

Pianoforte v New York City Hous. Auth.
2022 NY Slip Op 30166(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 156924/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

ANTHONY PIANOFORTE, CARMELA
PIANOFORTE,

Plaintiffs,

- v -

NEW YORK CITY HOUSING AUTHORITY,
TECHNICO CONSTRUCTION SERVICES INC.,
KORDUN CONSTRUCTION CORPORATION,
VITAL PLUMBING, INC.,

Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY,
TECHNICO CONSTRUCTION SERVICES INC.,

Third-party Plaintiffs,

-against-

KANTA ELECTRIC CORP., KORDUN
CONSTRUCTION CORPORATION,

Third-party Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY,
TECHNICO CONSTRUCTION SERVICES INC.,

Second Third-party Plaintiffs,

-against-

VITAL PLUMBING, INC.,

Second Third-party Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595203/2018

Second Third-Party
Index No. 595924/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 215- 240, 272, 277-
279, 286-294, 297, 298, 305, 309 were read on this motion for summary judgment

The following e-filed documents, listed by NYSCEF document number (Motion 004) 241-271, 274-276, 280-285, 299-304, 306-308, 310, 311

were read on this motion for summary judgment.

Defendant/third-party defendant Kordun Construction Corp. (Kordun) moves pursuant to CPLR 3212 for an order granting summary dismissal of plaintiffs' complaint and all third-party and cross claims against it. Defendants/third-party plaintiffs New York City Housing Authority (NYCHA) and Technico Construction Services, Inc. (Technico) oppose; plaintiffs oppose in part. Third-party defendant Kanta Electric Corp. (Kanta) cross-moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the third-party complaint, all cross claims, and any direct claims against it. Kordun, NYCHA, and Technico oppose the cross motion. (Mot. seq. 3).

NYCHA and Technico move for an order dismissing plaintiffs' Labor Law §§ 200 and 241(6) and common law negligence claims and granting them summary judgment on their claims against Kanta in the third-party action. Kanta and Kordun each oppose in part. Plaintiffs oppose and cross-move pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability for the same causes of action against NYCHA and Technico. NYCHA and Technico oppose the cross motion; Kordun opposes in part.

I. PERTINENT BACKGROUND

A. Relevant contract provisions

Technico, as general contractor on the construction site where the accident occurred, entered into practically identical subcontractor agreements with Kanta (NYSCEF 266) and with Kordun (NYSCEF 232), the following provisions of which are at issue:

Article 9: To the extent permitted by law, the Subcontractor shall indemnify, hold harmless and defend Owner, Contractor... and agents and employees of any of them from and against all claims, damages, losses and expenses including but not limited to attorneys fees arising out of or resulting from the performance of the agreement, provided any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death... (b) is caused in whole or in part by any act or omission of the

Subcontractor or anyone directly or indirectly employed by it or anyone for whose acts it may be liable pursuant of the performance of the agreement... In any and all claims against Contractor or any of its agents or employees, employee of Subcontractor, the indemnification obligation under this paragraph shall not be limited by any limitation of amount or type of damages, compensation or benefits payable by or for Subcontractor under workers' compensation and benefit acts or other employee benefit acts.

Article 11: B. The Subcontractor shall provide and maintain the following insurance either directly or by the Owner's OCIP Policies or both...

2. Public liability (comprehensive general liability)...

C. Total limits of liability, bodily injury and property damage shall not be less than \$2,000,000.00 per occurrence, combined bodily injury and property damage...

F. The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner... as additional insured's for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during Subcontractor's completed operations ...

Article 12 A. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death... but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder...

B. Kanta's site safety plan (NYSCEF 265)

Kanta, plaintiff Anthony Pianoforte's employer, provided a site safety plan, the pertinent portions of which follow:

Proper guarding shall be provided on all floor and wall openings, unfinished or temporary ramps and stairways, as well as scaffolds and work platforms. (1) Any floor opening through which a person may fall or step must be covered with substantial material that will support expected loads and not create a tripping hazard. The material used to cover the opening shall be cleated to prevent accidental sliding.

C. Certificates of liability insurance (NYSCEF 233, 239)

Kordun and Kanta each produced certificates of liability insurance, naming NYCHA and

Technico as additional insured, which contained per occurrence limits of \$1,000,000 and general aggregate limits of \$2,000,000.

