SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

----------X

RICHARD SMITH,

Plaintiff,

- v -

EA FOUNDATION OF NY, INC, ALL-SAFE, LLC,RCDOLNER LLC,

Defendants.

----------X

INDEX NO. 452888/2015

MOTION DATES 04/01/2021

MOTION SEQ. NO. 003 004 005 006

DECISION + ORDER ON MOTION

EA FOUNDATION OF NY, INC

Plaintiff,

-against-

RC DONLER LLC,

Defendant.

----------X

Third-Party
Index No. 595859/2016

EA FOUNDATION OF NY, INC

Plaintiff,

-against-

CORD CONTRACTING CO, INC.,

Defendant.

----------X

Second Third-Party
Index No. 595906/2017

CORD CONTRACTING CO. INC., CORD CONTRACTING CO, INC.,

Plaintiffs,

-against-

ISLAND TAPING, INC.

Defendant.

----------X

Third Third-Party
Index No. 595062/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 242, 245, 248, 249, 252, 253, 284, 291, 292, 294, 298

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 243, 246, 250, 285, 295, 299

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 244, 247, 251, 286, 289, 296, 300

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 287, 290, 293, 297, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315

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

This is an action to recover damages for personal injuries allegedly sustained by a painter/taper on May 15, 2013, when, while working at a construction site located at 197 East Broadway, New York, New York (the Premises), he tripped in a hallway and fell.

In motion sequence number 003, second third-party defendant/third third-party defendant/fourth third-party plaintiff Cord Contracting Co., Inc. (Cord) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for summary judgment in its favor on its fourth third-party claim for contractual indemnification against fourth third-party defendant Island Taping (Island).

In motion sequence number 004, defendant All-Safe, LLC (All-Safe) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it. All-Safe also seeks dismissal of the contractual indemnification, common-law indemnification, and breach of contract for the failure to procure insurance crossclaims made against it by defendant/third-party

plaintiff/third third-party plaintiff EA Foundation of New York, Inc. (EAF) and defendant/third-party defendant/second third-party plaintiff RC Dolner, Inc. (RC Dolner).

In motion sequence number 005, EAF moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it. In addition, EAF and RC Dolner move for summary judgment in their favor on their contractual indemnification claims as against Cord.[1, 2]

In motion sequence number 006, plaintiff Richard Smith moves, pursuant to CPLR 3212, for summary judgment in his favor on his Labor Law § 241 (6) claim as against EAF, All-Safe and RC Dolner.

In connection with motion sequence number 003, Island moves for summary judgment dismissing the fourth third-party complaint.[3]

Motion sequence numbers 003, 004, 005 and 006 are consolidated for disposition.

BACKGROUND

On the day of the accident, the Premises was owned by EAF. EAF's predecessor in interest (non-party Education Alliance, Inc. [EAI]) hired RC Dolner to provide construction management services for a project at the Premises that entailed the renovation and expansion of the building as a school (the Project). RC Dolner, in turn, hired All-Safe to install fencing and

[1] By stipulation, dated May 5, 2020, the third-party action between third-party plaintiff EAF and third-party defendant RC Dolner was discontinued (NYSCED Doc. No. 167).

[2] By decision and order dated September 20, 2017, plaintiff's direct claims against RC Dolner (raised for the first time in the amended complaint) were dismissed as time barred (NYSCEF Doc. No. 79).

[3] Cord concedes that portion of Island's motion seeking dismissal of the common-law indemnification and contribution claims (Cord's reply, ¶ 4; NYSCEF Doc. No. 292). Accordingly, they will be dismissed.

scaffolding at the Project. RC Dolner also hired Cord to perform drywall installation. Cord subcontracted its spackling and taping work to Island. Island was plaintiff's employer.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was employed as a taper by Island. His supervisor was "Walter," Island's foreman (plaintiff's tr at 17) (later identified as Walter Singh). Plaintiff and Singh were the only two Island employees working at the Project. He received all his directions from Singh. The Project entailed the renovation of four floors of a school building. His duties included applying tape and compound to drywall. At the end of each day, he would clean his tools.

Over the course of a month, plaintiff performed his work on the first second and third floor. On the day of the accident, plaintiff was working on the fourth floor. At the end of the day, he had to clean his tools but there was no place on the fourth floor to do so. Since plaintiff had to go to the third floor to clean his tools, at the end of the day, he used the construction elevator to access the third floor.

The third floor consisted of "a long hallway," approximately eight feet wide, with doorways on both sides leading to classrooms (*id.* at 47). The entrance to the construction elevator was at one end of the hallway and the wash basin was on the other. The hallway itself had an old wooden floor that was covered by several "plywood patches" in some areas (*id.* at 52). The patches were laid out to cover holes cut into the wooden floor (*id.*). While plaintiff "believed" that the plywood patches were affixed to the floor, he did not know for certain (*id.* at 60). He also never saw anyone installing the patches or working with the plywood (*id.* at 60).

Plaintiff placed his tools into a cart known as a "Mini Peri scaffold" and took the construction elevator to the third floor (*id.* at 74). He began moving the tool cart down the

hallway, pulling it over plywood patches as needed, because the plywood was thick enough to stop the cart's movement (*id.* at 92 ["You have to lift the cart up over the patch"]).

