SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JAMES KOSTULIAS,

Plaintiff,

- v -

CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION, VOLMAR CONSTRUCTION, INC.,

Defendant.

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INDEX NO. 154897/2015

MOTION DATE 10/1/2021

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

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CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION

Plaintiff,

-against-

ACRON MAINTENANCE, INC., EXCEL ELEVATOR & ESCALATOR CORP.

Defendant.

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Third-Party
Index No. 595465/2016

The following e-filed documents, listed by NYSCEF document number (Motion 007) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 207, 209, 210, 211, 230, 237, 239, 240, 242, 246, 248, 250, 251, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 304, 311, 313, 314, 315, 316, 317, 318, 319, 321, 340, 342, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 357, 359, 360, 361, 362, 363, 368, 373, 374, 375, 376, 377, 378, 381, 383

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 238, 241, 243, 244, 245, 247, 249, 252, 253, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 298, 300, 305, 306, 307, 308, 309, 310, 312, 320, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 341, 343, 356, 358, 364, 365, 366, 367, 369, 370, 371, 372, 382

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that the branch of Plaintiff James Kostulias' motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment on his Labor Law Sections 240(1) and 241(6)

claims against Defendants City of New York, N.Y.C. Department of Education (collectively, "City Defendants"), and Volmar Construction, Inc. ("Volmar") is denied; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment on his negligence claim against City Defendants, Volmar, and Defendant Excel Elevator Corp. ("Excel") is denied; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 007), pursuant to CPLR 3216, for an order sanctioning Defendants for spoliation of evidence, is denied; and it is further

ORDERED that City Defendants and Volmar's cross-motion (Motion Seq. 007), pursuant to CPLR 3212, for dismissal of Plaintiff's complaint, is partially granted to the extent that Plaintiff's Labor Law Sections 240(1) and 241-a claims are severed and dismissed, and is otherwise denied; and it is further

ORDERED that Excel's motion (Motion Seq. 008), pursuant to CPLR 3212, seeking dismissal of Plaintiff's complaint and all crossclaims asserted against it by City Defendants and Volmar is denied in its entirety; and it is further

ORDERED that City Defendants and Volmar's cross-motion (Motion Seq. 008), pursuant to CPLR 3212, for summary judgment on their crossclaims asserted against Excel is denied in its entirety; and it is further

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

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for City Defendants and Volmar shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 007, Plaintiff James Kostulias moves for summary judgment pursuant to CPLR 3212 on his claims under Labor Law Sections 240(1) and 241(6) against Defendants City of New York, N.Y.C. Department of Education (collectively, "City Defendants"), and Volmar Construction, Inc. ("Volmar"). Plaintiff also moves for summary judgment on his negligence claims against City Defendants, Volmar and Defendant Excel Elevator Corp. ("Excel") as to

liability. Plaintiff also seeks, pursuant to CPLR 3126, an order sanctioning Defendants for spoliation of evidence. Plaintiff seeks an order: (1) striking Defendants' Answers; or (2) precluding Defendants from introducing certain evidence at trial; or (3) striking Defendants' Affirmative Defenses, or (4) granting an adverse inference at trial.

Defendants all oppose Plaintiff's motion in its entirety, and City Defendants and Volmar cross-move for an order pursuant to CPLR 3212 dismissing Plaintiff's complaint in its entirety.

In Motion Seq. 008, Excel moves for an order pursuant to CPLR 3212 dismissing Plaintiff's complaint and all crossclaims asserted against it by City Defendants and Volmar.

City Defendants, Volmar and Plaintiff oppose Excel's motion in its entirety. City Defendants and Volmar also cross-move for an order pursuant to CPLR 3212 (1) granting City Defendants summary judgment on their crossclaims for contractual indemnification, reimbursement of attorneys' fees and common law indemnification against Excel; and (2) granting Volmar summary judgment on its cross-claim for common law indemnification against Excel.

BACKGROUND FACTS

This proceeding stems from an accident that occurred at a construction project[1] located at the P.S. 217 school in Brooklyn ("the subject premises") on or about March 23, 2015. The subject premises are owned by City Defendants, who hired Volmar as a general contractor to perform construction work on the school (NYSCEF do No. 186, ¶ 25). Volmar in turn hired non-

[1] Although Volmar was not engaging in construction of a building or structure on the subject premises, the Court of Appeals has deemed the work of installing new HVAC units to be an "alteration" under Labor Law § 240(1) as it satisfies the standard of "making a *significant* physical change to the configuration or composition of the building or structure," in contrast to routine maintenance and/or decorative work (*Sanatass v Consol. Investing Co.,* 10 NY3d 333, 337 [2008]). An "alteration" also falls under the ambit of "construction work" under Labor Law § 241(6) (*Rodriguez v Antillana & Metro Supermarket Corp.*, 179 AD3d 613 [1st Dept 2020]. Accordingly, both Labor Law statutes are applicable to Volmar's project.

party Acron Maintenance, Inc. ("Acron"), as a subcontractor to install air conditioning (AC) units in the school's auditorium (*id.* at ¶ 26).

Plaintiff's Accident

Plaintiff James Kostulias is an AC Mechanic employed by Acron who was assigned to help with installing and upgrading approximately twelve AC units in the auditorium (NYSCEF doc No. 284 at ¶ 14).

Plaintiff's 50-H Hearing Testimony

Plaintiff first gave testimony related to the circumstances of his accident as a part of a separate Rule 50-H Hearing on July 9, 2015 (NYSCEF doc No. 286).

Plaintiff testified that at the time of his accident, he was walking around the auditorium stage so that he was able to move a ladder closer to the wall in order to reach an AC unit that had been installed on the left side of the stage (*id.* at 15). Plaintiff testified that while the stage itself was well lit, the back of the room was dark (*id.* at 16, 27-28). Plaintiff stated that he was told to open a door covered by a black curtain behind the stage to turn on more lights:

> "I was asked to go around the stage and open that particular door. I moved the curtain and saw a door. I opened it and carefully looked inside the room. I looked to my right and saw another door that I would have to walk through. The room was poorly lit, and I was looking for a light switch. I took one step past that door, and there was nothing there. I fell."
>
> (*id.* at 26).

Plaintiff testified that although he could not tell at the time, the door he opened led to a handicap lift elevator shaft (*id.* at 33). Plaintiff fell five feet down into the steel frame of the lift and landed on the lift's platform where he was found by coworkers (*id.* at 35-36). There were no City Defendant employees present at the time (*id.* at 33).

Plaintiff's Deposition Testimony

Plaintiff initially appeared for deposition in this matter on December 12, 2017 (NYSEF doc No. 287), which was resumed on April 24, 2018 (NYSCEF doc No. 288) and completed on May 1, 2018 (NYSCEF doc No. 289).

Plaintiff testified that when Acron's crew arrived on March 23, 2015, his supervisor, Ron Amoroso, found the school's superintendent, who opened the door to the auditorium (NYSCEF doc No. 287 at 194-6). The lights in the auditorium were on, but parts of the stage area were dark (*id.*). Acron brought additional halogen light stands to use if needed, as well as head bands with flashlights that were stored in a toolbox (*id.* at 214).

Plaintiff testified that he was working with his colleague Francisco Hernandez to install "blower units" on the auditorium walls (*id.* at 204). Mr. Hernandez instructed Plaintiff to go around the back of the stage to open a locked door from the other side. The door was beneath a blower unit that was being installed so that Mr. Hernandez could place a portion of a ladder over the door threshold for better access to the wall (*id.* at 208-10).

Plaintiff walked up the side of the stage and then walked approximately 12 feet down the left back side of the stage when he saw a door (*id.* at 224). Plaintiff did not see any other doors on the side of the stage, so he believed this door led to the locked door Mr. Hernandez asked him to open (*id.* at 234). Plaintiff pulled a handle on the left edge of the door towards him and the door opened immediately (*id.* at 236-39). Plaintiff noticed a rectangular box above the handle with "up and down" markings but did not realize that the door was meant to lead to an elevation device (*id.* at 274).

