

**Magistro v 56th & Park (NY) Owner, LLC**

2022 NY Slip Op 30534(U)

February 18, 2022

Supreme Court, New York County

Docket Number: Index No. 155724/2016

Judge: Richard G. Latin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

FRANK MAGISTRO, TERESA MAGISTRO,

Plaintiff,

- v -

56TH AND PARK (NY) OWNER, LLC, LENDLEASE (US)
CONSTRUCTION, LMB INC., A.S.R. ELECTRICAL
CONTRACTING, INC.,

Defendant.

-----X

AND TWO THIRD-PARTY ACTIONS.

-----X

INDEX NO. 155724/2016

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY

As a preliminary matter, that portion of plaintiffs motion seeking summary judgment based on their proposed nunc pro tunc amendment to the third amended complaint is denied as premature since issue has not yet been joined (see Weinstock v Handler, 254 AD2d 165 [1st Dept 1998]). Nevertheless, inasmuch as the proposed amendments are not palpably insufficient, devoid of merit, or unduly prejudicial, the plaintiffs may amend their third amended complaint to include Industrial Code provisions 23-1.7(e) and 23-1.7(d) in conformance with the deposition testimony, and the amended complaint is deemed served on all parties (CPLR 3025[b]; see McGhee v Odell, 96 AD3d 449 [1st Dept 2012]).

Upon the foregoing documents, it is ordered that plaintiffs' motion for, inter alia, summary judgment and defendants/third-party plaintiffs 56th and Park (NY) Owner, LLC ("56 & Park")

and Lendlease (US) Construction LMB Inc.'s ("Lendlease") cross motion for summary judgment are determined as follows:

Plaintiffs commenced the instant action when plaintiff Frank Magistro, a construction worker, was allegedly injured when he slipped and fell on debris while descending a staircase at the 432 Park Avenue construction project on July 8, 2015. By way of background, it is undisputed that 56 & Park is the owner of the subject premises, Lendlease was the agent of the owner as the construction manager for the project, A.S.R. Electrical contracting, Inc. ("ASR") was hired to do electrical work including lighting for the project, and third-party defendant Post Road Iron Works ("Post Road") fabricated and installed metal handrails in the internal stairwells of the building. With this motion, plaintiff seeks, inter alia, partial summary judgment on their Labor Law §§ 241(6) and 200 claims. With their cross motion, defendant Lendlease seeks conditional summary judgment its claims for contribution and indemnification.

In support of the motion and cross motion, the parties submit, inter alia, the deposition testimony of Frank Magistro, Richard L'Abbate, John Marcek, Adam Chaikin, and Dennis Addis.

*Frank Magistro*

Frank Magistro testified that he was working at the construction project at 432 Park Avenue on July 8, 2015 as a carpenter. He was employed by Component Assembly Systems and was solely under the supervision of Anthony Alvino. Magistro's job duties included framing, sheetrocking, and woodworking. On the date of the accident, he was installing top tracks on the 77<sup>th</sup> floor. After approximately four and a half hours at work, Magistro intended to use the bathroom located on the 76<sup>th</sup> floor. Magistro averred that he began descending a stairwell that was not occupied by workers and made it only two or three steps before his right foot rolled on something and gave way. He stated that he rolled his foot on a cut off piece of handrail that he did not see because of how dark

and dimly lit it was. He explained that when he entered the stairwell there was a hanging light waist high on the 77<sup>th</sup> floor landing and that there should have been another on the 76<sup>th</sup> floor landing, but its bulb was not turned on. Magistro assumed that he slipped on a piece of handrail because he felt his foot roll on it and there were a bunch of dark brown, cut off pieces on the landing from when the installed handrails were cut to size.

*Richard L'Abbate*

Richard L'Abbate testified that he works for CR Safety Group, Inc. as a site safety manager. He stated that he was the site safety manager on the 432 Park Avenue project and that his job entailed inspecting the site from top to bottom, marking down any deficiencies, and reporting to Lendlease's superintendent. He explained that in the normal course of business he would prepare and submit inspection reports on a daily basis.