Plaintiff testified that when he was approximately halfway down the hallway, his "left foot got caught in [] a little hole" (*id.* at 94) – later described as an "indentation" (*id.* at 97) and a "divot" (*id.* at 167) – in the hallway's floor that was "before the patch," causing him to stumble (*id.* at 94). He tried to steady himself by holding onto the cart, but as he stumbled, "the cart caught [on a] patch" and "jerked [him] back forwards" causing him to twist and fall, injuring his knee (*id.*). After the fall, plaintiff was able to get up and maneuver his cart to the wash basin. He then finished his workday. He reported his accident to Singh the following morning and took photographs of the accident site.

Plaintiff was shown a copy of an incident report prepared shortly after the accident. He confirmed that the report stated that he "tripped over raised plywood in the hallway" (*id.* at 116-117). Plaintiff was shown a series of photographs of the accident site and testified that they depicted "the piece of plywood that [his] cart got caught on" (*id.* at 117). When asked whether his foot ever contacted the plywood, plaintiff stated "[h]onestly, I can't tell you" (*id.* at 167-168).

Plaintiff was alone at the time of the accident. He was unaware of any witnesses. Prior to the accident, plaintiff never complained about the plywood patches and never had any trouble navigating the hallways.

Deposition Testimony of Mark Enselman (EAF's Assistant Treasurer)

Mark Enselman testified that since June 2014, he was the assistant treasurer for EAF. EAF is a non-profit company that has no employees. It was created to purchase the Premises and renovate it. EAF is affiliated with EAI, a non-profit social services and education company.

Enselman is the chief administrative officer and chief financial officer (CFO) of EAI. As the CFO of EAI, he was responsible for the financing of the Project.

According to Enselman, EAF is the owner of the Premises. Prior to the accident, EAF purchased the Premises from EAI via an "intercompany transaction" (Enselman tr at 57). Enselman testified that EAI hired RC Dolner as a "general contractor" for the Project (*id.* at 20). RC Dolner was required to hire all subcontractors and oversee the entirety of the work at the Premises, including safety and cleanup (*id.* at 34). EAF and EAI had no control over the hiring of subcontractors, supervision of the subcontractors, or the means and methods of any work at the Project.

Enselman never visited the work site and did not know if anyone on behalf of EAF ever did so.

Deposition Testimony of Anthony Dolce (RC Dolner's Managing Partner)

Anthony Dolce testified that on the day of the accident, he was the managing partner for RC Dolner. RC Dolner is a construction management and general contracting company. It was responsible for hiring and paying the trades at the Project (Dolce tr at 23).[4] In addition, RC Dolner would usually staff a project with a superintendent and a project manager who were at the Project daily to oversee the trades.

RC Dolner was involved in two phases of the Project. The first involved a "vault" while the second involved the actual construction work at the Premises (*id.* at 20).

[4] More specifically, Dolce testified, RC Dolner would submit a requisition for funds, an EA entity would then provide RC Dolner with those funds, and RC Dolner would disburse the funds thereafter (*id.* at 23).

Dolce testified that he was not present at the Premises on a regular basis, but on occasions when he was present, he would walk the site. If he saw an unsafe practice, he would inform the site safety supervisor or a foreman (*id.* at 37).

Dolce was shown a contract between RC Dolner and All-Safe and noted that in involved "vault protection" which entailed installing a fence on the exterior of the Premises (*id.* at 57). Dolce was also shown several photographs and was unable to identify whether they depicted the Premises. He noted that one photograph appeared to depict material "lipping" – i.e. a raised condition – on the floor (*id.* at 44). Dolce did not know who the floor contractor was, and he did not know if the raised material in the photograph was in the process of being nailed down by the floor contractor.

Finally, Dolce did not witness the accident and first learned about it after this case was filed.

Deposition Testimony of Martin O'Donovan (All-Safe's Owner)

Martin O'Donovan testified that on the day of the accident, he was an owner of All-Safe. All-Safe was a scaffolding rental and erection company (O'Donovan tr at 25). All-Safe would deliver the scaffold to a work site, erect it, leave the project and then return when the project was finished to disassemble and remove the scaffold.

The scaffolds All-Safe rented were comprised of "[p]lanking and steel" (*id.* at 33). He was unsure whether the scaffold planking was made of plywood.

Deposition Testimony of John Ranieri (Cord's Carpentry Foreman)

John Ranieri testified that on the day of the accident, he was Cord's carpentry foreman for the Project. Cord is a carpentry contractor. It was hired by RC Dolner to perform carpentry work at the Project. Its work included, among other things, "framing the job" and installation of

"drywall, doors, ceilings" (Ranieri tr at 13). Ranieri's duties included supervising and directing Cord's workers, as well as performing carpentry work himself.

Cord did not typically perform any flooring work, though "on occasions" they would install temporary plywood flooring (*id.* at 14). Specifically, they would install temporary flooring only if it was required by their contract (*id.* at 19). Also, Cord did not perform taping work – i.e. finishing work. It contracted that work out to Island.

According to Ranieri, RC Dolner ran the Project and provided laborers for "[c]leanup and protection and general maintenance" (*id.* at 25). RC Dolner also contracted the flooring work to another subcontractor, though Ranieri did not know what company it was. That flooring contractor installed a new floor over the old "tongue-and-groove wood" floor (*id.* at 33). That new floor was made of "plywood and vinyl" (*id.*). Specifically, the flooring company first installed a plywood subfloor. Then it would install the vinyl flooring over the top. This work was separate from Cord's work but often ran concurrent with it. Ranieri did not recall whether the flooring contractor taped or screwed down the plywood, which was typically laid out in eight-foot by four-foot sections.