D. Complaint and bill of particulars

It is alleged in the complaint that on February 28, 2017, while he was working at a construction site in Brooklyn, New York, Anthony stepped into an uncovered five-inch diameter core hole and fell, thereby sustaining injuries. Plaintiffs commenced this action against NYCHA, the owner of the premises where the accident occurred, and Technico, the general contractor at the construction site, advancing causes of action for negligence, violations of Labor Law §§ 200 and 241(6), and loss of consortium. (NYSCEF 1). By verified bill of particulars dated August 13, 2018, plaintiffs allege violations of Industrial Code § 23-1.7(e)(1) and (2) and specify that Anthony's injuries include "internal derangement of the left knee, with torn medial and lateral meniscus, and with torn anterior cruciate ligament (ACL)." (NYSCEF 275).

E. Procedural history

NYCHA and Technico filed a third-party complaint against Kanta and Kordun (NYSCEF 18), after which plaintiffs amended their complaint by adding Kordun as a defendant in the main action (NYSCEF 55). NYCHA and Technico filed a second third-party complaint against Vital Plumbing, Inc. (Vital) (NYSCEF 77). Plaintiffs then amended their complaint again to add Vital as a defendant in the main action (NYSCEF 98).

F. Material facts

1. Undisputed facts

Kordun's affirmation in support of its motion (NYSCEF 216) contains a statement of facts which was adopted in its entirety by Kanta (NYSCEF 238); NYCHA and Technico's affirmation in support of its motion (NYSCEF 242) also contains a statement of facts. Plaintiffs

submit a separate statement of facts with their cross motion (NYSCEF 285). While each statement is disputed in part by at least one party, the following pertinent facts are undisputed:

(1) Anthony was injured on February 28, 2017, while employed by Kanta as an electrician on the jobsite in Coney Island.

(2) Technico was the general contractor for the project and it was hired by NYCHA, the owner of the premises.

(3) Technico had a superintendent assigned to the jobsite, who was tasked with daily coordinating the subcontractors' work. He was also responsible for the workers' jobsite safety.

(4) Anthony's direct supervisor at the jobsite was a Kanta employee who was in the room with Anthony when the accident occurred.

(5) While in a boiler room at the jobsite, Anthony was pulling wire, took a step backward, and stepped into a hole, twisting his knee and causing him to fall to the floor.

(6) Immediately after the accident, Anthony observed two round five-inch diameter holes that he described as being core holes that had been drilled into the concrete floor.

2. Additional relevant deposition testimony

Anthony testified that before his accident, he did not see the core hole, and that he is unaware of who drilled it, although he also denied that Kanta drilled any core holes while he was on the job. And, whereas Anthony initially testified that he did not know who was responsible for covering core holes, he subsequently explained that the task was no different from other jobs where the general contractor was responsible for covering core holes. He sought treatment for his left knee after the accident and was diagnosed with a torn inner and outer meniscus and a damaged ACL. (NYSCEF 225).

Technico's superintendent testified that he was responsible for conducting daily

walkthroughs of the project to identify potential safety issues, including tripping hazards. He testified that Kordun, Vital, and Kanta all drilled core holes at the jobsite, that Technico laborers were responsible for closing off or covering core holes that it did not want workers to have access to, but that if a hole was drilled by a subcontractor, it was the subcontractor's duty to cover it or bring it to Technico's attention. Had he seen the core hole into which Anthony had stepped he would have instructed the Technico laborers to cover it, and he did not recall if anyone other than Technico employees had covered core holes in the floor. He was also unsure as to whether Kordun used core holes to perform work in the area of the alleged incident but believed that Kordun and Technico workers drilled core holes. While he initially testified that the pertinent core hole was pre-existing, he later stated that he was not "100 percent positive" about it. (NYSCEF 226).

