence or fence pole. JLL maintains that the electrified fence was a latent condition that was caused directly by the work performed by plaintiff and Forest.

Plaintiff argues, in opposition to Rogers' motion, that there are questions of fact as to whether Rogers had the authority to supervise plaintiff's work, and had actual and constructive notice of the improperly-grounded fence. With respect to JLL, plaintiff contends that there are issues of fact as to whether JLL was a statutory agent of the owner for purposes of liability under section 200. Furthermore, plaintiff maintains that there are triable issues of fact as to whether JLL had constructive notice of the electrified fence.

Additionally, plaintiff moves for summary judgment pursuant to the res ipsa loquitur doctrine as against JLL. Plaintiff asserts that: (1) his accident was an event that only occurred

through another's negligence, (2) the electrical systems were within the exclusive control of JLL, and (3) there is no evidence that he contributed to or caused his own injuries.

Labor Law § 200 (1), "a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), provides as follows:

> "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. The board may make rules to carry into effect the provisions of this section"

(Labor Law § 200 [1]).

"Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca*, 99 AD3d at 144).

Where the worker's injury results from a dangerous or defective premises condition, "liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition" (*Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 648 [1st Dept 2013]; *see also Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In contrast, where a plaintiff's injury stems from the means and methods in which the work is performed, including dangerous or defective equipment provided by the plaintiff's employer, "the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

Here, plaintiff's accident implicates both standards of liability – whether plaintiff's accident resulted from the means and methods in which he performed his work by failing to de-energize the electricity leading to the parking lot, and whether plaintiff's accident resulted from a dangerous premises condition that caused the fence to become electrified.

Rogers

Even if Rogers has demonstrated that it did not supervise plaintiff's work, Rogers has failed to show that it had no notice of the ungrounded electrified fence or fence pole located on the premises. Indeed, it has not submitted any evidence as to when the area was last inspected prior to the accident (*see Ellis v JPMorgan Chase Bank*, 190 AD3d 413, 414 [1st Dept 2021] ["Defendants also failed to establish a lack of notice, as no evidence was submitted to show when the area was last inspected"]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015] ["There are triable issues as to constructive notice of the defective condition of the staircase since the record is unclear as to when the staircase was last inspected prior to plaintiff's fall"]). And, the electrified fence was not a superseding, intervening cause. Although Rogers argues that it was not required to make sure that the fence or fence poles were properly grounded, there are questions of fact as to whether Rogers had a duty to provide plaintiff with a safe place to work (Labor Law § 200 [1]). Under its contract, Rogers was "responsible for the safety of its personnel and for assuring the continuing safety of JPMC facilities" and was

"required to adhere to industry standards, federal, state, local codes [and] ordinances" (NYSCEF Doc No. 277 at 4-5). As noted previously, Rogers subcontracted out electrical work to Forest (NYSCEF Doc No 278). As a result, Rogers is not entitled to dismissal of plaintiff's Labor Law § 200 or common-law negligence claims.

JLL

JLL contends that it cannot be liable under section 200 and under principles of negligence because it was not an owner or contractor, that it did not supervise or direct any work at the site, and did not have notice of any dangerous condition. However, JLL is not entitled to dismissal of these claims.

A statutory agent of an owner may be held liable pursuant to section 200 and in common-law negligence for injuries caused or created by it or of which it has actual or constructive notice (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]; *see also Sledge v S.M.S. Gen. Contrs., Inc.*, 151 AD3d 782, 783 [2d Dept 2017]). Pursuant to JLL's contract, it was required to repair and maintain indoor and outdoor lighting, and remedy all hazards, shorts, and flickering (NYSCEF Doc No. 279 at 155). Walsh testified that he inspected the premises every two months (NYSCEF Doc No. 260, Walsh tr at 12). JLL has also failed to demonstrate its lack of notice, given that it has not submitted evidence as to when the area was last inspected (*see Ellis*, 190 AD3d at 414). To the degree that JLL argues that the electrified fence was a latent condition, JLL has failed to demonstrate that it could not have been detected based upon a reasonable inspection (*McCole v City of New York*, 221 AD2d 605, 606 [2d Dept 1995]). Moreover, the electrified fence was not a superseding, intervening cause. Therefore, the branch of JLL's motion seeking dismissal of plaintiff's section 200 and common-law negligence claims is denied.