He was asked to review previous site safety manager logs beginning with July 6, 2015 and ending with the date of the accident. L'Abbate explained that throughout the document when he used the phrase "housekeeping" he was referring to the need to maintain the site and remove debris and not a maid's turndown service. He added that if he observed cuttings from a handrail on the stairs that he would consider those handrail cuttings as "debris" in his report. He also explained that in the context of a stairwell that "housekeeping" could not mean anything other than the need to clean up debris. The first time the phrase "housekeeping" was used was likely in reference to a guardrail on the 84<sup>th</sup> floor that was missing. When it was used later on it seemed to indicate that "housekeeping getting better." He stated on one page that believed was from July 7, 2015 that the "[l]ights out in stairwell and throughout building. Need maintained daily."

On the sheet for July 8, 2015 he typed, "[c]omponent carpenter slipped on stairs 78<sup>th</sup> floor, light out and housekeeping could be better." He again explained that by "housekeeping could be

better” it meant that “there was probably debris left in the area.” He further stated that, with respect to the light being out, he would not have written anything he was merely told and that he probably viewed it personally. Moreover, he added that if he noted that the lighting was out, it meant that the light in the stairwell was not working and was not OSHA compliant. He would not make a “candle power observation.” Additionally, he said it was absolutely possible that he got the floor off by one level in his report.

On that day’s form he also noted that the project was “noncompliant for electrical” but he could not recall if that meant that electrical boxes were uncovered, the lighting issue, or both. Later in the Daily Activities section of the form he verified that it stated, “[l]ights in stairs out thru out building, too many to list. Also panel covers missing on electrical boxes thru out.” A few lines later L’Abbate wrote that “[h]ousekeeping thru out is a mess, stairs and egress are blocked with debris.” He added that this was based on his personal observations. He also commented that trades were removing barricades without reinstalling them and explained that it was possible that barricades should be put up in an area a worker should not be at because debris has not yet been cleared.

L’Abbate did not remember exactly where his reports went after he completed them. He also did not remember interfacing with anyone in particular at Lendlease. He stated that typically he would submit the safety reports to the super of the site electronically on a daily basis. He added that in July of 2015, if he found debris all over the stairs and the lights out throughout the building, it would have been his general practice to communicate these issues through the submission of his report. L’Abbate also verified that Lendlease had laborers at the job site and that he did observe them cleaning up debris.

*Jon Marcek*

Jon Marcek testified that he was a Lendlease assistant superintendent at the subject job site. He averred that there were roughly five assistant superintendents and another five superintendents at the site. With respect to the project Lendlease was responsible for construction management. In that capacity, Lendlease was hired by the owner to hire the subcontractors and provide oversight of the construction.

Marcek explained that ASR was one of the electricians on the site. He added that they were responsible for core power. In that capacity they were responsible for the lighting of the stairwells. Marcek believed that the temporary lighting was completed at the time of the subject accident.

Marcek was also shown a site safety manager log. He stated he was familiar with CR Safety Group Inc. who was the third-party site safety company hired by Lendlease. They were the entity who would have filled out the logs concerning the activities of the day at the site. They would have performed safety inspections and reported back to Lendlease. With regard to the word “housekeeping” in the logs, Marcek understood the phrase to mean general cleaning. He further stated that Lendlease was responsible for performing general cleaning. He added that Lendlease construction laborers would police the areas and clean up debris.

With respect to these site safety logs and reports, he stated that after they are prepared, they are submitted to Lendlease and kept in the regular course of business. He was not sure, however, who was responsible for reviewing the reports, whether it be himself or another superintendent. He added that if the information in the report would have been conveyed to him that he would have reported the lighting issues to the electrician. He initially stated that he was not sure if ASR would be informed verbally or in writing, but later said he would have notified them via phone call.

As for the note that the housekeeping was a mess throughout with the stairs being blocked with debris, Marcek said that the stairs should have then been cleaned. He also confirmed that the logs indicated that “excess debris could be better” and that it was necessary to verify that the floors and stairs were clean from excess debris throughout the day, which he understood to mean continuously. Nevertheless, while agreeing that the deficiencies stated in the report were serious, he said that he was not familiar with the actual report, did not think that he ever saw it, and had no recollection of it. Marcek further stated that he did not even know about plaintiff Magistro’s accident until learning about the lawsuit from counsel. Marcek additionally concluded that if the “opinions” stated in the site safety logs were true that they would constitute violations of Lendlease’s safety manual.