Towards the beginning of Cord's work, an RC Dolner's superintendent instructed Ranieri to "[c]ut the floor out and put in plywood" in unspecified parts of the Premises (*id.* at 34). This work was necessary because the floor in those spaces was "uneven" and Ranieri needed the floor to be patched "so that [Cord] could start [its] work" (*id.* at 35). To install a patch, Cord workers would "cut out the damaged part and inlay a piece of plywood" (*id.* at 36). They then affixed the patch with screws "down to the joist, hard fastened" (*id.*). This patch work was limited to areas where walls were being erected (*id.* at 38).

Ranieri clarified that the patch work was specifically limited to portions of the floor directly upon which walls were to be erected (*id.* at 58). Cord did not patch any flooring in the hallway corridors (*id.* at 66).

Once Cord had installed the walls, Island would come in to begin the taping and finishing work.

Deposition Testimony of Walter Singh (Island's Foreman)

Walter Singh testified that at the time of the accident, he was Island's foreman for the Project. His duties included supervising Island workers and directing their work. He and plaintiff were the only two Island employees at the Project. Island's work at the Project included taping and applying joint compound. The areas where Island worked were typically "90-percent completed" (Singh tr at 25).

Singh recalled that the floors in some areas were covered in Masonite boards, approximately one quarter inch thick. He did not know who was responsible for placing the Masonite at the Project, and he could not recall whether the Masonite was taped down. Singh was familiar with Cord. He did not recall anyone from Cord working with Masonite or plywood flooring.

Singh was present on the day of the accident but did not witness it. He learned about the accident from plaintiff one day later. Specifically, plaintiff told Singh that he tripped in a hallway while "going towards the hoist" (*id.* at 12). Singh then called Island's office and reported the accident (*id.* at 29).

Plaintiff's Bill of Particulars and Affidavit

Plaintiff's bill of particulars dated April 3, 2015, states that the accident occurred when he "was caused to trip and fall over a wood plank that was not properly secured" (All-Safe's

notice of motion, exhibit AA). In his affidavit, dated December 24, 2020, plaintiff avers that he "was caused to trip and fall on a raised piece of plywood" (plaintiff's notice of motion, exhibit M, ¶ 4).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]). 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]).

Procedural Issues

Timeliness of plaintiff's motion (Motion Sequence Number 006)

As an initial matter, Cord argues that plaintiff's motion is untimely.

In *Brill v City of New York* (2 NY3d 648, 652 [2004]), the Court of Appeals determined that courts should not consider late summary judgment motions without "a satisfactory

explanation for the untimeliness" – i.e. showing good cause for the delay – even if it means permitting less than meritorious claims or defenses to continue to trial.

Here, plaintiff filed his note of issue on February 13, 2020 (NYSCEF Doc. No. 139). This part's rules require that summary judgment motions be made within 60 days of the filing of the note of issue. Plaintiff filed his summary judgment on December 24, 2020.

On March 20, 2020, due to the ongoing Covid-19 pandemic, an executive order was signed suspending and/or tolling most time limits under New York law, including the time to file summary judgment motions (9 NYCRR 8.202.8).[5] This suspension was extended up to and including November 3, 2020 (9 NYCRR 8.202.72).[6] Recently, the Second Department determined that this executive order constitutes a toll that "suspends the running of the applicable period of limitation for a finite period" such that "[t]he period of the toll is excluded from the calculation of the [relevant time period]" (*Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

With this tolling included in the calculation, the question is whether plaintiff's motion, filed on December 24, 2020 falls within the 60-day timeframe for the filing of summary judgment motions. There are 36 days between February 13, 2020 (the date the note of issue was filed) and March 20, 2020 (the date of the first executive order). There are 50 days from

---

[5] "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID–19 health crisis, 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, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

[6] "[T]he suspension for civil cases in Executive Order 202.8 . . . that tolled any specific time limit for the commencement, filing or service of any legal action, notice, motion or other process or proceeding . . . is hereby no longer in effect as of November 4, 2020 . . . ."

November 4, 2020 (the expiration of the executive order) and December 24, 2020 (the date plaintiff's motion was filed). Therefore, excluding the tolled days, plaintiff's motion for summary judgment was filed 86 days post note of issue, in violation of this part's rules. Therefore, plaintiff's motion is untimely.

Accordingly, since plaintiff did not present any excuse or reason for the delay in his motion and did not address or attempt to cure this issue in his reply papers, his motion for summary judgment will be denied as untimely.

Timeliness of Island's cross-motion (Motion Sequence Number 003)

Cord timely moved for summary judgment in its favor on its fourth third-party claim for indemnification on May 4, 2020. Island's cross-motion to dismiss the fourth third-party claim was filed on December 24, 2020 (the same date as plaintiff's motion). Therefore, it was also filed 86 days post note of issue, making it untimely. However, an untimely cross motion seeking relief that is nearly identical to the relief sought in a timely motion for summary judgment will not be considered untimely (*see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304 [1st Dept 2006] [cross motion that "was largely based on the same arguments raised in [movant's] timely motion" was not untimely and was properly considered]).

Here, the relief sought in Island's cross-motion is nearly identical to the relief sought in Cord's summary judgment motion. Therefore, Island's cross-motion will be considered on the merits.