Plaintiff is not entitled to summary judgment against JLL based on the res ipsa loquitur doctrine.

A plaintiff is entitled to rely upon the doctrine of res ipsa loquitur, which creates an inference of negligence, where he or she establishes that: (1) the event is of a kind that does not normally occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the plaintiff did not contribute to the cause by any voluntary act (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]). This doctrine recognizes that "'certain occurrences contain within themselves a sufficient basis for an inference of negligence'" (*Dermatossian*, 67 NY2d at 226, quoting *Foltis, Inc. v City of New York*, 287 NY 108, 116 [1941]). "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 208 [2006]).

This is not a case "when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*id.*). Even assuming that the first and second elements of res ipsa loquitur have been satisfied, there are questions of fact as to the third element. Plaintiff testified that he did not use the multimeter on the day of the accident because he "didn't require one," and that he did not do any testing of the area around where he set up the ladder (NYSCEF Doc No. 251, plaintiff 12/5/18 tr at 70). Caputo testified that an electrician had to "make sure everything is dead before working on it" (NYSCEF Doc No. 252, Caputo tr at 41). Therefore, the branch of plaintiff's motion based upon the res ipsa loquitur doctrine as against JLL is denied.

E. JP Morgan's Request for Leave to Amend its Answer

JP Morgan moves to amend its answer to correct a typographical error so as to assert a contractual indemnification claim against JLL. JLL did not specifically oppose JP Morgan's request to amend its answer.

As noted by the Court of Appeals, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citation omitted]; *see also* CPLR 3025 [b]). The First Department has instructed that "[o]n a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit'" (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Prejudice "requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks and citation omitted]).

Here, JP Morgan has demonstrated that the amendment is not palpably insufficient, in view of the fact that JLL's contract contains an indemnification provision. JLL does not argue that it has been somehow prejudiced by the amendment. In fact, JLL did not even oppose this branch of JP Morgan's motion. Accordingly, JP Morgan's request to amend its answer to assert a contractual indemnification claim against JLL is granted.

F. JP Morgan's Request for Contractual Indemnification Against JLL

JP Morgan moves for contractual indemnification against JLL pursuant to the indemnification provision in the Master Services Agreement, which provides as follows:

> "**14. INDEMNITIES.**
>
> 14.1 Indemnity by Supplier. Supplier agrees to indemnify, defend and hold harmless JPMC . . ., and their respective officers, directors, employees, agents, representatives, successors, and assigns, from any and all Losses and threatened Losses due to third party claims to the extent arising from or in connection with any of the following:
>
> (a) Representations, Warranties and Covenants. Supplier's breach of any of the representations, warranties and covenants set forth in Article 12;
>
> ***
>
> (m) Negligence; Willful Misconduct. Any claim arising out of negligent, willful or reckless acts or omissions of or by Supplier or any Supplier Personnel"

(NYSCEF Doc No. 325 at 84, 85).

JP Morgan contends that JLL must indemnify it, given plaintiff's allegations that the electrified fence caused or contributed to the accident. According to JP Morgan, JLL was responsible for inspecting the branch location and repairing the electrical systems.

In opposition, JLL argues that there is no evidence indicating that JLL had notice that the fence was electrified, and JP Morgan has failed to establish its freedom from negligence.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

Pursuant to General Obligations Law § 5-322.1, a clause in a construction, repair or maintenance contract which purports to indemnify a party for its own negligence is void and unenforceable as against public policy (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification

agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this savings language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

In this case, JLL must indemnify JP Morgan for JLL's "breach of any [contractual] representations, warranties and covenants . . ." and for its "negligent, willful or reckless acts or omissions" (NYSCEF Doc No. 325 at 84, 85). There are questions of fact as to whether JLL was negligent in failing to inspect the area and repair the electrified fence in the parking lot. Walsh testified that he visited the branch location every two months, and inspected the parking lot and electrical components (NYSCEF Doc No. 260, Walsh tr at 12, 16-18, 25). Furthermore, it would be premature to grant JP Morgan conditional contractual indemnification against JLL. The indemnification provision "contains no language limiting indemnification to damages arising from accidents caused by [JLL's] negligence, or precluding indemnification for damages caused by [JP Morgan's] own negligence" (*Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]). In light of the foregoing, the branch of JP Morgan's motion seeking contractual indemnification against JLL is denied.

G. JP Morgan's Common-Law Indemnification Claim Against JLL

JP Morgan also moves for common-law indemnification against JLL, arguing that JLL negligently caused or contributed to the accident by failing to inspect, maintain and repair the building's electrical systems.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

In this case, there are questions of fact as to whether JP Morgan was negligent. JP Morgan has not moved to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against it, and there are issues of fact as to when the area was last inspected. Moreover, a jury must determine whether JLL was negligent in failing to inspect the parking lot and repair the electrified fence (NYSCEF Doc No. 260, Walsh tr at 12, 16-18, 25). "Summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 489 [2d Dept 2006] [internal quotation marks and citation omitted]). Therefore, JP Morgan's request for common-law indemnification against JLL is denied.

H. JP Morgan's Common-Law Indemnification Claim Against Rogers

JP Morgan requests common-law indemnification from Rogers. Specifically, JP Morgan argues that it did not have any employees at the site on the night of the accident, and that Rogers supervised and directed plaintiff to perform work on the lamp post.

JP Morgan's request for common-law indemnification against Rogers is denied. As indicated previously, there are issues of fact as to JP Morgan's negligence. Further, there is no

evidence that Rogers actually supervised the injury-producing work (*see Reilly v DiGiacomo & Son*, 261 AD2d 318, 318 [1st Dept 1999] [owners' motion for common-law indemnification was properly denied because their evidence did not establish, as matter of law, that the general contractor was "either negligent or exclusively supervised and controlled plaintiff's work site"]). Plaintiff testified that Hall-Brooks told him to disconnect the photocell (NYSCEF Doc No. 250, plaintiff 2/15/18 tr at 88), but there is no evidence that he told plaintiff how to do his work on the ladder or how to de-energize the electrical circuits. Hall-Brooks testified that he did not have to turn off the power for Forest's electricians (NYSCEF Doc No. 256, Hall-Brooks tr at 22). Nevertheless, there are unresolved questions of fact as to whether Rogers had constructive notice of the electrified fence.

I. JP Morgan's Contractual Indemnification Claim Against Forest

JP Morgan moves for contractual indemnification against Forest, pursuant to the following indemnification provision in Forest's contract:

> "The Subcontractor hereby agrees to fully indemnify, defend and hold harmless RELC, its subcontractors, officers, directors, affiliates, Clients, contractees, upstream contractors in privity with RELC, owners, agents and authorized representatives ('Indemnitees') from and against and all losses, suits actions, legal and administrative proceedings . . . in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of any negligent act or omission, whether active or passive, of Subcontractor, its Subcontractors . . . notwithstanding the partial fault or negligence of any Indemnitee"

(NYSCEF Doc No. 326 at 1-2).

JP Morgan contends that it is entitled to indemnification pursuant to this provision, as the Client, contractee, upstream contractor in privity with Rogers and the owner. JP Morgan further argues that Forest supervised, directed, and controlled the injury-producing work.

Forest moves for summary judgment dismissing this claim, arguing that the provision is not triggered because it was not negligent as a matter of law.

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered'"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]).

"[W]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Contrary to JP Morgan's contention, it is not entitled to contractual indemnification from Forest pursuant to this provision. JP Morgan is not a signatory to Forest's subcontract and the subcontract does not expressly identify it as an indemnitee (*see Sicilia v City of New York*, 127 AD3d 628, 629 [1st Dept 2015]). Therefore, JP Morgan's contractual indemnification claim against Forest must be dismissed.

J. JP Morgan's Common-Law Indemnification and Contribution Claims Against Forest

Forest moves for summary judgment dismissing JP Morgan's common-law indemnification and contribution claims asserted against it, on the ground that plaintiff did not suffer a "grave injury." As support, Forest submits an affirmed report from Dr. David M. Erlanger, Ph.D., who conducted a neuropsychological evaluation of plaintiff and reviewed plaintiff's medical records, and opines that "there was no evidence that Mr. Rivera sustained a concussion or traumatic brain injury on 7/13/16, or that he developed subsequent cognitive sequelae as a result" (NYSCEF Doc No. 270 at 10). Forest also provides an affidavit from Joseph Pessalano, MA, CRC, a vocational rehabilitation specialist, who opines that "Mr. Rivera

can perform the essential functions of occupational titles classified as sedentary, light, and in some instances, medium, according to Department of Labor Exertional Guidelines" (*id.* at 22).

JP Morgan moves for summary judgment on its common-law indemnification claim against Forest. JP Morgan contends that Forest failed to shut off the power to the parking lot, and provided the ladder that shook and/or failed to provide plaintiff with any other safety equipment. In response to Forest's motion, JP Morgan provides the supplemental expert disclosure and report of Brian D. Greenwald, M.D., a brain injury rehabilitation expert, which states that "[d]ue to a combination of the orthopedic injuries, lumbar spine injuries and traumatic brain injury Mr. Rivera suffered on 7/13/16 he is totally and permanently disabled" (NYSCEF Doc No. 395 at 68).

Workers' Compensation Law § 11 provides that:

> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'"

A "grave injury" is defined as:

> "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(*id.*).

"The grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (*Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001] [internal quotation marks, citation, and emphasis omitted]).

Plaintiff alleges that he suffered a brain injury, in addition to injuries to his left wrist, left shoulder, cervical spine, and lumbar spine (NYSCEF Doc No. 249, verified bill of particulars ¶ 2). The parties agree that the only injury that may rise to the level of a "grave injury" is plaintiff's brain injury.

The Court of Appeals has held that "a brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]). In *Purcell v Visiting Nurses Found. Inc.* (127 AD3d 572 [1st Dept 2015]), the First Department held that a plaintiff's employer "met its initial burden to establish that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, by submitting the report of a neurologist who examined plaintiff and concluded that he did not suffer from any brain injury rendering him 'no longer employable in any capacity.'" Further, "[d]efendants failed to raise an issue of fact as to whether plaintiff's brain injury constituted a grave injury. The evidence that plaintiff suffered from certain brain conditions, including headaches and post-concussion syndrome, did not satisfy the standard for a grave injury" (*id.*).

Applying these principles, Forest has demonstrated prima facie that plaintiff did not suffer a grave injury. Dr. Erlanger and Mr. Pessalano indicate that plaintiff is capable of working with restrictions (NYSCEF Doc No. 270 at 10, 22). In opposition to Forest's motion, JP Morgan has failed to raise an issue of fact by relying on plaintiff's expert disclosure (*see Bacani v Rosenberg*, 114 AD3d 454, 455 [1st Dept 2014] ["plaintiffs' submission of an attorney-drafted CPLR 3101 (d) expert disclosure averring that an expert pathologist would testify concerning causation is not evidentiary proof in admissible form sufficient to defeat the subject motion for summary judgment"]). Dr. Greenwald's report, which states that "the aforementioned statements

made by me are true and accurate to the best of my knowledge" (NYSCEF Doc No. 395 at 70) fails to comply with CPLR 2106, which requires a physician's statements to be "affirmed . . . to be true under penalties of perjury" (*see Offman v Singh*, 27 AD3d 284, 284 [1st Dept 1996]). In any event, while Dr. Greenwald states that plaintiff suffered a traumatic brain injury, he does not state that plaintiff is "no longer employable in any capacity" (*Rubeis*, 3 NY3d at 413). Accordingly, JP Morgan's common-law indemnification and contribution claims against Forest are dismissed.

K. JP Morgan's Breach of Contract Claim Against Forest

JP Morgan moves for summary judgment on its breach of contract claim against Forest. JP Morgan contends that Forest was required to name it as an additional insured on its policies, and that Forest failed to do so.

Forest also moves for summary judgment dismissing JP Morgan's breach of contract claim. As support, Forest submits a letter dated June 4, 2020 from Continental Casualty Company (CCC), indicating that CCC issued general liability coverage under policy number GL4025756461 with a policy period of 10/1/15 to 10/1/16 with limits of $2,000,000 each occurrence, and that CCC agreed to provide JP Morgan with a defense subject to a reservation of rights to deny indemnity to the extent that the incident does not arise out of Forest's work (NYSCEF Doc No. 271).

An agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]).

However, in cases where the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *McLaughlin v Ann Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

Forest's subcontract required it to purchase commercial general liability insurance with limits of $1,000,000 each occurrence and $2,000,000 general aggregate, and was required to add Owner as an additional insured including completed operations on the policy (NYSCEF Doc No. 278 at 3). Under Forest's subcontract, "CGL coverage shall be written on ISO Occurrence from CG 00 01 1001 or a substitute form providing equivalent coverage and shall cover liability arising from premises, operations, independent contractors, products-completed operations, and personal and advertising injury" (*id.*). The policy "shall apply as Primary and Non-Contributing Insurance before any other insurance or other self-insurance, including any deductible, maintained by, or provided to, the additional insured" (*id.*). Additionally, Forest was required to purchase commercial umbrella insurance with limits of $1,000,000 each occurrence and $1,000,000 aggregate, and name Owner as an additional insured on the umbrella policy (*id.*).

Although Forest has submitted an unsworn letter from CCC, it has failed to provide a commercial general liability insurance policy demonstrating that it complied with its insurance procurement obligations (*see Amante v Pavarini McGovern, Inc.*, 127 AD3d 516, 517 [1st Dept 2015]; *Taylor v Gannett Co.*, 303 AD2d 397, 399 [2d Dept 2003]). Even if the court considers the letter, Forest does not provide anything to show that it purchased an umbrella policy, as required by its contract. Therefore, JP is entitled to partial summary judgment as to liability on its breach of contract claim against Forest. "Because insurance procurement clauses are entirely

independent of indemnification provisions, the determination with respect to liability for the contract breach need not await a final determination as to the underlying liability for personal injury" (*Spencer v B.A. Painting Co., B & F Abramowitz*, 224 AD2d 307, 307 [1st Dept 1996] [citation omitted]).

L. JP Morgan's Breach of Contract Claim Against JLL

JP Morgan also moves for summary judgment on its breach of contract claim against JLL. Pursuant to the Master Services Agreement, JLL agreed to obtain "Commercial General Liability insurance covering the Services . . . the performance and provision of the Services and everything incidental thereto, with limits of not less than Two Million Dollars ($2,000,000) per occurrence/$10 million annual aggregate, combined single limit and extended to cover: (a) Commercial Liability assumed by Supplier under this Agreement, including the Indemnity section, with defense provided in addition to policy limits for Indemnitees of the named insured . . ."; (g) name 'JP Morgan Chase & Co and any and all subsidiaries . . .' as additional insureds; and (h) Personal Injury & Advertisers Liability" (NYSCEF Doc No. 279 at 3). "The Commercial General Liability Insurance shall be raised to not less than Five Million Dollars ($5,000,000) per occurrence . . . if Supplier's provision of the Services, in the ordinary course, involves hazardous trades (e.g., mechanical, electrical . . .)" (*id.*).

In response to JP Morgan's motion, JLL has failed to tender an insurance policy. JLL's attorney's affirmation, indicating that it obtained the required insurance, is without evidentiary value (*see Zuckerman*, 49 NY2d at 563). Therefore, JP Morgan is entitled to summary judgment as to liability on its breach of contract claim against JLL (*see Crespo v Triad, Inc.*, 294 AD2d 145, 148 [1st Dept 2002]).

M. JLL's Contractual Indemnification, Breach of Contract, Common-Law Indemnification, and Contribution Claims Against Rogers

Rogers moves for summary judgment dismissing JLL's contractual indemnification and breach of contract claims. Rogers argues that it did not agree to indemnify JLL or procure insurance for JLL's benefit. Further, Rogers maintains that JLL's common-law indemnification and contribution claims should be dismissed because it was not negligent.

In moving for summary judgment on its contractual indemnification claim against Rogers, JLL relies on an indemnification provision requiring JP Morgan to indemnify JLL for the negligence or tortious conduct of JP Morgan or JP Morgan's failure to comply with its obligations under the facility management agreement. JLL argues that Rogers clearly breached its contract. Additionally, JLL seeks common-law indemnification and contribution from Rogers. According to JLL, it was not negligent, and Rogers had to ensure the safety of employees on the project.

Contractual Indemnification and Breach of Contract

JLL's contractual indemnification and breach of contract claims against Rogers fail as a matter of law. The Master Agreement between JP Morgan and Rogers does not contain an indemnification provision. In fact, JLL relies on an indemnification provision contained within a contract that Rogers was not a party to and does not require Rogers to indemnify any party; rather, it requires JP Morgan to indemnify JLL under certain circumstances (NYSCEF Doc No. 360 at 68-69). Moreover, Rogers did not agree to procure insurance for JLL. Accordingly, these claims are dismissed.

Common-Law Indemnification

As for JLL's common-law indemnification claim against Rogers, neither JLL nor Rogers is entitled to summary judgment with respect to this claim. First, there are issues of fact as to whether JLL was negligent in inspecting the parking lot and failing to discover the electrified

fence. Second, there are issues of fact as to whether Rogers had notice of the electrified fence. The electrified fence was not a superseding, intervening cause.

Contribution

For the same reasons, neither Rogers nor JLL is entitled to summary judgment on JLL's contribution claim against Rogers. Contribution is available where "two or more tortfeasors combine to cause an injury" and is determined "in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [citation omitted]). There are issues of fact as to whether JLL was negligent in performing inspections and maintaining the parking lot, and whether Rogers had notice of the dangerous condition.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 010) of defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric and second third-party defendant Forest Electric Corp. for summary judgment is granted to the extent of dismissing:

(5) plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21,

(6) defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc.'s claims for contractual indemnification and breach of contract against defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric,

(7) defendant/second third-party plaintiff JPMorgan Chase Bank, N.A.'s contractual indemnification claim against second third-party defendant Forest Electric Corp., and

(8) defendant/second third-party plaintiff JPMorgan Chase Bank, N.A.'s common-law indemnification and contribution claims against second third-party defendant Forest Electric Corp., and is otherwise denied; and it is further

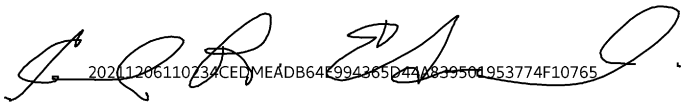
ORDERED that the motion (sequence number 011) of plaintiff is granted on the issue of liability under Labor Law §§ 240 (1) and 241 (6), based upon a violation of 12 NYCRR 23-1.13 (b) (4), as against defendants JPMorgan Chase Bank, N.A. and Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric, with the issue of plaintiff's damages to be determined at the trial of this action, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 012) of defendant/second third-party plaintiff JPMorgan Chase Bank, N.A. is granted to the extent of granting leave to amend its answer to assert a cross claim for contractual indemnification against Jones Lang LaSalle Americas, Inc., and granting summary judgment as to liability on its breach of contract claims against defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc. and second third-party defendant Forest Electric Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 013) of defendant/third-party plaintiff Jones Lang LaSalle Americas, Inc. is granted to the extent of dismissing plaintiff's Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.13 (b) (4) and 12 NYCRR 23-1.21, and is otherwise denied; and it is further

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

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within ten (10 days.



12/6/2021
DATE

CAROL EDMEAD, J.S.C.

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