Kordun's superintendent testified that Kordun was responsible for installing boilers and air conditioning systems at the jobsite and that it necessarily ran pipe through core holes. He recounted that Technico laborers would drill those holes, although he did not personally witness it, and he asserted that had he been aware of an uncovered hole or other unsafe condition at the site, he would have alerted Technico. (NYSCEF 227)

Kanta's foreperson testified that on the date of Anthony's accident, he provided him with work instructions, and stated that as soon as Kanta created core holes at the jobsite, it immediately ran pipes through them, although it did not do so in the room where Anthony had fallen. Rather, he related, earlier that month, Kordun was working on a vacuum pump at the accident site, and that day, he looked around that room before work started that day and saw no open core holes.

After the accident, Kanta's foreperson saw that an unlabeled piece of sheet metal that had

covered the core hole had been moved, and before the accident, he saw Anthony walking backward as he threaded a wire, an unusual way of performing that task. (NYSCEF 228)

II. SUMMARY JUDGMENT STANDARD

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

III. KORDUN’S MOTION FOR SUMMARY JUDGMENT

A. Contentions

Kordun asserts that plaintiffs’ Labor Law claims should be dismissed as against it as it was neither the owner nor the general contractor or an agent thereof. Moreover, given the testimony of its foreperson that as it was not involved in drilling the core hole into which Anthony had fallen and that it performed no work in the room when and where the accident occurred, Kordun claims to demonstrate that it breached no duty to plaintiffs, and absent a breach, plaintiffs’ common law negligence claim also fails. Having demonstrated that it cannot be held liable for the accident, Kordun maintains, the third-party and cross claims against it for common law and contractual indemnification and contribution should also be dismissed. Kordun

additionally contends that the third-party and cross claims against it for failure to procure insurance should be dismissed as it demonstrates that it was properly insured by producing the certificate of liability insurance, and that in any event, its obligation under the insurance procurement provision was not triggered. (NYSCEF 216, 234).

In opposition, although conceding that Kordun is not liable under their Labor Law claims, plaintiffs oppose dismissal of their common law negligence claim, as the testimony of Technico and Kordun's respective superintendents raises a question of fact as to whether Kordun drilled the core hole into which plaintiff had stepped. (NYSCEF 286).

In their opposition, NYCHA and Technico assert that Kordun fails to meet its *prima facie* burden for summary judgment, and that even if it does, summary judgment is not warranted as triable issues of fact remain, arguing that that Kordun does not demonstrate its freedom from responsibility for drilling the core hole at issue, that before Anthony's accident it had not worked in the room where he fell, that it did not drill core holes, and that in general, subcontractors were not responsible for covering holes they created or notifying the general contractor of their existence. Thus, having failed to establish that it is not liable for the underlying accident, NYCHA and Technico maintain that Kordun is liable to them for indemnification and contribution. Additionally, they contend that the insurance procurement provision of the contract between Kordun and Technico applies regardless of which party is liable for the underlying injury and that Kordun did not provide a copy of the policy or establish its compliance with the insurance requirements. (NYSCEF 287).

In reply, Kordun argues that the deposition testimony cited by plaintiffs, NYCHA, and Technico is misleading, and that it is clear that Kordun was not involved with the pertinent core hole. Kordun otherwise reiterates its arguments. (NYSCEF 297).

B. Analysis

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.” (*Prevost v One City Block LLC*, 155 AD3d 531, 533 [1st Dept 2017], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Pursuant to Labor Law § 200, an owner or general contractor may not be held liable for failing to provide a safe place to work for alleged injuries arising out of the method and manner of the work being performed, unless it exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). Alternatively, an owner or general contractor may be held liable for a dangerous premises condition if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546 [1st Dept 2018]).

Even when the evidence is viewed in the light most favorable to plaintiffs, the identity of the party who drilled the core hole into which Anthony had fallen or when it was drilled remains unclear, and the testimony of Technico’s superintendent that Kordun had worked in the area before the accident and that its work involved drilling core holes is sufficient to raise a triable issue of fact as to whether Kordun drilled the hole. For the same reason, the third-party and cross claims against it for indemnification and contribution remain viable.

The certificate of liability insurance offered by Kordun as evidence of its compliance with the insurance procurement provision in article 11 of the contract with Technico (NYSCEF 233) constitutes evidence of the contract between them, “rather than conclusive proof that coverage was procured” (*Shala v Park Regis Apartment Corp.*, 192 AD3d 607, 608 [1st Dept 2021], quoting *Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]). Thus, absent additional evidence of compliance with the insurance procurement provision, Kordun fails

to meet its *prima facie* burden of proving it is entitled to dismissal of NYCHA and Technico's third-party claim for breach of contract for failure to procure insurance. (*Shala*, 192 AD3d at 608 [finding issues of fact precluded dismissal of defendant's insurance procurement claim where certificate of insurance was the only proof submitted]).