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 003, 004 and 005)

Cord, All-Safe and EAF each move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

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

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010], Roman, J. concurring). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Here, plaintiff alleges that he tripped when he stepped into a divot in the floor and/or when his foot contacted raised plywood and/or Masonite. Notably, an accident of this nature does not implicate the protections of section 240 (1) because plaintiff's "trip and fall was not caused by defendants-respondents' failure to provide or erect necessary safety devices in response to 'elevation-related hazards' and, accordingly, the protections of Labor Law 240(1) do not apply" (*Piccuillo v Bank of New York Co., Inc.*, 277 AD2d 93, 94 [1st Dept 2000]; *see also Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590, 592 [1st Dept 2012] [dismissal of § 240 (1) claim warranted where the plaintiff tripped and fell over debris because the plaintiff's "injuries were not related to an elevation related hazard"]).

Plaintiff's argument that section 240 (1) applies because he was pulling a baker scaffold at the time of his trip and fall is immaterial as it does not establish that plaintiff's accident involved an elevation related hazard.

Accordingly, EAF, All-Safe and Cord are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against EAF and All-Safe.

The Labor Law § 241 (6) Claim (Motion Sequence Number 003, 004, 005 and 006)

Cord[7], All-Safe and EAF each move for summary judgment dismissing plaintiff Labor Law § 241 (6) claim as against them.

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

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

[7] Although Cord is not a direct defendant, it has a right to move for summary judgment on plaintiff's claims (CPLR § 1008; *Ackman v Haberer*, 111 AD3d 1378 [4th Dept 2013] [observing that "CPLR § 1008 grants to a third-party defendant all of the rights a direct defendant has to defend against a plaintiff's claims . . ."]).

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

Labor Law § 241(6) imposes a duty upon owners, general contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [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" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets 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 Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Preliminarily, EAF does not contest that it is the owner of the Premises. Therefore, it is a proper defendant under Labor Law § 241 (6). All-State, however, argues that, as a scaffolding subcontractor, it is not an owner or a general contractor. Therefore, the question that must be resolved is whether All-Safe was an agent of either the owner, EAF or the general contractor, RC Dolner, for the purposes of the Labor Law, such that it may be liable to plaintiff under Labor Law § 241 (6).

> Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of

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

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981] [internal citations omitted]). To hold a subcontractor liable as a statutory agent, "the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 (1st Dept 2011), quoting *Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]).

Additional Facts Relevant to this Issue

On or about June 29, 2011, All-Safe and RC Dolner entered into an agreement whereby All-Safe was to provide and install certain protections at the Premises (the RC Dolner/All-Safe Agreement) (All-Safe's notice of motion, exhibit AE; NYSCEF Doc. No. 228). The RC Dolner/All-Safe Agreement provided for the following items:

> "Vault Protection . . . . Overhead protection in the sidewalk vault over the 2 boilers and their associated piping.
>
> * * *
>
> "Fence @ 197 East Broadway . . . . Approximately 90 lineal feet plus 2 returns each 10' long on East Broadway. The fence will be . . . plywood on a steel pipe frame . . . . anchored to the sidewalk. Also included will be approx.. 130lf of DOT barriers to create temporary walkway in street"
>
> * * *
>
> "Vault Bracing . . . . Brace approximately 90 lineal feet of sidewalk vault wall

(*id.*; Ex. AF, affd Daniel O'Brien (co-owner of All-Safe) ¶ 4).

It is uncontroverted that All-Safe only performed work on the exterior of the Premises. The accident, however, did not occur on the outside of the Premises, rather, it occurred inside the Premises, on the third floor. All-Safe's work did not include any work on the third floor of the Premises or anywhere else inside the Premises (*id.*).

Plaintiff posits that plywood that All-Safe delivered to the Premises may have been the plywood that plaintiff tripped on. However, in addition to being mere speculation insufficient to create an issue of fact, *(see Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004] ["As we have repeatedly stated, '[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment'"] [internal citation omitted]; *Pesantes v Komatsu Forklift USA, Inc.*, 58 AD3d 823, 824 [2d Dept 2009] ["Speculation and surmise are insufficient to defeat a motion for summary judgment"]), supplying the plywood that plaintiff tripped on is an insufficient nexus to the specific work area where plaintiff tripped (inside on the third floor) or to the work which gave rise to plaintiff's injury (applying tape and compound to drywall). Therefore, All-Safe was not an agent of the owner or general contractor to impose liability for plaintiff's Labor Law § 241 (6) claim.

Accordingly, All-Safe is entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it.

Turning to plaintiff's Labor Law § 241 (6) as against EAF, plaintiff lists multiple violations of the Industrial Code in the bill of particulars. However, except for section 23-1.7 (e) (1), plaintiff does not oppose their dismissal. Therefore, these uncontested provisions of the Industrial Code are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails

to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Accordingly, EAF is entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (e) (1)

Industrial Code 12 NYCRR 23-1.7 (e) governs "[t]ripping and other hazards." It is sufficiently specific to support a Labor Law § 241 (6) claim (*Vieira v Tishman Constr. Corp.*, 255 AD2d 235, 235 [1st Dept 1998]). It provides the following:

> "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."