Specifically, with respect to the handrails, he did not recall which subcontractor was responsible. He stated that to his knowledge it would typically be an ironworker’s trade and that he has generally seen cuttings of metal handrails (circular pieces of tube) at sites before. He explained that Lendlease laborers would generally clean up that type of debris within 24 hours after it was center piled. He did not know if laborers hired by Lendlease verified that the floors were clean from excess debris throughout the day.

Marcek also averred that foreman meetings were held weekly where safety was discussed. He attended these meetings occasionally. Marcek did not recall if the issues brought up in the site safety logs were discussed but stated that after a report like that a Lendlease supervisor would have raised the deficiencies at a foreman meeting. He did not know, however, if that would be documented in writing.

*Adam Chaikin*

Adam Chaikin testified that he is the current Vice President of ASR and was the project manager of the 432 Park Avenue project back in July of 2015. He averred that as part of ASR's scope of work that they installed temporary lighting in the stairwells of the building at the beginning of the project, while work was going on. The temporary lighting would consist of "stringers" that are essentially electrical wiring with bulbs. Chaikin could not recall if they were incandescent or florescent. The temporary lights had battery backups, where when the battery source went out, the battery would kick on for 90 minutes.

Chaikin could not be 100 percent certain but believed based on invoices that the permanent lighting was installed in the stairwell between the 76<sup>th</sup> and 77<sup>th</sup> floor. Those invoices indicated that the permanent lighting from stairs 10 through the floor were 85% complete before May of 2015. He further stated that ASR installed the permanent lighting starting from the bottom and working their way up and that the building had roughly 100 floors. Additionally, from his review of the invoices he believed that the permanent lighting was 95% installed by the end of June and 99% installed by July 31, 2015, but he was not 100% sure.

With respect to site safety meetings, Chaikin said that he did not attend them but that his foreman would. He further stated that he was not familiar with CR Safety Group Inc. and was not aware that Lendlease had employed an independent safety inspector. He explained that if there was a safety concern related to the lighting at the premises that it would have been brought to his foreman's attention, and then possibly his attention if still unremedied. He did not recall any such concerns with respect to the subject project.

Chaikin was shown the site safety logs from July 6, 2015 wherein it stated that "lights out in stairwell throughout building" and "lights in stairs out throughout building, too many to list. Also panel covers missing on electrical boxes throughout, live boxes need metal covers." He then

agreed that electrical boxes are supposed to have covers and that under the safety manual for the project they were required to provide adequate lighting to meet OSHA standards, which would have been enforced by Lendlease.

Ultimately, Chaikin does not believe the contents of this report were ever brought to his attention. He averred that he had no recollection of ever being asked to address issues of lights being out in the stairwell and that it would have been ASR's duty to address these issues. He reiterated that he may have no recollection because these concerns should have been brought to his foreman who had the authority to address the issues. Moreover, if the foreman had addressed the issue, that would not be recorded in any documents kept by ASR. He also stated that there could be a million different reasons why temporary lighting may go out intermittently.

*Dennis Addis*

Dennis Addis testified that that he is a foreman for Post Road and was a foreman for them on the 432 Park Avenue project. As foreman he was responsible to "call timing" and arranging work for the workers. By "call timing" he explained that he meant the description of the job done that day, what workers were there, and number of hours worked.

Addis averred that Post Road installed architectural steel, stairways, handrails, etc. and performed work on the subject project pursuant to a written contract with Lendlease. He recalled that the building was one of the biggest in New York at the time and contained approximately 90 floors. He also recalled that Lendlease's superintendents would hold weekly site safety meetings in which a Post Road foreman would attend. However, he was not the foreman who attended so he was not sure if debris on the stairwell was ever discussed.

Addis stated that Post Road did perform work on the portions of the two stairwells between the 76<sup>th</sup> and 77<sup>th</sup> floor. He recalled that there were landings between each set of stairs and that the

two stairwells were permanently installed by Post Road by July 8, 2015. Post Road also installed the handrails within the stairwells of the building.

He averred that in June and July of 2015, Post Road was installing the handrails within the stairwells of the building each morning. On or about July 15, 2015 they were working on installing handrails on or about the 80<sup>th</sup> floor. Addis stated that as of July 8, 2015, handrails were already installed between the 76<sup>th</sup> and 77<sup>th</sup> floor. He believed that they were installed between the 76<sup>th</sup> and 77<sup>th</sup> floor the day before the subject accident. Those handrails were made of steel pipe, were round, and painted primer red. They were constructed off-site by Post Road and then cut to size by them within the stairwells of the building with a band saw before being installed. He explained that the handrails had to be cut on the stairwell platforms because there was a “hand clearance issue,” wherein the distance between the center of the handrail and the wall was not code complaint. Addis added that these hand clearance issues existed on most floors including between the 76<sup>th</sup> and 77<sup>th</sup> floors.