IV. KANTA'S CROSS MOTION

A. Contentions

Kanta argues that it is entitled to summary judgment on all third-party and cross claims against it, relying on the testimony of its foreperson and arguing that it demonstrates that it did not drill the core hole that caused Anthony's injury, nor did it have notice of its existence. And, as plaintiff did not sustain a grave injury as defined by the Workers Compensation Law, Kanta additionally argues that it cannot be held liable for indemnification or contribution. (NYSCEF 238).

In partial opposition, Kordun asserts that, if it is liable for plaintiffs' injuries, then it is entitled to indemnification and contribution from Kanta, as Kanta directed Anthony in performing the work that led to his accident. Additionally, whether Anthony suffered a grave injury constitutes a question of fact for the jury to decide and it takes no position as to whether the third-party complaint, cross claims, and any direct claims by plaintiffs against Kanta should be dismissed. (NYSCEF 274).

In separate opposition, NYCHA and Technico concur that Kanta fails to demonstrate that it was not negligent. They additionally contend that Anthony did not suffer a grave injury and that Kanta was obligated under the site safety plan to guard against tripping hazards. And, as Kanta fails to demonstrate its compliance with the insurance procurement provision of the contract, NYCHA and Technico maintain that their breach of contract cause of action against

Kanta should not be dismissed. (NYSCEF 291).

In reply, Kanta argues that the walkthrough of the site by its foreperson shortly before the accident relieves it of liability and that the indemnification provision of the contract does not apply to it absent negligence on its part. It otherwise reiterates its arguments. (NYSEF 305).

B. Analysis

Pursuant to the contract between Kanta and Technico, Kanta must indemnify Technico for claims arising out of or resulting from the performance of Kanta's work under the subcontract "in whole or in part by any act or omission of [Kanta] or anyone directly or indirectly employed by it." (NYSCEF 234). Here, Kanta's site safety plan provides that it was responsible for ensuring that any floor opening through which a person may step into or fall be covered with substantial material that would support expected loads and not create a tripping hazard. As Kanta's foreperson admitted that the sheet metal that had covered the core hole had been moved, Kanta fails to meet its *prima facie* burden of demonstrating that it or its employees are without responsibility for the accident.

Absent additional evidence, Kanta's certificate of liability insurance (NYSCEF 239) is insufficient to sustain its *prima facie* burden of demonstrating that it complied with the contract. (*Shala*, 192 AD3d at 608).

Workers Compensation Law § 11 provides that an employer is not liable for indemnification or contribution, except as specified under contract, to any third party for injuries sustained by an employee acting in the scope of his employment unless the third party proves through "competent medical evidence" that the employee sustained a "grave injury," 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.

The list prescribed by the statute is specific and exhaustive. (*Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 402 [2001]). It is the burden of the party seeking summary judgment to show that the plaintiff's injuries were not "grave" (*Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343 [1st Dept 2006], citing *Fitzpatrick v Chase Manhattan Bank*, 285 AD2d 487 [2d Dept 2001]). The burden of proof then shifts to the party seeking indemnity or contribution to show by competent medical evidence that the injuries were grave. (*Altonen*, 32 AD3d at 344).

Here, plaintiffs fail to assert an injury which would arguably fall under the statute and absent such a claim or competent medical evidence that Anthony's injuries were grave, NYCHA, Technico, and Kordun fail to raise a triable issue of fact. (*see Santana v MMF 1212 Assoc LLC*, 190 AD3d 505, 506 [1st Dept 2021] [denying summary judgment where defendant failed to establish through competent medical evidence that plaintiff's brain injury was not grave]).