Plaintiff presents two versions of the accident. The first, as presented in his bill of particulars, asserts that he tripped over improperly secured plywood in a hallway that he was required to traverse for the purpose of cleaning his tools (bill of particulars, annexed to All-Safe's notice of motion, exhibit AA). The second, as presented in his deposition testimony, asserts that plaintiff tripped when he stepped into a divot in the floor (plaintiff's deposition tr at 94). Though plaintiff testified that his accident report – which indicates he tripped over plywood – was accurate, plaintiff also testified that he was unsure whether he, in fact, tripped over the plywood (plaintiff's tr at 167-168 ["[h]onestly, I can't tell you"]). Therefore, plaintiff's testimony is inconsistent and creates two plausible versions of the accident.

While Cord and EAF note the discrepancies in plaintiff's testimony in their opposition to plaintiff's late summary judgment motion, they do not address the discrepancy in their own motions for summary judgment. Instead, they focus solely on the version of the accident where

plaintiff tripped over plywood and fail to address whether a divot in the floor is a tripping hazard contemplated by Industrial Code 23-1.7 (e) (1).

Cord and EAF raise two arguments that must be addressed. First, they argue that plaintiff's accident did not occur in a passageway, and therefore plaintiff cannot have a claim based on section 23-1.7 (e) (1). This argument applies to both versions of the accident, as both occurred in the hallway. If they are correct, this argument would require dismissal of plaintiff's Labor Law § 241 (6) claim because it would apply to either version of plaintiff's accident.

Second, they argue that the subject plywood was integral to the work and, as such, falls outside the scope of section 23-1.7 (e) (1). This argument applies only to one version of plaintiff's accident.

Whether the hallway is a passageway

Plaintiff alleges that his accident occurred in a hallway that he was required to traverse to access the area where he cleaned his tools. Typically, a hallway is a passageway (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018] ["A 'passageway' is commonly defined and understood to be 'a typically long narrow way connecting parts of a building' and synonyms include the words corridor or hallway"]).

It is uncontested that plaintiff's accident occurred in a hallway that connected parts of a building. It is also uncontested that the hallway was bounded on both sides with walls. It is further uncontested that plaintiff was required to traverse the hallway to reach the cleaning station as a part of his job. Therefore, plaintiff has established that the hallway was a passageway (*see Quigley,* 168 AD3d at 67).

EAF argues that the hallway was an open area that falls outside the scope of section 23-1.7 (e) (1) (*Muscarella v Herbert Constr. Co.,* 265 AD2d 264, 264 [1st Dept 1999] [an "open

area did not constitute the sort of passageway . . . contemplated by" section 23-1.7 [e]). In support of this argument, it relies on plaintiff's testimony that the hallway was approximately eight feet wide. EAF then argues that an eight-foot-wide hallway is not a passageway, but an open area. In support of this proposition, it relies on three cases; *Prevost v One City Block LLC*, 155 AD3d 531, 535 (1st Dept 2017), *Mott v Tromel Constr. Corp.*, 79 AD3d 829 (2d Dept 2010) and *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 (1st Dept 2007). These cases are not controlling here.

First, *Prevost* does not hold that summary judgment in plaintiff's favor can never be granted where a plaintiff fell in an eight-foot-wide hallway. Rather, the First Department in *Prevost* found that a question of fact existed as to whether the plaintiff tripped in a passageway based on a conflict in testimony between the plaintiff (who testified that he tripped in a corridor) and his supervisor (who testified that the plaintiff tripped in an open area). It left this material issue of fact for the jury to resolve (*Prevost,* 155 AD3d at 535). Here, defendants cite to no such conflicting testimony. Rather, as noted above, plaintiff consistently testified that he tripped in a hallway that he had to traverse as a part of his work – i.e. a passageway. There is no testimony in the record describing the hallway as an open area.

Next, *Mott* does not stand for the proposition that an 8-foot wide hallway cannot be a passageway for the purposes of section 23-1.7 (e) (1). It held only that the defendant construction company, in its motion for summary judgment seeking dismissal of a Labor Law § 241 (6) claim predicated on an argument that a hallway was an open area, "failed to establish . . . that the hallway was not a 'passageway' within the meaning of 12 NYCRR 23-1.7 (e) (1)" (*Mott*, 79 AD3d at 831). Finally, *Burkoski* stands for the proposition that a "room that measured 18 feet by 20 feet" is not a passageway. It is inapposite to the facts of this case.

Consequently, defendants have not established as a matter of law that the hallway was not a passageway as contemplated by section 23-1.7 (e) (1).

Whether the plywood was integral to the work

EAF argues that the accident was caused by materials that were integral to the work at the construction site – namely the plywood, which was being installed over the existing floors. In support of this argument, EAF relies on Ranieri's testimony that the floors were, generally, under construction, and that Cord's work sometimes occurred while the flooring contractor was performing its work.

The "integral part of [the] work" defense applies to section 23-1.7 (e) (1) (*Kryzyanowski v City of N.Y.*, 179 AD3d 479, 480 [1st Dept 2020]). This defense asserts that section 23-1.7 (e) will not apply where a plaintiff trips over an object that is an integral part of the "work being done on the day of the accident" (*Pereira v New School*, 148 AD3d 410, 412 [1st Dept 2017]).

Here, importantly, the record is devoid of any evidence that flooring work was being done on the day of the accident. In addition, the flooring contractor was not identified or deposed. Further, other than supposition from witnesses with no actual knowledge of the flooring work, the record is devoid of any evidence establishing the purpose of the subject plywood or why it was placed in the hallway. Therefore, defendants have failed to present adequate evidence as to whether the subject plywood was an integral part of the work being done on the day of the accident sufficient to establish entitlement to dismissal of that part of the section 23-1.7 (e) (1) claim on that ground.

Accordingly, EAF and Cord are not entitled to summary judgment dismissing the Labor Law § 241 (6) claim premised on a violation of Industrial Code 23-1.7 (e) (1) as against EAF.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 003, 004 and 005)

EAF, Cord and All-Safe move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against EAF and All-Safe.

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

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

Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the

degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

Here, as discussed above, there are two versions of the accident. The first – that plaintiff tripped over insufficiently secured plywood – implicates the means and methods of the work. The second – that plaintiff tripped over an existing divot in the floor – implicates the existence of a dangerous condition inherent in the premises. The parties address their arguments to both means and methods and hazardous condition analyses. Under either version of the accident, plaintiff's common-law negligence and Labor Law § 200 claims against EAF and All-Safe will be dismissed.

Means and Methods Analysis

Assuming, *arguendo*, that plaintiff's accident was caused by tripping over plywood, a review of the record reveals that neither EAF nor All-Safe had the authority to supervise or control the performance of the injury producing work, i.e. the placement and securing of the plywood on the floor in the hallway – work that was actually performed by an unidentified flooring contractor.

While plaintiff argues that EAF had general supervisory control over the entirety of the project, such general supervisory control is insufficient to impute liability under section 200 or the common-law (*Hughes*, 40 AD3d at 309).

Plaintiff's speculative and unsupported arguments that All-Safe may have supplied the plywood and may have improperly stored it at the Project does not establish that All-Safe exercised actual supervision or control over the installation or securing of the subject plywood.[8]

Hazardous Condition Analysis

Assuming, *arguendo*, that plaintiff's accident was caused by tripping over a divot in the floor, a review of the record reveals that EAF and All-Safe neither created nor had actual or constructive knowledge of the alleged hazardous condition.

Nothing in the record suggests that All-Safe created, knew or had reason to know that the subject divot in the floor existed (*Bala v Target Corp.* 63 AD3d 518, [1st Dept 2009] [noting "the record (on the motion for summary judgment) does not indicate that Macy's was aware of a dangerous or deteriorating condition . . ."]) , or that All-Safe – a scaffolding company that only performed work outside of the Premises – had any duty to remedy such a condition even if it was aware of it.

Similarly, the record contains no evidence that EAF created the condition or had actual or constructive knowledge of it prior to plaintiff's accident (*id.*). In fact, plaintiff testified that he had traversed the hallway many times without incident and never complained of any hazardous condition and, further, testified that he was unaware of anyone making any such complaints (plaintiff's tr at 172).

Accordingly, EAF and All-Safe are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

---

[8] While plaintiff puts forward several arguments as to why the common-law and Labor Law § 200 claims should not be dismissed as against Cord, plaintiff did not sue Cord. Therefore, no such claim exists as against Cord. Similarly, while plaintiff raises several arguments regarding RC Dolner, plaintiff's claims against RC Dolner were dismissed (NYSCEF Doc. No. 79).

RC Dolner and EAF's Contractual Indemnification Claims Against Cord (Motion Sequence Number 005)

RC Dolner and EAF move for summary judgment on their second third-party and third third-party claims, respectively, for contractual indemnification against Cord.

Additional Facts Relevant to This Issue

RC Dolner and Cord entered into a contract, dated January 20, 2012 (the RC Dolner/Cord Agreement), for drywall installation work at the Project, including taping work (EAF's notice of motion, exhibit Z). The RC Dolner/Cord Agreement includes an indemnification provision that provides in pertinent part, the following:

> To the fullest extent permitted by law, [Cord] agrees to indemnify, defend, and hold harmless [EAF and RC Dolner] . . . from and against any and all losses, claims, suits . . . directly or indirectly arising out of, alleged to arise out of or in connection with or as a consequence of the performance or non-performance of the Work.

(*id.* § 22.1).

"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]).

"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, plaintiff's accident occurred while he was working at the Project as a taper subcontractor pursuant to an agreement between Island and Cord. More specifically, plaintiff was actively fulfilling the work-related task of cleaning his equipment. It is undisputed that the RC Dolner/Cord Agreement includes taping work, and it is undisputed that Cord subcontracted with Island (plaintiff's employer) to perform Cord's taping work. Consequently, plaintiff's accident directly arose out of and in connection with Cord's work at the Premises, as required by the RC Dolner/Cord Agreement's indemnification provision. That Cord may not be negligent with respect to plaintiff's accident is immaterial, as the indemnification provision does not contemplate negligence.

Accordingly, in light of the determination that EAF was not negligent with respect to plaintiff's accident, EAF is entitled to summary judgment in its favor on its contractual indemnification claim as against Cord.

Turning to RC Dolner, at this time there is no affirmative determination as to whether RC Dolner was negligent with respect to plaintiff's accident because plaintiff's negligence claim as against RC Dolner was dismissed as untimely. A procedural dismissal of a negligence claim, however, does not equate to a finding that the dismissed party was not negligent.

To that end, RC Dolner now argues that, as the construction manager, it did not have actual supervision or control over the means and methods of the injury producing work, nor any knowledge of a hazardous condition. The record indicates that RC Dolner had superintendents present to generally oversee the Project, but that they did not provide actual supervision or have active control over any of the subcontractors. As noted above, general supervisory control (coordinating the trades, the ability to stop work), is insufficient to establish the type of supervision and control required under the Labor Law (*see Hughes v Tishman Constr. Corp.*, 40

AD3d 305, 309 [1st Dept 2007]). Similarly, there is no evidence in the record that RC Dolner created a hazardous condition or knew or should have known of its existence (*Bala*, 63 AD3d at 518). Therefore, it has established its lack of negligence with respect to plaintiff's accident.

Accordingly, in light of the above, RC Dolner is entitled to summary judgment in its favor on its contractual indemnification claim as against Cord.

EAF and RC Dolner's Contractual Indemnification Claims Against All-Safe (Motion Sequence Number 004)

All-Safe moves for summary judgment dismissing EAF and RC Dolner's contractual indemnification crossclaims against it.

Additional facts relevant to these claims

The RC Dolner/All-Safe Agreement included an "Insurance & Indemnification Agreement" (the All-Safe Indemnification Provision) that provides in relevant part, the following:

> To the fullest extent permitted by law, [All-Safe] agrees to indemnify, defend and hold harmless [EAF and RC Dolner] from and against any and all losses . . . directly or indirectly arising out of, alleged to arise out of or in connection with or as a consequence of the performance or non-performance of the Work . . .

(All-Safe's notice of motion, exhibit AN; NYSCEF Doc. No. 237).

Here, All-Safe's work, as described in the RC Dolner/All-Safe Agreement, was limited to protection of the sidewalk vault, the construction of a 90-foot fence along the exterior of the Premises, and the construction of approximately 90 feet of bracing along a sidewalk vault wall. As discussed above, All-Safe's work did not cause plaintiff's accident. Therefore, since plaintiff's accident did not arise out of All-Safe's work, All-Safe is not required to indemnify EAF or RC Dolner.

Accordingly, All Safe is entitled to dismissal of EAF and RC Dolner's contractual indemnification crossclaims against it.

Cord's Contractual Indemnification Claim Against Island (Motion Sequence Number 003 and Island's cross-motion)

Cord moves for summary judgment in its favor on its contractual indemnification claim against Island. Island cross-moves for summary judgment dismissing same.

Additional Facts Relevant to this claim

Cord and Island entered into a purchase order, dated March 16, 2012 (the Purchase Order), for taping work at the Premises. The Purchase Order references an annexed "Terms and Conditions" sheet that includes three indemnification provisions (Cord's notice of motion, exhibit O; NYSCEF Doc. No. 159). Two of the indemnification provisions are found in the same paragraph (the Indemnification Paragraph).[9] That paragraph provides the following, in pertinent part:

> "This purchase order is subject to [Island's] acceptance of the following terms and conditions: Hoists, conveyances, scaffold and ladders at site are for transportation or materials only and [Island] employees will not make personal use of them without written permission; if used, your company . . . hereby agrees to indemnify and hold [Cord] harmless from and against any and all loss. . . which [Cord] may sustain in connection with the use of such scaffolds and ladders."

The paragraph then contains terms for tax and insurance requirements, and then continues:

> "[Island] will indemnify and hold [Cord] harmless from any and all damages . . . which [Cord] sustain[s], by reason of injury or death to persons or damage to property which may arise in connection with any work performed under this order"

[9] The third indemnification provision, found in a separate section of the Purchase Order's Terms and Conditions relates solely to unfair competition, trademark, copyright, and the manufacture and sale of goods. It is, therefore, not relevant to this Labor Law personal injury case.

(*id.*). The first provision of the Indemnification Paragraph will be referred to as the Hoist Indemnification Provision. The second provision of the Indemnification Paragraph will be referred to as the General Indemnification Provision.

Cord argues that the General Indemnification Provision is the operative indemnification provision for this action. In opposition, Island argues that the General Indemnification Provision is unenforceable because it is ambiguous and because it runs afoul of General Obligations Law (GOL) § 5-322.1.

Ambiguity

Island argues that the General Indemnification Provision is ambiguous because it is found within the same paragraph as the Hoist Indemnification Provision (which is at the beginning of the paragraph). Therefore, according to Island the General Indemnification Provision must only apply to Hoists.

"'[A]greements are construed in accord with the parties' intent'" (*Marin v Constitution Rlty.*, LLC, 28 NY3d 666, 673 [2017]; quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "The best evidence of that intent is the parties' writing" (*id.*).'"[A] contract should be 'read as a whole, . . . and if possible it will be so interpreted as to give effect to its general purpose'" (*id.*, *quoting Beal Sav. Bank v Sommer,* 8 NY3d 318, 324-325, [2007]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.*, *quoting Greenfiled*, 98 NY2d at 569). "Whether an agreement is ambiguous or unambiguous 'is an issue of law for the courts to decide'" (*id., quoting Greenfiled*, 98 NY2d at 569).

The General Indemnification Provision is separate and distinct from the Hoist Indemnification Provision. That the General and Hoist Indemnification Provisions are in the same paragraph does not create ambiguity. Rather, the Hoist Indemnification Provision is a separate and complete indemnification provision that applies to hoists, conveyances, scaffolds and ladders, having its own independent language that is identifiably separate from the subsequent indemnification language found later in the paragraph. In short, indemnity for hoists is not controlled by the General Indemnification Provision but by its own, separate, indemnification language.