With respect to the removal of debris, Addis stated that Post Road had a general procedure, wherein they would put “all the scraps” in buckets. By “all the scraps” he was referring to all the pieces of pipe, extra screws, and anything that someone could trip on. This duty to keep the stairwell clear of debris was set forth by his superintendent at the time, Mr. Karl, but it was also dictated by common sense. He articulated that it was their number one rule and that they would discuss it all the time. Addis added that they would put the cuttings in a bucket right away, and Lendlease laborers would clean up after them if they missed anything. He also verified that cut portions of handrails had been removed from stairwells at the site. Addis did not observe anyone else place cut off portions of handrails into dumpsters outside, but he knew that he placed them into spackle or paint buckets that were tucked into the corner of the stairwells where they were

working. Post Road would take the bucket with them as they worked their way up, unless the bucket was full. If full, they would leave the bucket for the Lendlease laborers to pick up. That bucket would be placed in the hallway by the stairwell after Addis' helper would salvage some of the re-usable scraps. He also recalled seeing Lendlease laborers clean up the hallways and stairways every day. He did not clean up any cut pieces of handrails on the stairs of the stairwells between the 76<sup>th</sup> and 77<sup>th</sup> floors on July 8, 2015.

Addis recalled that he was informed of Magistro's accident around 12 o'clock on July 8, 2015 by the Lendlease superintendent, Andrew Bentley. He stated that he was told that "somebody fell in the stairway. He said they tripped over a piece of metal or a piece of rail." By rail, Addis understood this to mean handrail. Addis alleged that he told Bentley, "[t]he lights are out, and you're not going to start trying to pin this on us."

He further stated that specifics were not given to him such that he was not sure if the accident occurred on stairwell A or B. Nevertheless, he claimed that he and his co-worker went to the stairwell where the accident occurred at approximately 12:30 p.m. and walked each stair and looked at each step, the landing, everywhere. He stated that the stairs were wet since it had been raining, and that "the lights were out like all day." He could not tell if it the stairs were dirty because of how dark it was. However, he alleged that there was not any debris on the stairs or landing. He claimed that while he did not see any cut portions of handrail, he did observe a piece of silver electrical conduit on the 76<sup>th</sup> floor landing. He did not know, however, if porters were dispatched between 12 and 12:30 or if any debris had been removed from the stairwell before he arrived at the scene. He also recalled speaking to his co-worker and telling him "I don't see anything he tripped on of ours" and that it could not be due to Post Road since "our stuff is in here, in the hallway." He averred that he did not take any pictures of the condition of the stairwell

because he did not think of it, but that it was dark out and the pictures would not have come out anyway. He recalled that it was too dark to read a newspaper and that he had to navigate the stairs with a flashlight on his phone.

Addis also remembered discussing the accident with Mr. Karl. He stated that he told him that “somebody fell down the stairs, and they said they fell over a piece of our railing. And I told them what the conditions were in there.”

As for the lighting between the 76<sup>th</sup> and 77<sup>th</sup> floor on the date of the accident, Addis recalled that it was still temporary lighting. He stated that there would be one light bulb on every floor and then one light bulb in between every floor on the center part of the stair. Despite this, he alleged that most of the time, a lot of those bulbs were out. He specifically remembered that there was no lighting there when he went down for lunch at 11 a.m. and that they could not do too much work that day because there was no light in the stairwell. Before heading to lunch he claimed that he was “walking the stairs” and neatening up to make sure no one would trip. He stated that at that point, “[t]here were no lights. It was pitch-black. You didn’t need something to fall down the stairs, basically.” He believed that from floor 80 to 70 that all of the lights were out.

Addis stated that he communicated the lighting conditions within the stairwells on July 8, 2015 to “Andrew Bentley, a number of Lendlease’s guys, supers. I texted them. Stuff like that.” He recalled that he spoke to Bentley around 12 o’clock but that he had also spoken to him earlier in the day by text because, “[y]ou’re supposed to let the GC know if there’s a dangerous situation, and that was a dangerous situation, correct?” He claimed that he first texted Bentley around 8 or 9 in the morning and probably several other times, and texted others from Lendlease throughout the morning. He stated, however, that he did not have great service where he was so he could not be sure if his message was received by Bentley, but he did not receive a text back from him. He

thought that someone said something to him like “we’re working on it.” He averred that he also spoke to others at Lendlease about the lighting in the stairwells before July 8, 2015, to which he was told “[w]e’ll get it taken care of.”

Additionally, Addis remembered seeing and speaking with Richard L’Abbate as he performed walkthroughs of the stairwells at the project. He knew him as the safety guy and thought that he was a Lendlease employee.

### ***Labor Law § 200***

Labor Law § 200 (1) provides, in pertinent part, as follows:

[a]ll 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.

It is well settled that the purpose of Labor Law § 200 was to codify the common law duty owed by owners and general contractors to maintain a safe work site (*see Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 [1993]). Claims for personal injury under Labor Law § 200 and common law negligence fall into two categories: (1) those arising from the manner in which the work was performed and (2) those arising from an alleged defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

When a worker’s injury is due to a dangerous or defective premises condition, liability is based on whether the owner or general contractor created the condition or had actual or constructive notice of the condition and not whether defendants supervised or controlled the plaintiff’s work (*see Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648 [1st Dept 2013]). When

a worker is injured by slipping or tripping on debris on an inadequately lit stairwell where the worker was not regularly working, the plaintiff's accident arises out of a dangerous premises condition and not from the method of work (*see Stephens v New York Law School*, 2017 WL 11617006 [Sup Ct, New York County 2017]; *compare Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]). A court will find that there was constructive notice when the defect was visible and existed for enough time prior to the accident to allow the defendant to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]).

Here, the testimony and site safety logs of Richard L'Abbate, which he would customarily submit daily to Lendlease in the regular course of business, evince dangerous housekeeping (debris) and lighting conditions in the stairwell that existed in the days leading up to, and including, the subject accident. He stated that he would not have written these deficiencies into his report unless he personally observed them. Moreover, Post Road foreman Addis testified that he notified Lendlease about the lighting prior to and on the morning of the accident. While he was not sure if his messages went through to superintendent Bentley that morning, he did recall generally being assured either that day or before that the lighting would be fixed. Here, there is ample evidence in the record of the dangerous conditions and Lendlease's notice. Moreover, Marcek's lack of knowledge alone is insufficient to raise a triable issue of fact when he admitted that there were roughly 9 other superintendents at the project and he was unsure as to who was receiving the site safety reports. Accordingly, summary judgment on plaintiffs' Labor Law § 200 claim is granted against defendant owner 56 and Park and its agent/construction manager, defendant Lendlease.

***Labor Law § 241(6)***

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

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

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

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendants violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (*see Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]).

Here, plaintiffs allege that defendants violated 12 NYCRR §§ 23-1.7(e)(1), 23-1.7(e)(2), 23-1.30, and 23-2.1(a)(1). Inasmuch as plaintiffs cited to Industrial Code §§§§§ 23-1.15, 23-1.22(b)(4), 23-1.22(c), 23-1.7(a)(2), and 23-1.7(f) in their bill of particulars, they are now dismissed as abandoned (*see Rodriguez v Dormitory Authority of the State of New York*, 104 AD3d 529 [1st Dept 2013]).

12 NYCRR § 23-1.30 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.

In order to establish a violation of this Industrial Code provision, evidence must be offered that is more than vague testimony that the lighting was dark or poor (*see Carty v Port Auth. of N.Y. &*

*N.J.*, 32 AD3d 732 [1st Dept 2006]). Expert testimony with respect to the amount of candle power is unnecessary as lay witnesses' testimony that lighting was "nonexistent" and "pitch black" is sufficient (*Murphy v Columbia University*, 4 AD3d 200 [1st Dept 2004]). Here, in addition to plaintiff Magistro's testimony about the dark, dimly lit stairwell, L'Abbate noted that the lighting was out throughout the staircases, and Addis testified that it was pitch black, too dark to take a useful picture, dark enough to require a flashlight, and too dark to read a newspaper. The fact that there may have been one dimly lit, waist high bulb that was behind plaintiff as he descended the staircase is insufficient to create a triable issue of fact as to whether the stairwell was inadequately lit. Accordingly, summary judgment on this Labor Law § 241(6) claim is granted against 56 & Park, Lendlease, and ASR.

12 NYCRR §§ 23-1.7(e)(1) and (2) entitled Tripping and other hazards states:

- (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. . .
- (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Summary judgment is inappropriate as to §23-1.7(e)(2) inasmuch as the site of plaintiff Magistro's accident was no longer a work area. With respect to §23-1.7(e)(1), however, plaintiff testified that he felt his foot roll on something while descending the stairwell. Additionally, L'Abbate's testimony and site safety logs demonstrate that the project suffered from poor housekeeping in that the stairs were blocked with debris. Whether that debris was sheetrock, an electrical conduit, or a handrail cutting is immaterial to whether summary judgment should be granted against 56 & Park and Lendlease with regards to this Industrial Code provision.

12 NYCRR §§ 23-2.1 entitled Maintenance and housekeeping states:

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

Summary judgment is inappropriate as to this provision inasmuch as no deposition testimony renders this Industrial Code provision applicable.

***Lendlease's Cross Motion***

The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 276 NYS2d 612 [1966]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 549 NYS2d 365 [1989]). A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous (*see Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470 [2007]). It is well established that “[i]n 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. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]).

A construction contract is unenforceable and void against public policy where it seeks to indemnify a promisee against liability resulting from the promisee's own negligence (General Obligations Law § 5-322.1[1]). However, an indemnification provision that permits indemnification “to the fullest extent permitted by law” contains savings language that would

allow a construction manager to receive partial and proportionate indemnification for its contractors' negligence, even where the construction manager may have also been negligent (*see Brooks v Judlau Contracting, Inc.*, 11 NY3d 204 [2008]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]; *Guzman v 170 West End Ave. Associates*, 115 AD3d 462 [1st Dept 2014]).

The contract between Lendlease and ASR states in pertinent part:

#### ARTICLE 11, INDEMNIFICATION

11.1 To the fullest extent permitted by law, Contractor agrees to defend, indemnify and hold harmless Construction Manager and Owner, as well as any other parties which Construction Manager is required to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claim, cost, expense, or liability (including attorneys' fees, and including costs and attorneys' fees incurred in enforcing this indemnity) attributable to bodily injury, sickness, disease, or death, or to damage to or destruction of property (including loss of use thereof), caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Contractor, its subcontractors and suppliers of any tier, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Contractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage, or destruction is caused by the sole negligence of a party indemnified hereunder.

Here, the contractual provision expresses a clear intent for ASR to indemnify Lendlease. Inasmuch as the provision is enforceable "to the fullest extent permitted by law," ASR must indemnify Lendlease, but does not need to indemnify Lendlease for Lendlease's own negligence. Accordingly, the cross motion for conditional indemnification is granted solely to the extent that ASR must indemnify Lendlease, but that indemnification is limited by any affirmative negligence on the part of Lendlease which may be found by the jury that was a substantial factor in causing plaintiffs' injuries (*see Murphy*, 4 AD3d 200).

Accordingly, plaintiffs' motion is granted to the extent that plaintiffs are entitled to summary judgment on their Labor Law § 200 cause of action against defendants 56 & Park and Lendlease, their Labor Law § 241(6) predicated on §23-1.7(e)(1) against defendants 56 & Park and Lendlease, and their Labor Law § 241(6) predicated on §23-1.30 against defendants 56 & Park, Lendlease, and ASR; and it is further


ORDERED that plaintiffs' motion to amend, pursuant to CPLR 3025, is granted solely to the extent that the third amended complaint now containing Industrial Code provisions 23-1.7(e) and 23-1.7(d) is deemed served on all parties; and it is further

ORDERED that plaintiffs' Labor Law § 241(6) claims predicated on violations of Industrial Code §§§§ 23.115, 23-1.22(b)(4), 23-1.22(c), and 23-1.7(f) are dismissed; and it is further

ORDERED that defendant Lendlease's cross motion for conditional indemnification is granted solely to the extent that ASR must indemnify Lendlease, but that indemnification is limited by any affirmative negligence on the part of Lendlease which may be found by the jury that was a substantial factor in causing plaintiffs' injuries; and it is further

ORDERED that the remainder of any motion and cross motion are denied in all other respects.

This constitutes the decision and order of the Court.

<u>2/18/2022</u> DATE					 RICHARD LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	