V. NYCHA AND TECHNICO'S SUMMARY JUDGMENT MOTION

A. Contentions

NYCHA and Technico seek dismissal of plaintiffs' negligence and Labor Law § 200 claims as against them on the ground that Kanta, not them, had the exclusive authority to supervise, direct, or control Anthony's work. They additionally deny that the Industrial Code violations relied on by plaintiffs support their claim under Labor Law § 241(6). And, absent a legal basis for his claim, the derivative claim for loss of consortium likewise cannot be sustained. NYCHA and Technico also claim entitlement to a conditional order of indemnification against Kanta based on their contract and along with damages for breach of contract given Kanta's failure to procure insurance with a limit of at least \$2,000,000. (NYSCEF 242).

In opposition, plaintiffs argue that NYCHA and Technico fail to establish, *prima facie*, that they neither created the allegedly dangerous condition nor had actual or constructive notice of it, and that therefore, their negligence claim against them is viable. They also maintain that NYCHA and Technico fail to show the asserted inapplicability of Industrial Code §23-1.7(e) as the accident clearly occurred in a “passageway” per the statutory definition. (NYSCEF 282).

In partial opposition, Kordun asserts that plaintiffs’ negligence and Labor Law § 200 claims cannot be dismissed against NYCHA and Technico as Technico was admittedly responsible for covering core holes on the site and there are issues of fact as to whether both NYCHA and Technico had constructive knowledge of the core hole into which Anthony had fallen. Kordun agrees that plaintiffs’ Labor Law § 241(6) claim is not supported by the cited Industrial Code violations. (NYSCEF 280).

In separate partial opposition, Kanta states that it does not oppose NYCHA and Technico’s request to dismiss plaintiffs’ claims but oppose their request for an order of indemnification against it as it is not negligent and their request for summary judgment on their breach of contract claim, asserting that the issue is not ripe for adjudication as NYCHA and Technico have not been assessed a judgment or paid money toward a settlement. (NYSCEF 304).

In reply, NYCHA and Technico assert that they cannot be held liable for negligence absent authority to supervise, direct, or control Anthony’s work, and in any event, there is nothing in the record indicating that they had constructive notice of the allegedly dangerous condition. (NYSCEF 306). They moreover observe that Kanta’s opposition, submitted without excuse one day before the return date of the motion, is untimely and should not be considered, and even if it is, Kanta either acted negligently or plaintiff, its employee, did, triggering its obligation to indemnify in either event. Also, NYCHA and Technico contend, damages based on

their breach of contract claim are independent of a finding of liability or negligence. (NYCEF 307). They also maintain that Industrial Code §23- 1.7(e) is inapplicable as the accident did not occur in a passageway, and plaintiff did not trip on dirt, debris, scattered tools, materials or sharp projections. (NYSCEF 301).

B. Analysis

Absent any demonstrated prejudice, and in light of NYCHA and Techico's submission of a reply affirmation addressing Kanta's arguments on the merits, the opposition is considered. (*Chrin v Gate of Heaven Cemetery*, 190 AD3d 516, 517 [1st Dept 2021]; *Seradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014]).

1. Labor Law § 200 and common law negligence claims

At issue is whether NYCHA or Technico created the dangerous condition, or whether they had actual or constructive notice of it. Here, as it is unclear who drilled the relevant core hole and when it was drilled, there remain issues of fact as to whether Technico created the dangerous condition by drilling and failing to cover the core hole. Additionally, the testimony is clear that Technico was responsible, at least in part, for preventing tripping hazards on the site, including the covering of core holes. While Technico's superintendent testified that he was not aware of the core hole prior to Anthony's injury, he also testified that he believed the core hole may have been preexisting, in which case Technico may be found to have constructive notice.

2. Labor Law § 241(6) claim

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor

or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating the violation of such a regulation, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Davis v Trustees of Columbia University in City of New York*, 199 AD3d 481, 482 [1st Dept 2021]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Industrial Code § 23-1.7(e) applies to “tripping and other hazards,” providing that:

- (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.

As plaintiffs do not address defendants' arguments that Industrial Code §23- 1.7(e)(2) is inapplicable, it is deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [deeming abandoned industrial code provisions that plaintiff did not address in opposition to summary judgment motion]). Thus, the sole issue is whether the area where the accident occurred constitutes a “passageway” within the meaning of Industrial Code § 23- 1.7(e)(1).