Island's interpretation of the indemnification paragraph ignores the language in the Hoist Indemnification Provision so that the General Indemnification Provision is limited solely to hoists. This would result in removing all indemnification obligations with respect to plaintiff's accident. However, doing so would excise terms from the agreement and a court "may not by construction add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.,* 143 AD3d 146, 156 [1st Dept 2016], *affd sub nom. Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire and Mar. Ins. Co.*, 31 NY3d 131 [2018] [internal quotation marks and citations omitted). While the Indemnification Paragraph is in-artfully written, it is not ambiguous. The language regarding hoists is directly tied to the language of the Hoist Indemnification Provision. The subsequent General Indemnification Provision is separate from – and broader than – the Hoist Indemnification Provision. Therefore, the Island Indemnification Provision is not ambiguous, and it applies to this case.

Unenforceability

Next, Island argues that the Island Indemnification Provision is unenforceable because it runs afoul of GOL § 5-322.1 to the extent that it contemplates Island indemnifying Cord for Cord's own negligence.

GOL § 5-322.1 provides, in pertinent part, as follows:

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable . . . ."

Pursuant to GOL § 5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is void (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]). However, an otherwise void indemnification agreement "may nevertheless be enforced where the party to be indemnified is found to be free of any negligence" (*Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508, 508 [2d Dept 2005]; *Itri Brick*, 89 NY2d at 795 [GOL § 5-322.1 "applies to the indemnification agreements in their entirety where . . . the general contractor/promisee is actually found to have been negligent"]).

Here, the record contains sufficient evidence to establish that Cord, itself, was not negligent in causing plaintiff's accident. Specifically, Raineri (Cord's carpentry foreman) testified that Cord installed plywood on the floor, but that such work was limited to portions of the floor directly underneath where walls were erected. This was done in order to make the floors level so that walls could be built directly on top of the installed plywood (Ranieri tr at 38,

58). Ranieri also testified that Cord did not patch any flooring in the hallways themselves or install plywood or Masonite (*id.* at 66). Rather, there was a separate flooring contractor that was responsible for installing plywood and Masonite (*id.* at 65, 66).

There is no evidence nor testimony that contradicts Ranieri's testimony that Cord was not responsible for the floor where plaintiff tripped. Consequently, Cord has established that plaintiff's accident was not caused by Cord's negligence. Therefore, the Island Indemnification Provision does not run afoul of GOL § 5-322.1.

Since plaintiff's accident occurred while he was traversing a hallway for the purpose of cleaning his tools at the end of the workday, plaintiff's accident arose "in connection with [the] work performed under" the Purchase Order (Cord's notice of motion, exhibit O [the Island Indemnification Provision]).

Accordingly, Cord is entitled to summary judgment on its claim for contractual indemnification as against Island and Island is not entitled to summary judgment dismissing same.

EAF, RC Dolner and Island's Common-Law Indemnification Claims Against All-Safe (Motion Sequence Number 004)

All-Safe moves for summary judgment dismissing the crossclaims of EAF, RC Dolner and Island for common-law indemnification against it.

"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,* 259 AD2d at 65).

Here, as discussed above, All-Safe was not guilty of any negligence that contributed to plaintiff's accident. Accordingly, All-Safe is entitled to summary judgment dismissing EAF, RC Dolner and Island's common-law indemnification crossclaims against it.

EAF and RC Dolner's Breach of Contract for the Failure to Procure Insurance Crossclaim Against All-Safe (Motion Sequence Number 004)

All-Safe seeks dismissal of EAF and RC-Dolner's breach of contract for the failure to procure insurance crossclaims against it. In support, All-Safe provides only a copy of its certificate of insurance (All-Safe's note of issue, exhibit AO; NYSCEF Doc. No. 238). It fails to annex a copy of its policy. "[A] certificate of insurance is merely evidence of a contract rather than conclusive proof that coverage was procured" (*Shala v Park Regis Apt. Corp.*, 192 AD3d 607 [1st Dept 2021]; quoting *Prevost v. One City Block LLC,* 155 AD3d at 536), therefore, All-Safe has not established that it procured the proper insurance. Accordingly, All-Safe is not entitled to dismissal of this crossclaim.

The parties' remaining arguments have been considered and they are unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of second third-party defendant/third third-party defendant/fourth third-party plaintiff Cord Contracting Co., Inc. (Cord) (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in its favor on its fourth third-party claim for contractual indemnification against fourth third-party defendant Island Taping (Island) is granted; and it is further

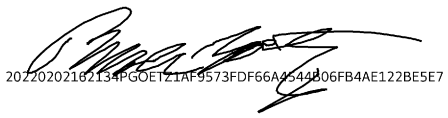
ORDERED that that part of the motion of defendant All-Safe, LLC (All-Safe) (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing (1) the complaint as against it and (2) the contractual and common-law indemnification claims made

against it by defendant/third-party plaintiff/third third-party plaintiff EA Foundation of New York, Inc. (EAF) and defendant/third-party defendant/second third-party plaintiff RC Dolner, Inc. (RC Dolner), is granted; and the remainder of the motion is denied; and it is further

ORDERED that the part of EAF and RC Dolner's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment (1) dismissing the complaint as against EAF and (2) in their favor on their contractual indemnification claims against Cord is granted, except as to the Labor Law § 241 (6) claim premised on a violation of Industrial Code 23-1.7 (e) (1), which claim remains active; and it is further

ORDERED that the motion of plaintiff, Richard Smith (motion sequence number 006) for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim is denied; and it is further

ORDERED that the part of Island's cross-motion seeking dismissal of the common-law indemnification and contribution claims against it is granted, and the remainder of the motion is denied.



2/2/2022
DATE

PAUL A. GOETZ, J.S.C.

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