Plaintiff stated that the door opened to a dark room that he was unable to see into, but he noticed what looked like a "solid door" to his right (*id.* at 245). Plaintiff stepped into the door area and reached with his left hand to find a light switch (*id.* at 251-54). Plaintiff stepped forward

with his right foot and fell down, hitting plexiglass and landing on his back on a steel platform (*id.* at 258-59). Plaintiff was found by his supervisor, Mr. Amoroso, who helped him up and walked him out of the room through the door Plaintiff was supposed to open on the stage (*id.* at 298-99).

City Defendants' Deposition Testimony

Joseph Cambria

Joseph Cambria, a Custodian Engineer employed by City Defendants at the subject premises, appeared for deposition on October 3, 2018, which was completed October 15, 2018 (NYSCEF doc No. 226).

Mr. Cambria explained that the elevator shaft that Plaintiff fell into is used for a handicap lift elevator that transports disabled students or individuals that need to get from the stage level to the dressing room (*id.* at 50-51).

Mr. Cambria was notified of Plaintiff's accident and went with Mr. Eskrine Ward, the school's fireman, to investigate how someone could have fallen into the elevator (*id.* at 55). They noticed that the stage side of the door was unlocked, and they could not re-lock the door (*id.*). Mr. Cambria had not been advised that the door lock mechanism was not working (*id.* at 63). Mr. Cambria did not recall when the lift had last been used for any purpose and was not aware of any prior incidents with the lift (*id.* at 82-83).

Mr. Cambria testified that he would call Excel when there was a problem with one of the school's elevators, including the handicap lift, as Excel had been the school's exclusive company for maintenance and repairs of all elevators for a few years prior to the accident (*id.* at 65-66).

During his deposition, Mr. Cambria was shown a document identified as an Excel Work Order dated March 2, 2015 ("the March 2 Work Order") (NYSCEF doc No. 195). The March 2

Work Order reflected that Excel performed routine maintenance on the lift (*id.*). Mr. Cambria believed that this was the last time Excel performed work on the lift but did not recall what work was performed and had no recollection of being informed of any issue with the lift's lock mechanism (NYSCEF doc No. 226 at 119-120). Mr. Cambria was not sure if Excel's maintenance inspection would have included adjusting or checking the lock mechanism (*id.* at 180).

Mr. Cambria noted that while he and a few other colleagues had keys to the lift, he generally only used the lift to clean it and make sure that no access was blocked (*id.* at 214-215). He did not regularly inspect the lift or ensure that the locking mechanism was working (*id.*).

Eskrine Ward

Eskrine Ward, a Fireman employed by City Defendants at the subject premises, appeared for deposition on March 12, 2020 (NYSCEF doc No. 225).

Mr. Ward testified that as part of his job duties, he performed a walkthrough of all areas of the subject premises every day, including the auditorium (*id.* at 21). However, he did not regularly inspect the lift while walking through the auditorium (*id.*).[2]

Mr. Ward, along with Mr. Cambria, had a key to the lift but rarely used his key to help a student use the lift (*id.* at 26-27). If he ever noticed an issue with the lift, he would alert Mr. Cambria who could contact Excel (*id.* at 45).

Excel's Deposition Testimony

Eduardo Martinez

[2] Mr. Ward initially testified during his deposition that he checked the lift "at least once a month" to "make sure it's operating," which included checking that the door remained locked (*id.* at 34-35). However, by affidavit dated October 30, 2020, Mr. Ward clarified that said inspections did not become part of his job responsibilities until 2017, and therefore he was not performing monthly inspections at the time of Plaintiff's accident (NYSCEF doc No. 265).

Eduardo Martinez, an elevator mechanic employed by Excel, appeared for deposition on July 9, 2019 (NYSCEF doc No. 222).

Mr. Martinez, who serviced the subject lift, testified that as part of his regular maintenance inspection, he would check the stop switch and alarm bell, clean the unit, and run the unit up and down a few times (*id.* at 33-35). He would spray lubricant on the door hinges and silicone on the locking mechanism (*id.*).

Mr. Martinez testified that if the lift was at the lower level, the lift's interlock switch should have prevented the door of the lift at the auditorium's stage level from opening (*id.* at 41-43). Mr. Martinez stated that he would check both lift doors to ensure the interlock was operating but did not perform a separate inspection of the interlock itself, which was internal and located inside the door frame (*id.* at 45).

Mr. Martinez reviewed the March 2 Work Order and confirmed that he filled out the Order after inspecting the lift, using a rag and a can of WD-40 to perform maintenance (*id.* at 63). Mr. Martinez inspected both the subject lift and another handicap lift located elsewhere in the school within thirty minutes, between 10:00 and 10:30 am (*id.*).

William Moore

William Moore, a mechanic employed by Excel, appeared for deposition on December 3, 2018 (NYSCEF doc No. 274).

Mr. Moore was not sure if he was employed by Excel at the time of the subject accident in March 2015 but testified that he started servicing the elevators at the subject premises, including the lift, within the last few years (*id.* at 44-45).

Mr. Moore testified that a periodic inspection included checking the operation of the lift but lubricating doors and hinges and checking the key switches (*id.* at 25). Mr. Moore testified

that said inspection would take "thirty minutes to an hour" for each lift (*id.* at 53). Mr. Moore stated that the lifts' interlocks did not require lubrication but did need to be examined and adjusted occasionally (*id.* at 85-86).

Travis Marchica

Travis Marchica, a mechanic employed by Excel, appeared for deposition on September 27, 2019 (NYSCEF doc No. 275).

Mr. Marchica did not recall visiting the subject premises to repair the lift, but reviewed a work ticket that reflected repair work performed by him on the lift the day after Plaintiff's accident (the "March 24 Work Order;" NYSCEF doc No. 190). Mr. Marchica noted that according to the March 24 Work Order, he "adjusted the door solenoid on second landing, returned unit in service, and observed normal operation" (NYSCEF doc No. 275 at 67). Mr. Marchia did not recall exactly how he adjusted the door solenoid but explained that the solenoid is part of the lock mechanism that allows that door to unlock and lock when the elevator is level with the floor (*id.*).

Mr. Marchia further noted that according to the March 24 Work Order, he shut down the lift and then returned it to normal operation by ensuring it worked properly (*id.* at 74-75). Mr. Marchia stated that Plaintiff should not have been able to open the door when the lift was at the lower level and not at the door level (*id.* at 107). Mr. Marchia noted that the elevator's locking mechanism was comprised of several different parts, some of which should not be lubricated as it may cause damage (*id.* at 158).

Acron's Deposition Testimony

Mr. Ronald Amoroso, Plaintiff's supervisor, appeared for deposition on August 29, 2019 on behalf of non-party Acron (NYCSEF doc No. 198).

Mr. Amoroso did not personally witness Plaintiff's accident but was called by Plaintiff's coworker, Mr. Francisco Hernandez, shortly thereafter (*id.* at 28). Mr. Hernandez told him that he asked Plaintiff to enter the door to the left of the stage to turn on more lights in the auditorium (*id.* at 31). Mr. Amoroso testified that the auditorium was lit while Acron performed work, but the stage area itself was not well lit (*id.* at 34).

Mr. Amoroso did not know of the existence of the lift prior to Plaintiff's accident (*id.* at 86). After Mr. Hernandez called him over, he went behind the stage to observe the lift door, which was made of Plexiglass and had a metal frame (*id.* at 97). He did not attempt to open the door but could see the lift at the bottom through the doorframe, as it was only about three feet below (*id.* at 100-101).

Acron's Accident Report

Acron's "Supervisor's Report of Job Site Accident or Injury" reflects that Plaintiff injured his left shoulder and was driven to a hospital after the accident (NYSCEF doc No. 293).

The accident's description states that Plaintiff "went up on the stage and behind the curtain, there was low lighting and he felt around for a door. He found the door handle, opened it up and fell four ft. to the bottom of the wheelchair lift. The door was made of Plexiglas with metal framing. The door was malfunctioning because in the down position, the upper door should have been locked" (*id.*).

Under "corrective actions taken to prevent this type of injury recurring", the report states that the "door locking mechanism was repaired the next day by a repair company" (*id.*).

Affidavit of William J. Seymour

Mr. William Seymour, an electrical engineer with experience in elevator compliance standards and engineering, was retained by Plaintiff to review the record of this proceeding and inspected the subject lift in April 2018 (NYSCEF doc No. 191).

Mr. Seymour opined that Plaintiff's injuries were the direct result of a broken interlock on the lift door. Mr. Seymour defined an interlock as "a safety device that prevents the wheelchair lift's hoistway or landing door from opening when the lift is not present at that specific landing" (*id.* at 5).

Mr. Seymour stated that Excel's failure to maintain a working interlock violated various requirements of the ASME A17.1 Safety Code for Elevators, which are applicable to wheelchair lifts such as the subject lift herein (*id.* at 5). Mr. Seymour further reviewed Excel's March 2 Work Order and noted that it was highly unlikely that Excel could have properly completed its preventive maintenance work on the school's two lifts in a half hour, given that prior work orders reflected that inspections took between an hour and 90 minutes (*id.* at 10).

Mr. Seymour also stated that the City Defendants were negligent in their oversight of Excel's maintenance and were negligent in failing to report the accident to the New York City Department of Buildings' elevator division as required by NYC Administrative Code 3012.1 (*id.* at 13). Mr. Seymour noted that by failing to report the accident to the Department of Buildings (DOB), City Defendants denied Plaintiff a contemporaneous, third-party examination of the lift.

Affidavit of Jon Halpern

Mr. Jon Halpern, a consulting engineer in the field of vertical transportation, was retained by Excel to review the record of this proceeding and inspected the subject lift in April 2018 (NYSCEF doc No. 210).

In contrast with Mr. Seymour, Mr. Halpern noted that the subject lift's lock system is not in fact an interlock but is rather a "mechanic lock and a switch" that is opened via a solenoid (*id.* at 6). Mr. Halpern argued that Excel properly maintained the lift, and that Plaintiff's accident was caused not by a deteriorating interlock, but rather by the failure to replace the mechanic lock and switch, which allows for the door to be opened by the activation of a solenoid even if the lift is not present at the landing, with an actual proper interlock (*id.* at 12).

Mr. Halpern further opined that Excel was not negligent during its March 2 inspection as it was unlikely that the "condition" of the mechanic lock and switch existed on March 2, three weeks prior to Plaintiff's accident, given that it was likely caused by "failure of the position detection system, construction debris and or/ misuse of the lift doors" (*id.* at 18).

Affidavit of William Meyer

Mr. William Meyer, an engineer with expertise in elevator systems, was retained by City Defendants and Volmar to review the record of this proceeding and inspected the subject lift in May 2018 (NYSCEF doc No. 262).

Mr. Meyer found that the lift was properly outfitted with "interlocks and locks" and that the lift would function in full compliance of all requisite safety conditions under "normal circumstances" (*id.* at 8). Mr. Meyer stated the door lock would only malfunction and open with the lift not at the landing when an individual "purposefully and knowingly attempted to bypass the latch" (*id.*).

Mr. Meyer also found, in contrast to Mr. Seymour, that no violation of the ASME 17.1 Safety Code occurred as said provisions apply only to the operation of devices, and the lift was not in operation at the time of Plaintiff's accident. Mr. Meyer also argued that the City Defendants' failure to notify the DOB was immaterial as the purpose of such notification is to

ensure the accident cause is remedied, and the DOB "typically would not perform an evidence gathering investigation" (*id.* at 9).

PROCEDURAL HISTORY

On May 15, 2015, Plaintiff commenced this action against City Defendants and Volmar, alleging causes of action under Labor Law §§§240(1), 241(6), and 241-a, as well as general negligence (NYSCEF doc No. 1).[3]

City Defendants and Volmar filed their Answers to Plaintiff's complaint on March 22, 2016 and May 18, 2016, respectively (NYSCEF doc No. 46 and 50).

On June 15, 2016, City Defendants filed a third-party action against Excel and Acron (NYSCEF doc No. 51). Excel filed its Answer on September 2, 2016 (NYSCEF doc No. 56).

On October 27, 2016, City Defendants filed a stipulation discontinuing the third-party action against Acron (NYSCEF doc No. 60).

On March 1, 2019, City Defendants moved for an order directing Excel to comply with outstanding discovery demands, which was resolved pursuant to a discovery stipulation dated June 4, 2019 (NSYCEF doc No. 87).

On August 2, 2019, Plaintiff moved for leave to amend his complaint to add Excel as a direct defendant, which this Court granted by order dated November 4, 2019 (NYSCEF doc No. 149).

On February 28, 2020, Plaintiff filed a Note of Issue and Certificate of Readiness for Trial (NYSCEF doc No. 167). On March 17, 2020, Excel moved to vacate the Note of Issue on the ground that discovery remained outstanding (NYSCEF doc No. 172). The parties filed a

[3] Plaintiff's original complaint asserted his Labor Law causes of action only against Volmar, with negligence as the only cause of action against City Defendants. Plaintiff thereafter moved for leave to amend his complaint to assert his Labor Law claims against City Defendants, which this Court granted by order dated March 11, 2016 (NSYCEF doc No. 43).

stipulation to vacate the Note of Issue (NYSCEF doc No. 184). However, the Court did not So-Order the stipulation but rather directed the parties to proceed with completing discovery while the case remained on the trial calendar (NYSCEF doc No. 304 at 2).

The Instant Motions

Motion Seq. 007

On July 29, 2020[4], Plaintiff commenced the first of two motions now before this Court, seeking summary judgment on his claims under Labor Law Sections 240(1) and 241(6) against City Defendants and Volmar. Plaintiff argues that City Defendants and Volmar are liable under 240(1) as they failed to protect Plaintiff against an elevation-related risk that was the proximate cause of his injuries. Plaintiff argues that City Defendants and Volmar are liable under 241(6) as they violated Industrial Code 12 NYCRR § 23-1.30, which pertains to illumination requirements for work sites. Plaintiff also moves for summary judgment on his negligence claims against City Defendants and Volmar based on their failure to maintain a safe worksite and Excel based on its failure to safely maintain the lift.

Plaintiff also seeks, pursuant to CPLR 3126, an order sanctioning all Defendants[5] for spoliation of evidence based on their failure to maintain certain elevator maintenance records and the fact that City Defendants had Excel repair the elevator before Plaintiff could engage in a third-party inspection. Plaintiff seeks an order: (1) striking Defendants' Answers; or (2) precluding Defendants from introducing evidence that would dispute whether elevator maintenance was a contributory factor in the accident; or (3) striking Defendants' Affirmative

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[4] Although filed more than 120 days after the Note of Issue, both instant motions are timely pursuant to former Governor Cuomo's Executive Order 202.67 that tolled from March 20, 2020 through November 3, 2020 "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state."

[5] As will be discussed *supra*, Defendants oppose this branch of Plaintiff's motion, arguing that all relevant maintenance records were disclosed and that Plaintiff has not demonstrated how he was prejudiced by Excel's repair.

Defenses, or (4) granting an adverse inference at trial with regard to Defendants' knowledge of the elevator defect and the improper maintenance thereof.

On February 12, 2021, City Defendants and Volmar cross-moved for an order dismissing Plaintiff's complaint in its entirety. City Defendants and Volmar argue that Plaintiff's accident falls outside the scope of Labor Law 240(1) and that Plaintiff's 241(6) claim should be denied as the record reflects that the work site was sufficiently illuminated. While Plaintiff does not move for summary judgment on his claim pursuant to Labor Law 241-a, which pertains to requirements for workers in elevator shafts, City Defendants and Volmar argue for its dismissal on the ground that it is inapplicable to Plaintiff's accident. City Defendants and Volmar also argue that they are entitled to dismissal of Plaintiff's negligence claim as Excel was the entity responsible for the maintenance and safety of the elevator lift and the City had no notice of a defective condition.

Motion Seq. 008

On October 8, 2020, Excel filed the second motion now before the Court, seeking an order dismissing Plaintiff's complaint and all crossclaims asserted against it by City Defendants and Volmar. Excel argues that the evidentiary record demonstrates that Excel had no actual or constructive notice of a defect in the lift, and that it owed no duty to Plaintiff as a third-party contractor and thus has no liability for the accident.

On May 18, 2021, City Defendants and Volmar cross-moved for an order granting City Defendants summary judgment on their crosclaims for contractual indemnification, reimbursement of attorneys' fees and common law indemnification against Excel and granting Volmar summary judgment on its crossclaim for common law indemnification against Excel. City Defendants argue that they are entitled to contractual indemnification pursuant to their

maintenance contract with Excel and argue that all parties are entitled to common law indemnification as Plaintiff's accident was proximately caused by Excel's negligence in maintaining the subject lift.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Here, since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A) (Sup. Ct., N.Y. County 2012], aff'd, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez,*

supra, Zuckerman v City of New York, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

Labor Law (Motion Seq. 007)

The Court first writes to address Plaintiff's application for summary judgment on his claims pursuant to Labor Law §§ 240(1) and 241(6), and City Defendants and Volmar's application for dismissal of the same, along with Plaintiff's Labor Law § 241-a claim.

Labor Law § 240(1)

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

> "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."

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). The statute "was designed to prevent those types of accident in which … [the] 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]). The Court of Appeals in *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 (2009) explained that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.* at 603). For the protections of the statute to be triggered, the fall must be proximately caused by the failure to provide proper protection in response to an elevation-related hazard (*id.*, *see also Piccuillo v Bank of New York Co, Inc,* 277 AD2d 93 [1st Dept 2000]).

As such, to prevail on a Labor Law § 240(1) claim, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Once a plaintiff establishes that a violation proximately caused the injury, an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

A plaintiff seeking summary judgment on a § 240(1) claim is not required to present evidence as to which specific safety device(s) would have prevented his injury (*Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). However, the Court of Appeals has made it clear that a plaintiff must still "establish that there was a safety device of the kind enumerated in the statute that could have prevented his fall, because liability is contingent upon the failure to use, or the inadequacy of such a device" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 336 [2011]). The First Department has consistently maintained that "the worker's burden is to show that the absence of adequate safety devices, or the inadequacy of the safety devices provided to protect the worker from a fall, was a proximate cause of his or her injuries" (*Nazario v 222 Broadway, LLC*, 135 AD3d 506, 507 [1st Dept 2016], *aff'd as modified,* 28 NY2d 1054, 1055 [2016]). Summary judgment should be denied when there are questions of fact regarding the adequacy of the safety devices provided (*id.*).

In *Rocovich v. Consol. Edison Co.*, the Court of Appeals noted that while the safety devices enumerated in § 240(1) are used for different purposes, the "various tasks in which these devices are customarily needed or employed share a common characteristic. All entail a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (78 NY2d 509, 513–14 [1991]). Accordingly, the devices enumerated under the statute are required "because of a difference between the elevation level of the required work and a lower level" (e.g., ladders and scaffolding) or "a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (e.g. hoists, blocks, and stays) (*id.*).

Here, Plaintiff argues that § 240(1) is applicable to his accident as he was injured when he fell off the auditorium's stage, at an elevated level, into an elevator shaft. In support, Plaintiff relies

on the case of *Pipia v Turner Constr. Co.*, wherein a plaintiff's foot got stuck in an uncovered hole and he fell backwards on a floating stage (114 AD3d 424 [1st Dept 2014]). The First Department held that while plaintiff fell "at the same level he had been working, he fell while struggling to avoid the elevation risk of falling into water" (*id.* at 427). Plaintiff also relies on *Milewski v Caiola,* wherein an injured worker fell into an elevator shaft after the plank he was laying across collapsed, and the failure to provide proper safety planking was a proximate cause of the accident (236 AD2d 320 [1st Dept 1997]). Plaintiff also relies on *Demetrio v Clune Constr. Co., L.P.*, wherein a worker exited a building a construction site and slipped into a trench, and the First Department found that defendants failed to adequately protect plaintiff from the elevation-risk of falling into a trench (176 AD3d 621 [1st Dept 2019]).

Plaintiff argues that here, similar to the above cases, Plaintiff was working at an elevated level and was provided no protection from falling into the elevation-related risk posed by the elevator shaft. Plaintiff notes that he was never told not to go to up to the stage and the areas surrounding it, and that there were no signs indicating that the door Plaintiff opened should remain closed. Plaintiff concludes that City Defendants and Volmar failed to protect Plaintiff against an elevation-related risk and said risk was the proximate cause of Plaintiff's injuries and are thus subject to absolute liability under § 240(1).

In opposition and in support of their cross-motion to dismiss, City Defendants and Volmar argue that Plaintiff has not demonstrated he was subject to a foreseeable risk at his job site that required a safety device of the kind enumerated in § 240(1). City Defendants and Volmar argue that Plaintiff's work did not require that he use the lift and it was thus not foreseeable that Plaintiff would encounter the lift, a permanent structure at the subject premises that was completely

unrelated to Plaintiff's task. City Defendants and Volmar further argue that the caselaw relied on by Plaintiff is inapplicable to the present circumstances.

The Court notes, as a preliminary matter, that the argument put forth by City Defendants and Volmar that the subject lift was outside of Plaintiff's job site is unavailing. The evidentiary record reflects that the entire auditorium was receiving new air conditioning units, and therefore the stage, located in the middle of the auditorium, was part of Acron's construction site (NYSCEF doc No. 318 at 7). Plaintiff was directed by a supervisor to go towards the back of the stage to open a door (*id.*). While Plaintiff evidently went to the incorrect door behind the stage, the fact that Plaintiff was directed to open a door at the stage level makes it foreseeable that a laborer would be in the stage area. Therefore, while Plaintiff was not required to use the lift to perform his job, it strains credulity for City Defendants and Volmar to argue that it was wholly unforeseeable that Plaintiff may have encountered the subject lift during the course of performing the air conditioning work in the auditorium.

With respect to City Defendants and Volmar's argument that the lift was a "permanent structure" at the subject premises, the Court first notes that the fact that an accident involves a permanent structure does not remove it from the ambit of § 240(1) (*see Conlon v Carnegie Hall Socy., Inc.*, 159 AD3d 655 [1st Dept 2018] [Plaintiff that fell down building staircase while working entitled to protection of the statute).

However, as City Defendants and Volmar correctly argue, the fact that Plaintiff's accident involved a permanent structure *does* require Plaintiff to show that there was a foreseeable need for Plaintiff to be provided a safety device of the kind enumerated in § 240(1), and that City Defendants and Volmar failed to do so.

In *Espinoza v Azure Holding II LP,* 58 AD3d 287 [1st Dept 2008]), a plaintiff was injured when the sidewalk he was standing on collapsed due to the failure of a cellar vault below. The First Department, in analyzing whether § 240(1) applied to the circumstances, held that "where an injury results from the failure of a completed and permanent structure within a building…a necessary element of a cause of action under Labor Law § 240(1) is a showing that there was a foreseeable need for a protective device of the kind enumerated by a statute" (*id.* at 292-293). The First Department concluded that neither party was entitled to summary judgment as evidence of the building's dilapidated state raised an issue as to whether the failure of the sidewalk was foreseeable. The First Department contrasted its holding with that of *Balladares v Southgate Owners Corp.*, where the plaintiff failed to show that there was any reason to anticipate a collapse of the floor he was working on and his § 240(1) claim was thus dismissed (40 AD3d 667 [2nd Dept 2007]).

In the years since *Espinoza*, the First Department has maintained that plaintiffs, while not normally obligated to establish foreseeability on a § 240(1) claim, are required to do so when the subject accident involves a permanent structure. For instance, in *Mendoza v Highpoint Associates, IC, LLC* (83 AD3d 1 [1st Dept 2011], the plaintiff was working on a leaky roof when the unstable condition of the roof caused him to lose his balance. The First Department, relying on *Espinoza*, held that "to prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure" the plaintiff must show that the structure's failure was foreseeable (*id.* at 12). The court found that Plaintiff's § 240(1) claim should proceed as he introduced evidence suggesting that the roof was in a long-term state of disrepair, raising an issue of fact as to the foreseeability of the roof's collapse. More recently, in *Clemente v 205 West 103 Owners Corp.*, 180 AD3d 516 [1st Dept 2020], the First Department similarly found that the

plaintiff, who was working in an apartment's bathroom when its ceiling collapsed on him, introduce evidence suggesting issues of fact as to whether the ceiling was in an advanced state of disrepair due to prior water damage.

Here, the Court finds that while it was foreseeable that Plaintiff may have encountered the subject lift during the course of his work at the subject premises, it was *not* foreseeable that the lift was in a malfunctioning state that would subject Plaintiff to an elevation-related risk.

As discussed, the subject lift was outfitted with an interlock[6] meant to prevent the stage-level door from opening if the lift was not waiting at the stage level (NYSCEF doc No. 254 at 39). Acron's accident report states that the "door was malfunctioning because in the down position, the upper door should have been locked" (NYSCEF doc No. 293). The lift in and of itself did not constitute an unreasonably dangerous elevation risk; it was protected by a door that should have prevented entry, and although Plaintiff testified he could not tell that the door led to an elevator, he took notice of the "Up/Down" box located next to the door before attempting to opening it (NYSCEF doc No. 284 at 277). Plaintiff's accident was thus caused by the failure of the lift's locking mechanism to prevent entry into the doorway. Plaintiff has introduced no evidence indicating that City Defendants and Volmar were on notice that the lift, a permanent structure on the subject premises, was in a state of disrepair such that additional protection was required. Accordingly, the record does not reflect that City Defendants and Volmar were on notice that the lift was in a defective condition such that it posed an elevation-related risk to workers in the auditorium.

[6] As discussed *supra,* Excel's expert Mr. Halpern stated that the lift did not have an interlock but rather a "mechanic lock and a switch" (NYSCEF doc No. 210). However, it is undisputed that the lift was outfitted with some type of locking mechanism.

The Court further holds that the caselaw cited by Plaintiff does not support liability for City Defendants and Volmar under the circumstances herein. In *Pipia,* Plaintiff was working on a float barge that had been provided as a safe work platform when he slipped and fell through a hole in the floor (114 AD3d at 424). In *Milewski*, Plaintiff fell down in an elevator shaft due to the collapse of inadequate wood planking (236 AD3d at 320). In *Demetrio,* Plaintiff fell when the safety netting and wooden fencing failed to protect him from falling into a trench (112 Ad3d at 621). The matter of whether there was a foreseeable need for a safety device was not at issue, as evidenced by the fact that the First Department found in each case that the safety device provided (e.g., the barge, the planking, and the fencing) was inadequate and failed to provide proper protection. Here, the subject lift was not being used by Plaintiff as a safety device, and Plaintiff only came into contact with the lift inadvertently while he was looking for a different room storing equipment. The caselaw relied on by Plaintiff is thus inapplicable and has no bearing on the fact that Plaintiff is required to show a foreseeable need for a safety device under *Espinoza*.

In conclusion, Plaintiff has not demonstrated that that the subject lift presented a foreseeable elevation-related risk. While Plaintiff suffered a gravity-related injury, the injury was proximately caused by the fact that the subject lift, a permanent structure, was not equipped with properly functioning locking mechanism, which was unknown to City Defendants and Volmar at the time of the accident. Plaintiff was provided the safety equipment needed for his task of installing air conditioning units (e.g. ladders) and has not introduced evidence suggesting that City Defendants and Volmar were on notice that the lift had a defect such that an additional type of protective device was required. While it is clear that Plaintiff suffered a gravity-related injury, the circumstances of Plaintiff's accident simply do not implicate the protections of § 240(1).

Accordingly, the Court finds that City Defendants and Volmar are entitled to dismissal of Plaintiffs' claim under Labor Law § 240(1). Therefore, the branch of City Defendants and Volmar's cross-motion to dismiss Plaintiff's Labor Law § 240(1) claim is granted and said claim is severed and dismissed. Consequently, the branch of Plaintiff's motion for summary judgment related to this claim is denied.

Labor Law § 241(6)

Labor Law § 241(6) "imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] [emphasis in original]). The statute applies where the plaintiff is an employee within the meaning of the Labor Law (*see Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]), and the injury occurs "in an area in which construction, excavation or demolition work is being performed" (*Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [internal quotation marks omitted]). In addition, Labor Law § 241 (6) requires an owner or contractor "to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross*, 81 NY2d at 501-502). Not only must the rule or regulation be relevant to the action, it must also "set[ ] forth a specific requirement or standard of conduct" (*id.* at 503). "The particular [Industrial Code] provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Therefore, to prevail on a Labor Law § 241 (6) claim, a plaintiff must plead and prove that there was a violation of rule or regulation setting forth a specific standard of conduct (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and

that the violation was a proximate cause of the injury (*see McVicker v Port Auth. of N.Y. & N.J.*, 195 AD3d 554, 554 [1st Dept 2021]).

Here, Plaintiff alleges that City Defendants and Volmar are liable under § 241(6) as they violated Industrial Code 12 NYCRRR § 23-1.30, which provides:

> "Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass."

City Defendants and Volmar dispute that 12 NYCRRR § 23-1.30 is applicable given that Plaintiff alleges the stage area was dark but concedes that the auditorium area where the air conditioning units were being installed was well lit (NYSCEF doc No. 186 at 11). However, liability under Labor Law § 241(6) includes an entire construction site, not just where work is being conducted (*See Sergio v Benjolo N.V.,* 168 AD2d 235 [1st Dept. 1990] ["responsibility extends . . . to the entire site, including passageways utilized in the provision and storage of tools, in order to insure the safety of laborers going to and from the points of actual work"]; *Smith v. McClier Corp.,* 22 AD3d 369 [1st Dept 2005] [holding a stairway landing between construction sites was part of the entire construction site]). Accordingly, as Plaintiff has testified he was instructed to go up to the stage to look for a door behind it, the entire backstage area constitutes part of the "construction site" under § 241(6).

Notwithstanding the above finding, the Court finds that summary judgment under Plaintiff's § 241(6) claim is premature at this juncture as conflicting testimony presents questions of fact regarding whether the stage area was sufficiently lit in compliance with 12 NYCRRR § 23-1.30.

Plaintiff's coworker, Mr. Hernandez, maintained that "the area by the front of the stage had little to no lighting....some of the lights were apparently...not turned on and we needed them on" (NYSCEF doc No. 188). However, Plaintiff's supervisor, Mr. Amoroso, testified that the stage lights were on when he was alerted to Plaintiff's fall (NYSCEF doc No. 198 at 101). Mr. Cambria, one of the school's custodians, testified that the lights in the auditorium were sufficient to light the stage and no part of the stage was dark (NYSCEF doc No. 263 at 7). However, as discussed, Mr. Cambria was not in the auditorium at the time of Plaintiff's accident. Plaintiff has also offered conflicting testimony regarding the level of illumination in the stage area when he encountered the lift door. Plaintiff testified in his 50-H hearing that the area was "poorly lit," and he was looking for a light switch when he stepped into the lift and fell (NYSCEF doc No. at 286 at 16), but also testified in deposition for this matter that there was a light attached to an electrical pole hanging from the ceiling that illuminated the area surrounding the lift door (NYSCEF doc No. 287 at 233). It is thus unclear exactly how illuminated the backstage area was when Plaintiff was asked to go behind the stage.

As the evidentiary record herein contains conflicting statements regarding the level of lighting in the worksite, the Court is unable to ascertain at this juncture whether City Defendants and Volmar complied with 12 NYCRRR § 23-1.30's requirement of "illumination sufficient for safe working conditions."

Accordingly, the branch of Plaintiff's motion seeking summary judgment pursuant to Labor Law Section § 241(6) is denied, and the branch of City Defendants and Volmar's cross-motion to dismiss Plaintiff's Labor Law § 241 (6) claim is also denied.

Labor Law § 241-a

While Plaintiff does not move for summary judgment on his Labor Law § 241-a claim, City Defendants and Volmar move for its dismissal. § 241-a provides that:

> "Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board."

City Defendants and Volmar maintain that Plaintiff's § 241-a is inapplicable as the statute does not apply to workers that only fall one story.

The Court finds that City Defendants and Volmar's interpretation of § 241-a is supported by First Department caselaw. In *Nevins v Essex Owners Corp* (259 AD2d 384 [1st Dept 1999]), a case involving a plaintiff injured while performing renovations when an elevator failed to stop and hit him, the Court held that the "point of planking" under § 241-a is "to protect the construction worker from falling through the shaft for more than one story….or from falling debris or other materials during construction, neither of which circumstance occurred here" (*id.* at 385; *See also Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39 [1st Dept 2003] [statute did not apply to worker who fell on top of elevator]).

In opposition, Plaintiff argues that dismissal of his § 241-a claim is premature as there are "no specific measurements or experts that have supplied any information regarding the distance Plaintiff fell" (NYSCEF doc No. 318 at 22). However, it is undisputed that Plaintiff fell only a few feet to the dressing room level immediately below the stage. Plaintiff testified in his 50-h hearing that he fell about "five feet" when he entered through the lift's door (NYSCEF doc No. 286 at 33-34). Plaintiff's supervisor, Mr. Amoroso testified that when he inspected the lift door, he was able to see where the bottom where Plaintiff landed as it was only a few feet below (NYSCEF doc No. 198). It is thus clear that Plaintiff did not fall "more than one story" and

therefore City Defendants and Volmar have made a *prima facie* showing that § 241-a is inapplicable to the circumstances of Plaintiff's accident.

Accordingly, the Court finds that City Defendants and Volmar are entitled to dismissal of Plaintiffs' claim under Labor Law § 241-a. The branch of City Defendants and Volmar's cross-motion to dismiss Plaintiff's Labor Law § 241-a claim is granted and said claim is severed and dismissed.

Negligence (Motion Seq. 007 and 008)

Although Plaintiff moves for summary judgment on his common law negligence claim against City Defendants, Excel, and Volmar, Plaintiff's most recent amended complaint asserts causes of action for negligence only against City Defendants and Excel (NYSCEF doc No. 139). While generally, a party may not obtain summary judgment on an unpleaded cause of action, "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice. As with a trial, the court may deem the pleadings amended to conform to the proof" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]). Here, counsel for City Defendants and Volmar has responded to Plaintiff's arguments related to negligence and has introduced arguments in opposition on behalf of both City Defendants *and* Volmar in the papers in support of their cross-motion (NYSCEF doc No. 345 at 10). The Court thus finds that it can proceed to evaluate whether Plaintiff has established a claim of negligence against Volmar without prejudicing the party.

Plaintiff's papers also discuss summary judgment against City Defendants and Volmar pursuant to Labor Law § 200; however, his complaint and Notice of Motion refer only to common law negligence (NYSCEF doc Nos. 139, 185). Accordingly, the Court will evaluate whether Plaintiff has established claims for common law negligence. This discrepancy does not

meaningfully affect the Court's analysis, as Labor Law § 200 is merely "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]).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, inter alia, *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

A contractor usually does not owe a duty to third parties (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals in *Espinal* articulated three exceptions to the rule:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."
>
> (*id.*)

As discussed *supra*, Plaintiff asserts negligence against City Defendants and Volmar on the grounds that they failed to maintain his worksite in a reasonably safe condition. Plaintiff further argues that City Defendants are liable for a breach of the NYC Administrative Code § 27-994-(e), which requires all building owners to maintain elevators in compliance with the Reference Standards RS-18-1 of the New York City Building Code for Elevators and Conveyors, which in turn reference various national standards, including the American Society of Mechanical Engineer's Safety Code for Elevators and Escalators (ASME) that mandate

requirements for, *inter alia*, proper working devices on elevators, including limited-use elevators such as the subject lift (collectively, the "Elevator Safety Standards").

Plaintiff separately argues that Excel is liable under *Espinal* as, per the terms of its maintenance contract with City Defendants, Excel displaced the City's duty to inspect and repair the lift and breached said duty when it negligently inspected the lift on March 2 and failed to remedy the lift's broken interlock, proximately causing Plaintiff's accident.

In opposition to Plaintiff's motion and in support of its own motion to dismiss the complaint in its entirety, Excel argues that it owed no duty to Plaintiff and had no notice that the lift was in a defective condition, given that the lift was properly functioning when it completed its March 2 preventative maintenance inspection, and it was not alerted to any issues in the interim weeks between said inspection and Plaintiff's accident. Excel further argues that it did *not* displace City Defendants' duties to maintain the lift, as the evidence demonstrates that City Defendants routinely inspected the lift.

To determine the proper liability of all Defendants herein with respect to the subject lift, the Court first looks to the Contract between City Defendants and Volmar (NSYCEF doc No. 279). The Contract was effective June 1, 2011 through May 31, 2016, and directed that Excel would provide preventative maintenance, service and repair for all "transportation machines and devices" in the applicable DOE facilities. Section 10.2B of the Contract provides that Excel was to perform regularly scheduled service to the handicapped lifts, such as the subject lift, which required Excel to "adjust, lubricate and clean certain components to the lift, repair or replace such components as requested" and perform other maintenance work and inspections as required in the Contract (*id.* at 139-140).

A plain reading of the Contract thus indicates that Excel displaced City Defendants' duty to inspect and safely maintain the subject lift, triggering potential liability to Plaintiff under the third prong of *Espinal*. An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found (*Rogers v. Dorchester Assocs*., 32 NY2d 553, 559 (1973); see also *Cilinger v Arditi Realty Corp*, 77 AD3d 880, 882-83 [2010]).

Rogers involved a plaintiff injured when she was struck by the malfunctioning automatic door of a self-service elevator in her apartment building (32 NY2d at 557). The building's management company had entered into a comprehensive service agreement with Otis Elevator Company ("Otis") for the building's elevators. Otis agreed to "'regularly and systematically examine, adjust [and] lubricate' elevator machinery, and to repair or replace parts if required in Otis' judgment" (*id.* at 558). Otis' representatives testified in pretrial examination that they performed regular routine inspections of the elevators to ensure that the elevators' doors were functioning and properly leveling. At trial, the jury was charged that Otis "was under a duty to exercise reasonable care in inspecting elevators for defects and in repairing defects to make the elevators reasonably safe to use" (*id.*).

On appeal, Otis argued that the jury charge was improper as there was no evidence of its acts or omissions to sustain a finding that Otis negligently performed its duty of maintenance. The Court of Appeals held that the charge was proper, noting:

> "Otis had undertaken, for a substantial fee, to handle exclusively all maintenance on the elevator. It was thus in exclusive control of maintenance, although it obviously was not in exclusive continuous control of the possession and operation of the elevator. The owner

> and manager were ill-equipped to service the complicated, delicate, and potentially dangerous elevator apparatus. In case of trouble, their employees were instructed to leave all repair work to Otis…Whether the door could have malfunctioned, absent negligence in the inspection and maintenance by Otis, was properly a question for the jury…"

(*id.* at 561).

Here, the Court finds that similarly, Plaintiff has established a viable claim of negligence against Excel. The record reflects that while Excel was not in exclusive control of the lift, it was in exclusive control of the lift's maintenance. Although Excel argues City Defendants were also responsible for the maintenance of the lift, the evidentiary record reflects that City Defendants' representatives Mr. Cambria and Mr. Ward only cleaned the lift and checked it was working as part of their custodial duties; they were not trained in elevator maintenance and accordingly would contact Excel if there were any issues with the lift, as they did following Plaintiff's accident (NYSCEF doc No. 271 at 29). As with the building's staff in *Rogers*, the fact that that City Defendants' janitor staff had access to the elevators does not absolve Excel of their potential liability. While it does not appear that Excel received specific complaints about the lift prior to Plaintiff's accident, Excel performed an inspection of the lift weeks before Plaintiff's accident on March 2. Accordingly, Plaintiff has established that Excel displaced the City's duty to maintain the lift and has asserted a viable negligence claim against Excel, and Excel is not entitled to dismissal of Plaintiff's complaint against it.

Notwithstanding the above holding, the Court further finds that Plaintiff has not demonstrated entitlement to summary judgment on his negligence claim against Excel at this juncture. As discussed *supra,* the experts retained by the parties herein have rendered differing opinions regarding whether the condition of the lift that caused Plaintiff's accident was caused by a defect that could and should have been remedied by Excel at its prior inspection. While

Plaintiff's exert, Mr. Seymour, opined that Plaintiff's accident was caused by a broken interlock that Excel negligently failed to repair at its March 2 inspection (NYSCEF doc No. 191), Excel's expert Mr. Halpern testified that the accident was caused by a "condition" of the lift's mechanic lock and switch system that likely did not exist on March 2 (NYSCEF doc No. 210). In contrast, Mr. Meyer, City Defendants' expert, has stated that the lift was properly outfitted with a functioning interlock and that someone must have "attempted to bypass" the lift's latch mechanism (NYSCEF doc No. 262).

In addition to the differing theories presented by the expert witnesses regarding causation, the Court is unable to ascertain whether Excel's March 2 inspection satisfied its contractual duties as Excel's own representatives have also provided different accounts of the maintenance procedures that should have been followed in order to prevent the lift's lock system from malfunctioning. As discussed *supra*, Mr. Martinez, who performed the March 2 inspection, testified that he would lubricate the door hinges and locking mechanism but would not inspect or adjust the lift's interlock (NYSCEF doc No. 222). Mr. Moore, another mechanic produced for deposition, testified that the interlocks do not require lubrication, but should be inspected and adjusted occasionally (NYSCEF doc No. 274). Mr. Marchica cautioned that the interlock should never be lubricated and stated that the interlock would only require adjustment if the lift door was unable to be opened (NYSCEF doc No. 275).

The Court concludes that while Plaintiff has asserted a viable negligence claim against Excel, the inconsistent testimony from Excel's representatives regarding the proper procedures with respect to maintenance and service of the lift, and, more critically, the differing theories presented by the experts regarding whether the condition of the lift was present during the March

2 inspection such that Plaintiff's accident was proximately caused by negligent maintenance of the lift[7], render summary judgment an improper remedy for either Plaintiff or Excel at this juncture. As in *Rogers,* the question of "whether the door could have malfunctioned, absent negligence in the inspection and maintenance" of Excel is a "question for the jury" (32 NY2d 553 at 561). Accordingly, while Excel is not entitled to dismissal of Plaintiff's negligence claim, Plaintiff is not entitled to summary judgment in his favor against Excel.

Separately, notwithstanding the Court's determination that Excel displaced City Defendants' duty to safely maintain the lift, City Defendants and Volmar are also not entitled to dismissal of Plaintiff's common law negligence claim. As discussed *supra*, Plaintiff has asserted a viable claim under Labor Law § 241(6) with respect to whether the lighting conditions at the worksite violated Industrial Code 12 NYCRRR § 23-1.30. Accordingly, a question of fact remains as to whether City Defendants as owners and Volmar as the general contractor breached their common law duty to maintain a safe workplace for all employees (*See Emp'rs Mut. Liab. Ins. Co. v. Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 383 [1st Dept 1959]; *Moura v City of N.E*, 165 A.D3d 434, 435 [1st Dept 2018] [general contractor breached their duty when a dangerous condition of inadequate lighting existed at the worksite]). While City Defendants and Volmar did not direct or control Plaintiff's work, Plaintiff's § 241(6) claim arises out of an alleged dangerous condition on the premises, not the methods or work materials used, and thus "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,*

[7] The experts' affidavits also render differing opinions regarding whether the subject lift was in compliance with the Elevator Safety Standards discussed *supra.* Accordingly, in addition to the matter of whether Excel negligently maintained the lift such that it caused Plaintiff's accident, a separate question of fact remains as to whether City Defendants, as owners of the lift, are separately liable to Plaintiff for a breach of their duty, as property owners, to ensure the property's elevators meet all applicable safety standards, regulations, and requirements (see *Wagner v Grinnell Hous. Dev. Fund. Corp.*, 260 AD2d 265 [1st Dept 1999]).

106 AD3d 648, 648 [1st Dept 2013]). Given that as discussed, Plaintiff has introduced a question of fact pertaining to whether City Defendants and Volmar, as the owner and general contractor, failed to remedy the allegedly insufficient lighting conditions at the worksite, neither party is entitled to dismissal of Plaintiff's common law negligence claim at this juncture.

Accordingly, the branch of Plaintiff's motion seeking summary judgment on his common law negligence claim against all Defendants is denied, and the branch of City Defendants and Volmar's cross-motion to dismiss Plaintiff's negligence claim is also denied. Additionally, the branch of Excel's motion seeking dismissal of Plaintiff's complaint against it is denied.

Indemnification (Motion Seq. 008).

In addition to seeking dismissal of Plaintiff's complaint, Excel also seeks summary judgment dismissing City Defendants and Volmar's crossclaims against it. City Defendants and Volmar cross-move for summary judgment in their favor on all crossclaims.

City Defendant's Contractual Indemnification Claim against Excel

City Defendants[8] seek summary judgment on their claim for contractual indemnification and reimbursement of attorneys' fees from Excel, and Excel moves for dismissal of the same.

"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.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also* Tonking *v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

[8] Volmar does not seek contractual indemnification as it was not a party to the agreement with Excel.

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Here, the contract between Excel and City Defendants provides, in relevant part, as follows:

> "Contractor hereby agrees to defend, indemnify and hold the Board of Education and the City of New York harmless from all claims, damages, judgment, expenses, attorney fees and compensation whether in contract or tort arising out of personal injury, including death, or property damage sustained or alleged to have been sustained in whole or in part by any or all persons whatsoever as a result of or arising out of any act or omission of the Contractor, its agents or employees, or caused or resulting from any deleterious substance in any of the products supplied or while the equipment, services, etc. are being delivered or the service-work is being performed under this Contract, whichever instance is applicable."
>
> (NYSCEF doc No. 334, Section 7.20).

City Defendants argue that the contract language "clearly and plainly states" that they are entitled to contractual indemnification from Excel, and that Excel is obligated to provide indemnification and reimbursement for all fees, disbursements, and costs incurred in connection with this action. However, as discussed *supra*, there has not yet been a determination that Plaintiff's accident was caused by "an act or omission" of Excel. While City Defendants argue that it is beyond dispute that Excel's negligent maintenance of the lift caused Plaintiff's accident, as discussed, City Defendants' own expert, Mr. Meyer, stated that the accident was "not occasioned by the manner in which the subject wheelchair lift was maintained" (NYSCEF doc

No. 262, ¶ 20), contributing to the issues of fact that this Court has determined must be adjudicated before liability can be properly ascertained.

Accordingly, the branch of Excel's motion seeking dismissal of City Defendants' crossclaim for contractual indemnification and reimbursement of fees is denied, and the branch of City Defendants' cross-motion seeking summary judgment on the same is also denied.

City Defendants and Volmar's Common-Law Indemnification Claim Against Excel

City Defendants, along with Volmar, also seek summary judgment on their common law indemnification claim against Excel. Excel moves for its dismissal.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d at 65]); *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

In other words, a claim for common-law indemnification is actionable only where a party has been found to be "vicariously liable without proof of any negligence . . . on its own part" (*McCarthy v Turner Constr., Inc.,* 17 NY3d 369, 377-378 [2011]).

Here, while City Defendants and Volmar may be entitled to common law indemnification should it be determined that their liability for Plaintiff's accident was purely statutory, as discussed *supra*, there has not yet been a determination that City Defendants and Volmar are completely free of negligence.

Accordingly, the branch of Excel's motion seeking dismissal of City Defendants and Volmar's common law indemnification crossclaim is denied, and the branch of City Defendants

and Volmar's cross-motion seeking summary judgment on their common law indemnification crossclaim is also denied.

Spoliation (Motion Seq. 007)

In addition to seeking summary judgment on his Labor Law and negligence claims against Defendants, Plaintiff seeks an award of sanctions against Defendants for spoliation of evidence pursuant to CPLR 3126 and/or the common law. Plaintiff argues that City Defendants violated NYC Administrative Code 3012.1 by failing to take the subject lift out of service and report it to the Department of Buildings, and thus denied Plaintiff of an opportunity for a contemporaneous, third-party examination of the lift. Plaintiff further argues that City Defendants and Excel should be sanctioned for failing to preserve the condition of the elevator. Plaintiff separately argues that City Defendants failed to comply with prior written discovery demands by failing to disclose certain records for the subject lift pursuant to Plaintiff's Supplemental Demand for Elevator Maintenance Records.

As a result of Defendants'[9] alleged spoliation, Plaintiff seeks an order: (1) striking Defendants' Answers; or (2) precluding Defendants from introducing evidence that would dispute whether elevator maintenance was a contributory factor in the accident; or (3) striking Defendant's Affirmative Defenses, or (4) granting an adverse inference at trial with regard to Defendants' knowledge of the elevator defect and the improper maintenance thereof.

Pursuant to CPLR 3126, if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article," the Court may, in its discretion, issue any of the following:

> "1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

[9] Although Plaintiff does not allege that Volmar spoliated evidence, his papers refer to "Defendants" collectively.

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Courts have broad discretion to issue sanctions under CPLR 3216, especially upon a finding that the prejudice resulting from the spoliation is severe (*Squitieri v City of New York*, 248 AD2d 201, 204 [1st Dept 1998]). Courts have defined spoliation as the intentional or negligent destruction of "key" or "crucial" evidence, and have held that sanctions are warranted when "crucial items of evidence" are destroyed (*see DeKenipp v Rockefeller Center, Inc.*, 856 NYS2d 23, 23 [Sup Ct NY Cty 2007] [holding that "[s]poliation is the loss, destruction, or alteration of key evidence to a lawsuit"]; *see also Squitieri, supra*; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Condition Corp.*, 221 AD2d 243 [1st Dept 1995]).

Accordingly, the First Department has held that when a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation (*Mudge, supra* [dismissing plaintiff's claim due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine"]), or, at the very least, preclude that party from offering evidence as to the destroyed product (*Strelov v Hertz Corp.*, 171 AD2d 420, 421 [1st Dept 1991] [defendant precluded from presenting any evidence in defense of suit based on allegedly defective rental car, except as to the parts of the car that defendant had not destroyed]).

Spoliation sanctions such as those described above are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be

just as fatal to the other party's ability to present a defense (*Squitieri supra, at 203*). The First Department has held that sanctions may be warranted even if the evidence was destroyed prior to the action being filed, and even if the destruction was not done in bad faith, if the destruction is fatal to a party's ability to defend (*Kirkland v New York City Hous. Auth.* [236 AD2d 170, 174-175] [1st Dept 1997] [dismissing third party complaint of New York City Housing Authority (NYCHA) against an oven supplier after NYCHA took no steps to ensure preservation of the allegedly defective stove at issue]).

Notwithstanding the fact that New York courts have authority to impose the ultimate sanction of dismissal where appropriate, the Court of Appeals has held that pursuant to CPLR 3126, courts "possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation … or employing an adverse inference instruction at the trial of the action" (*Ortega v City of New York,* 9 NY3d 69, 76 [2007]). Accordingly, courts have found that when a party does not willfully destroy evidence but negligently fails to retain it such that the other party has been prejudiced, a lesser sanction is warranted (*Minaya v Duane Reade Intern, Inc*, 2009 WL 10265144 [Sup Ct NY Cty 2009] [issuing an adverse inference charge and precluding defendant from offering evidence at trial as to the condition of the subject premises when defendant failed to maintain video surveillance footage of the subject premises].

Here, the Court finds that Plaintiff has not demonstrated that he has been prejudiced by either the willful or negligent destruction of evidence such that an award of sanctions of any degree is necessary to restore the balance of litigation in this proceeding.

Plaintiff's application for sanctions is primarily premised on a violation of NYC Administrative Code 3012.1, which pertains to accidents in elevators and conveying systems and provides:

> "The owner of any device regulated by this chapter shall promptly notify the commissioner of every accident involving injury to any person requiring the services of a physician or damage to property or to apparatus exceeding $1,000 on, about, or in connection with such equipment, before commencing any repairs and shall afford the commissioner every facility for investigating such accident or damage."

Plaintiff argues that City Defendants, as owners of the lift, were obligated to take the elevator out of service and notify the commissioner of the Department of Buildings (DOB) so that the DOB could conduct an investigation. The record here reflects that City Defendants' representative Mr. Cambria contacted Excel to inspect and repair the lift on March 24, the day after Plaintiff's accident, when he learned that someone had "got hurt" the night before (NYSCEF doc No. 192 at 53). Mr. Cambria was not aware of the person's condition (*id.* at 77). While Plaintiff sought medical treatment for his accident, he did not require an ambulance and one was not sent to the subject premises (NYSCEF doc No. 219 at 293). Accordingly, Plaintiff has not established that City Defendants were aware that someone had sustained an injury requiring the services of a physician such that they were obligated to take the lift out of service and contact the DOB commissioner.

Plaintiff further argues that City Defendants and Excel[10] should be sanctioned due to their improper repair of the lift, as they deprived Plaintiff of evidence of the lift's condition the day of his accident. However, Plaintiff has been provided with Excel's March 24 work order, which documents the work done by Excel. Mr. Cambria personally supervised Excel's mechanic Mr. Marchica while he performed the March 24 work, and both have provided sworn testimony as to

[10] Plaintiff does not articulate why Excel, a maintenance company called to repair the lift pursuant to its contract with City Defendants, was obligated to preserve evidence and should not have conducted its repair.

the work performed. In his affidavit before the Court, Plaintiff's expert, Mr. Seymour, states that a third-party investigation should been conducted before Excel made repairs but does not articulate how the failure to do so impeded his ability to provide an opinion on how the condition of the lift caused Plaintiff's accident. Plaintiff's argument that he has been prejudiced by the failure to conduct a real-time inspection of the elevator is belied by Mr. Seymour's thorough, detailed affidavit in which he testifies with specificity as to how defective parts of the lift caused Plaintiff's accident. The Court thus finds that Plaintiff has not demonstrated that the failure to preserve the condition of the lift has prejudiced him such that a sanction is "necessary as a matter of elementary fairness" (*Duluc v AC & L Food Corp*, 119 AD3d 450, 452 [1st Dept 2014]).

Plaintiff's application for sanctions based on City Defendant's failure to comply with Plaintiff's Supplemental Demand for Elevator Maintenance Records is similarly without merit, as Plaintiff's assertion for City Defendants' non-compliance is based on recanted testimony.

Plaintiff's Supplemental Demand, dated April 23, 2018, sought, as relevant here, "copies of any complaints, whether, electronic, written or verbal and/or maintenance records, logs or books" related to the subject lift (NYSCEF doc No. 200).

As discussed *supra*, City Defendants' representative Mr. Ward appeared for deposition on March 12, 2020 and testified that he inspected the lift each month and was required to complete monthly preprinted "elevator log" forms to document his inspections (NYSCEF doc No. 225 at 34-35). Plaintiff filed the instant motion seeking sanctions on July 29, 2020, and, citing to Mr. Ward's testimony, argued that City Defendant should be additionally sanctioned as "no safety log was ever turned over" (NYSCEF doc No. 186 at 56).

However, by affidavit dated October 30, 2020, Mr. Ward clarified that said inspections did not become part of his job responsibilities until 2017, and therefore he was not performing

monthly inspections at the time of Plaintiff's accident (NYSCEF doc No. 265). Mr. Ward also confirmed the log forms were not used until sometime in 2017 (*id.*). Given that the log forms did not exist at the time of Plaintiff's accident, City Defendants' failure to produce the same cannot be a basis for discovery sanctions.

In summation, the Court finds Plaintiff has not established a basis for an order of sanctions against Defendants, and the branch of Plaintiff's motion seeking sanctions is denied in its entirety.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of Plaintiff James Kostulias' motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment on his Labor Law Sections 240(1) and 241(6) claims against Defendants City of New York, N.Y.C. Department of Education (collectively, "City Defendants"), and Volmar Construction, Inc. ("Volmar") is denied; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 007), pursuant to CPLR 3212, for summary judgment on his negligence claim against City Defendants, Volmar, and Defendant Excel Elevator Corp. ("Excel") is denied; and it is further

ORDERED that the branch of Plaintiff's motion (Motion Seq. 007), pursuant to CPLR 3216, for an order sanctioning Defendants for spoliation of evidence, is denied; and it is further

ORDERED that City Defendants and Volmar's cross-motion (Motion Seq. 007), pursuant to CPLR 3212, for dismissal of Plaintiff's complaint, is partially granted to the extent that

Plaintiff's Labor Law Sections 240(1) and 241-a claims are severed and dismissed, and is otherwise denied; and it is further

ORDERED that Excel's motion (Motion Seq. 008), pursuant to CPLR 3212, seeking dismissal of Plaintiff's complaint and all crossclaims asserted against it by City Defendants and Volmar is denied in its entirety; and it is further

ORDERED that City Defendants and Volmar's cross-motion (Motion Seq. 008), pursuant to CPLR 3212, for summary judgment on their crossclaims asserted against Excel is denied in its entirety; and it is further

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

ORDERED that the remainder of the claims against the parties in this action are severed and shall continue; and it is further

ORDERED that counsel for City Defendants and Volmar shall serve a copy of this Order with Notice of Entry within 20 days of entry on all parties.

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1/24/2022
DATE

CAROL R. 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