For purposes of the statute, “passageway” is defined as “a typically long narrow way connecting parts of a building” (*Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018]), or “a defined walkway or pathway used to traverse between discrete areas as opposed to an open area” (*Prevost v One City Block LLC*, 155 AD3d 531, 535 [1st Dept 2017], quoting *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]). An open area is not a “passageway” under the statute, even if the accident occurs near one. (*Rodriguez v Dormitory Auth. of the State*, 104 AD3d 529, 530 [1st Dept 2013]; *Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008]).

Here, Anthony’s testimony is clear that the accident occurred in a boiler room, an open work area on a square platform. (NYSCEF 255, p 110, 111). Thus, NYCHA and Technico meet their *prima facie* burden of demonstrating that plaintiffs fail to set forth an applicable Industrial Code violation. While plaintiffs submit pictures depicting core holes near a narrow corridor (NYSCEF 283), they do not create a triable issue of fact.

3. Indemnification

“Where a triable issue of fact exists regarding the indemnitee’s negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature.” (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020], quoting *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2d Dept 2011]). Here, as NYCHA and Technico fail to demonstrate that no triable issue of fact exists, their request for a conditional order of indemnification is premature.

4. Breach of contract

A certificate of liability insurance, while insufficient to prove a contract for insurance coverage as a matter of law, may be sufficient to raise a triable issue of fact. (*Prevost*, 155 AD3d

at 536; *Horn Maintenance Corp v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]).

Thus, Kanta's certificate of liability insurance is sufficient to raise a triable issue of fact as to whether it complied with the insurance procurement provision of the contract.

VI. PLAINTIFFS' CROSS MOTION

As plaintiff's accident did not occur in a passageway (*supra*, V.B.2.), the parties' contentions related thereto are not addressed.

A. Contentions

Plaintiffs assert that Technico was negligent as Anthony was injured due to a dangerous condition on the job site, and Technico was responsible as the general contractor for securely covering all core holes, and thus, they need not establish that Technico had supervisory control. They argue that actual notice to Technico is established by testimony, including that of its superintendent, that it had an ongoing obligation to inspect the premises, including inspecting any covers over the holes to ensure that they were properly secured. (NYSCEF 282),

In opposition, NYCHA and Technico argue that plaintiffs' cross motion should not be considered as it was filed, without excuse, beyond the deadline set forth in the parties' stipulation to extend the deadline for filing motions to July 22, 2021. If the motion is considered, they assert that plaintiffs fail to meet their burden for summary judgment absent evidence that confirms that the core hole was pre-existing, that Technico was aware of the alleged defective condition, or that Technico was responsible for covering it. They argue that, at minimum, there is a question of fact as to who created the core hole. (NYSCEF 301).

In reply, plaintiffs deny that their cross motion is untimely as it was filed in response to a pending and timely summary judgment motion which seeks the same relief on the same issues. They otherwise reiterate their arguments. (NYSCEF 309, 310).

B. Analysis

Notwithstanding the parties' stipulation, which does not explicitly prohibit the parties from filing cross motions after the deadline, plaintiffs' cross motion is timely as it seeks relief that is nearly identical to that sought in NYCHA and Technico's timely motion. (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 448-49 [1st Dept 2013]).

Additionally, as there remain triable issues of fact as to who is liable for creating the dangerous condition, summary judgment on plaintiffs' Labor Law § 200 and common law negligence claims is premature.

VII. CONCLUSION

Accordingly, it is hereby,

ORDERED that defendant/third-party defendant Kordun Construction Corp.'s motion for summary judgment (seq. three) is granted to the extent of severing and dismissing plaintiffs' labor law claims against it, and otherwise denied; it is further

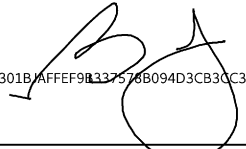
ORDERED that third-party defendant Kanta Electric Corp.'s cross motion for summary judgment is granted, to the extent of severing and dismissing all common law indemnification and contribution claims against it, and is otherwise denied; it is further

ORDERED that defendants/third-party plaintiffs New York City Housing Authority (NYCHA) and Technico Construction Services, Inc.'s for summary judgment (seq. four) is granted to the extent of severing plaintiffs' Labor Law § 241(6) claim against them, and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied.

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a settlement conference with Justice Jaffe.

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1/20/2022
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE