Coon v WFP Tower B Co. L.P.
2022 NY Slip Op 30770(U)
March 9, 2022
Supreme Court, New York County
Docket Number: Index No. 151837/2016
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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WILLIAM A. COON and LISA COON,

Plaintiffs,

-against-

WFP TOWER B CO. L.P., WFP RETAIL CO. L.P., TURNER CONSTRUCTION COMPANY, TIME, INC. and, SECURITY CONTROL INTEGRATORS,

Defendants.

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WFP TOWER B CO. L.P., WFP RETAIL CO. L.P., TURNER CONSTRUCTION COMPANY, TIME, INC. and, SECURITY CONTROL INTEGRATORS,

Third-Party Plaintiffs,

-against-

ALLRAN ELECTRIC OF N.Y., LLC,

Third-Party Defendant.

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DECISION/ORDER
Index No. 151837/2016
Motion Seq.: 005-008

Kotler, J.,

Motion sequence numbers 005, 006, 007 and 008 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a union electrician on July 15, 2015, when, while working at a construction site located at 225 Liberty Street, New York, New York (the Premises), he tripped on the edge of an uncovered hole in the concrete floor and fell.

In motion sequence number 005, plaintiffs William A. Coon (plaintiff) and Lisa Coon move, pursuant to CPLR § 3212, for summary judgment in their favor on plaintiff's Labor Law § 241 (6) claim against defendants/third-party plaintiffs WFP Tower B Co., L.P. (Tower), WFP

Retail Co. L.P. (Retail and together with Tower, the WFP Defendants), Time, Inc. (Time) and Turner Construction Company (Turner) and on plaintiff's common-law negligence and Labor Law § 200 claims against Turner.

In motion sequence number 006, third-party defendant Allran Electric of N.Y. (Allran) moves, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint against it.

In motion sequence number 007, the WFP defendants, Time, Turner and defendant Security Control Integrators, Inc. (Security and collectively defendants) move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against each defendant.

In motion sequence number 008, defendants move, pursuant to CPLR § 3212, for summary judgment in their favor on their common-law and contractual indemnification claims against Allran, and for a declaration that Allran is obligated to defend and indemnify defendants and reimburse all costs and expenses to them.

Issue has been joined as to all parties/claims and note of issue was filed on March 16, 2021. The preliminary conference order required motions for summary judgment to be filed within 30 days after note of issue was filed. The parties are in agreement that the summary judgment deadline was extended to May 17, 2021 and thus all motions filed before that date will be considered by the court. All but motion sequence 8 were filed before that deadline; defendants' motion was filed at 12:21 A.M. on May 18, 2021 – 21 minutes late.

Allran argues that defendants' motion for summary judgment in their favor on their third-party claims against it 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.

Allran argues that, because defendants did not explain their lateness in their motion, nor seek leave to file late, the court should deny their motion as untimely. The court declines to do so. In their reply papers, defendants sufficiently document an interrupted/delayed/latent internet connection error as the reason for their 21-minute late filing (Areizaga aff, ¶ 3-4; NYSCEF Doc. No. 339; *id.*, exhibit A; NYSCEF Doc. No. 340). This constitutes a satisfactory explanation for the untimeliness (*see, e.g. Cibener v City of New York,* 268 AD2d 334, 334 [1st Dept 2000] [courts are afforded "[w]ide latitude" to find good cause for late filings]; *Maloney v Pine Is. Corp.*, 2017 WL 6552651, *2 [Sup Ct, Rockland County 2017] [delay of a "few minutes" caused by "technical difficulties with the e-filing" deemed *de minimis* and not prejudicial]). Further, Allran, which fully opposed the instant motion on the merits, does not indicate that it was prejudiced in any way by defendants' 21-minute delay in filing.

Accordingly, the court will consider defendants' motion against Allran as well.

Relevant facts

On the day of the accident, Retail held the leasehold estate for the Premises. Tower was Retail's ground lessee, given the authority to lease out space within the Premises on behalf of Tower. Time entered into a lease agreement with Tower for portions of the ninth floor of the Premises that it intended to use as office space. Time then hired Turner to provide construction management services for a gut renovation of the ninth floor (the Project). Turner, in turn, hired all subcontractors for the Project including Security, an electrical company specializing in security systems. Security subsequently hired non-party Bigman Brothers' Electrical (Bigman) to perform its work. Plaintiff was employed by Bigman.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was an electrician employed by Bigman (plaintiff's tr at 165). His foreman was Joe Donnelly. Plaintiff was supervised by, and received directions from, Donnelly. He did not receive direction or supervision from anyone else. Bigman's work at the Project involved the installation of electric cables for electronic locks, security cameras and alarms on the ninth floor.

According to plaintiff, Turner acted as the general contractor at the Project, Time was the client, and Security supplied materials to Bigman for the Project. Allran, another electrical company, also worked at the Project.

On the day of the accident, plaintiff was working on the ninth floor of the Premises, alongside approximately 150 other workers from several trades, including Allran (*id.* at 203). The ninth floor was fully under construction and unfinished, but it was not a wide-open space. Rather, the floor had "partitions" – i.e. "final walls" – installed (*id.* at 210-211). In addition, several pieces of heavy machinery were present and in use, including several varieties of lifts.

To perform his work, plaintiff needed to use a four wheeled cart loaded with wire (*id.* at 202). He and his assistant, "Michelle," installed wiring throughout the morning without incident (*id.* at 230). After lunch, they needed to refill the cart with more wire.

After obtaining the wire from Bigman's ninth-floor shanty, plaintiff and Michelle attempted to return to their work area, however, they "couldn't go through the normal way" because "Allran or another company . . . had their lifts" blocking the corridor (*id.* at 231). So, they took a different path. Plaintiff pushed the cart while Michelle walked in front of it. While pushing the cart, plaintiff "stepped in a hole in the floor" that he did not see (plaintiff's tr at 152). He described the hole as square, approximately five inches by five inches, and three inches deep

(the Hole) (*id.* at 153). When he stepped into the Hole, his right foot and knee twisted. More specifically, plaintiff explained that his "heel stepped into the hole" causing his ankle to twist and causing him to fall onto his knee (*id.* at 239).

Michelle did not see plaintiff's accident, because she was walking approximately 10 feet in front of him. Plaintiff sat down and someone went to get Donnelly. When Donnelly arrived at the accident location, plaintiff showed him the Hole. Then, sometime later, plaintiff provided Donnelly with his accident statement, and Donnelley sent plaintiff photographs depicting the Hole (*id.* at 146).

Plaintiff testified that he was aware that open holes were present on the ninth floor, but he did not know exactly where they were. Some holes had been covered with pieces of aluminum. He did not know what the holes were for, nor who was responsible for them, though he stated that they were not Bigman's work or responsibility (*id.* at 209).

At his second deposition, plaintiff was shown a copy of his accident statement. Plaintiff confirmed it was his statement. Plaintiff was also shown several photographs and testified that he could not determine whether they depicted the accident location (plaintiff's second tr at 160-161). When asked whether they appeared similar to the accident location, he indicated that they did not. He further did not know when the photographs were taken.

At his third deposition, plaintiff testified that there were no partitions up on the day of his accident (plaintiff's third tr at 34), but then stated that the central part of the floor was finished and consisted of cubicles or offices (*id.* at 35). He described the accident location as an approximately three-to-six-foot-wide corridor bounded by cubicle spaces on the right side and columns on the left side (*id.* at 36).

Plaintiff was shown the floor plans for the ninth floor of the Premises. He marked his work area on the floor plan. He also marked the path that he took immediately prior to the accident (*id.* at 54). Plaintiff was also shown a photograph of the accident area and confirmed that it depicted a hole with paper debris inside it. He indicated that it appeared that the hole had been used as a "floor box" that would hold "communication cables and power" (*id.* at 69-70), but he did not know if it was part of the current renovation or a pre-existing hole from the prior tenants of the Premises.

Deposition Testimony of Larry Costello (Turner's Project Superintendent)

Larry Costello testified that on the day of the accident, he was employed by Turner as the Project's project superintendent. His duties included coordinating trades and confirming compliance with the Project's specifications. He was at the Project daily and regularly walked/inspected the site. Turner also employed six superintendents who regularly walked the Premises (Costello tr, at 18). In addition, the Project's site safety supervisors were Turner employees (*id.* at 19).

According to Costello, Turner was the construction manager at the Project. It was hired by Time to oversee the overall construction of the Project. This entailed hiring all subcontractors, holding safety talks and maintaining progress logs. Costello testified that if Turner's supervisors saw a dangerous condition, "[t]hey had the authority to correct it" (*id.* at 23). Though he later explained that Turner supervisors would only direct subcontractors to correct such conditions (Costello's second tr, at 34).

Turner hired Security to perform electrical work related to security systems at the Project. Security subcontracted all labor to Bigman. Allran was responsible for implementing the general electric for the ninth floor. Allran dug out holes and installed the new floor boxes for the Project.

Costello testified that there were existing floor boxes around the ninth floor. According to Costello, some of the existing floor boxes were being reused for the Project (*id.*). Allran and non-party "Forest" (another electrical company) were responsible for maintaining the existing floor boxes (*id.* at 50), including covering them when not in use (*id.* at 50-51).

At the deposition, Costello was shown a photograph. He confirmed that it depicted an uncovered floor box. He was not sure whether the photograph depicted the Premises. He also testified that if the photograph was of the Premises, and if the floor box in the photograph was not being worked on, it should have been covered (*id.* at 89).

Costello further testified that if, during a walkthrough of the Premises, he saw an uncovered floor box, he would contact the electrical foreman and direct him to cover it. Costello was shown the floor plan for the ninth floor and confirmed that Allran performed work near the accident location (Costello's second tr, at 21). He was also shown the photographs depicting the accident location and testified that the holes shown thereon were "openings into the existing floor cell system" – i.e. that they were preexisting floor boxes that predated the Project (*id.* at 25). Later, he testified that he did not recall whether there were any pre-existing boxes in the floor (*id.* at 86).

Costello then testified that Allran was responsible for drilling all the new floor box holes and for installing the new floor boxes (*id.* at 70 and 79). More specifically, Costello reviewed Turner's contract with Allran and identified a "scope leveling sheet" annexed to the contract (*id.* at 82-83). He confirmed that the scope leveling sheet directed Allran to "lay out and coordinate all floor penetrations" and to "[i]nclude for temporary protection covers or protection for all electrical raceways" (*id.* at 83).

Deposition Testimony of Michael Saunders (Allran's Foreman)

Michael Saunders testified that on the day of the accident, he was Allran's general foreman for the Project. His duties included coordinating Allran's work with Turner. He also directed Allran's workers. Saunders's typical day included instructing his foremen on the day's work, coordinating Allran's work with other trades, attending meetings, including safety meetings, and performing work area walkthroughs. If he saw an unsafe condition, he would inform Turner of the issue (Saunders tr at 43). He did not remember any specific safety issues on the ninth floor.

Allran was hired for the Project by Turner. Allran's scope of work included "basic power and lighting" (*id.* at 27). Part of Allran's work included work on the "floor cell system" – a series of conduits built into the concrete floor in order to "get electric across the entire floor, under the floor, without making holes in it" (*id.* at 64). Specifically, Allran was responsible for "core drilling at the location of the furniture and pulling electrical wire" (*id.* at 76). Allran was the only company that was drilling into the concrete to access the cell system (*id.* at 91). It was not responsible for any demolition or removal of pre-existing electrical systems (*id.* at 127).

To create access points into the cell system, Allran used a large drilling machine to open circular 2-inch diameter holes in the concrete (*id.* at 59). More specifically, Allran "used the existing cell system" and constructed openings as necessary for the Project (*id.* at 63).

Saunders testified that the openings in the slab that Allran created were round, and that it did not create any square openings. He also testified that "[t]here may have been existing openings in the floor before Allran started the project," (*id.* at 62).

Saunders testified that Allran had "no responsibility" with respect to pre-existing openings, such as the square opening that plaintiff tripped over because Allran "only worked

inside the header trench or any new opening . . . that we created" and not any preexisting openings (*id.* at 75). He testified that it was "the general contractor's responsibility to cover all floor openings" (*id.* at 77).

At the deposition, Saunders was shown a copy of the photograph depicting the condition that plaintiff tripped over and stated that it depicted "an existing box that was in the slab prior to Allran getting there" (*id.* at 127) that looked "abandoned" (*id.* at 115). He further testified that the box looked like a preexisting box because "the concrete is old around it" (*id.* at 121). If the box were new, it "would be shiny metal" (*id.* at 121).

Saunders testified that he could not recall whether the accident area was a corridor or an open space around the time of the accident (*id.* at 158).

Saunders was shown a copy of Allran's scope of work. He confirmed that it included that Allran's scope of work contained the following: "Include for temporary protection covers, protection for all electrical raceways and cell systems" (*id.* at 238). Saunders defined an electrical raceway as "anything you can put electrical wire through" (*id.* at 237). He was unaware of any electrical raceway at the Project, except for the cell system. He did not know whether the subject Hole was connected to an electrical raceway.

While Saunders was present at the Premises on the day of the accident, he did not witness it, nor did he learn of it until this action was commenced. He had no personal knowledge of how the accident took place.

Deposition Testimony of Joseph Donnelly (Bigman's Foreman)

Joseph Donnelly testified that on the day of the accident, he was Bigman's foreman for the Project. His work included directing Bigman workers, including plaintiff. He was at the Premises every day. He did not witness the accident but learned about it shortly after it

happened. He arrived at the accident location and spoke with plaintiff. Plaintiff told him that he tripped on a hole while pushing a wire cart (Donnelly tr. at 28).

Donnelly testified that when Bigman first arrived at the Project, approximately 50 holes that "must have been some old existing power" were present in the concrete slab on the ninth floor (*id.* at 19). He later identified these holes as floor boxes or "junction boxes" (*id.* at 63). On several occasions prior to the accident, he observed the holes uncovered (*id.* at 21). He considered such uncovered holes to be tripping hazards. Donnelly also observed Turner's site safety personnel walk past the uncovered holes and indicated that they never raised an issue about the uncovered holes (*id.* at 87).

Donnelly was shown a copy of Turner's incident report (the Incident Report), which listed Donnelly as a witness. He clarified that his statement was given not as a witness, but relayed information plaintiff gave him. He confirmed that the Incident Report stated that "holes were in the ground on May 20th when [he] arrived [at the Premises]" and that the holes were "to facilitate electrical outlets" (*id.* at 28). He explained that this was his direct observation. After he learned of the accident, Donnelly painted around the uncovered holes with orange paint, to increase their visibility.

Donnelly also testified that he spoke with Michelle, plaintiff's assistant on the day of the accident. He wrote down her statement that she was in front of plaintiff while he was pushing the cart. She "heard something scuffle" and then, after she turned around, plaintiff told her that he hurt his ankle (*id.* at 53).

Donnelly was shown several photographs of the accident site and confirmed that he had taken the photographs on the day after the accident. He confirmed that three photographs – labeled 8, 9 and 10 at the deposition – depict three separate uncovered holes on the ninth floor of

the Premises (*id.* at 45, 48-49). He was unsure whether any picture depicted the specific hole that plaintiff tripped on (*id.* at 67), though he believed that the photographs were taken in an area near where plaintiff's accident occurred (*id.* at 75).

Ultimately, at the end of construction, "[t]he floor guys covered the hole[s] in concrete" (*id.* at 90). Based on this, Donnelly believed that the holes were "abandoned holes" from the prior tenant of the Premises (*id.* at 91).

Affidavits

Affidavit of Kevin Poltie (Nonparty Witness)

Kevin Poltie affirms that he is the director of operations for project management for non-party Brookfield Properties, the building management company for the Premises. He states that Time and Tower entered into a lease agreement for the Premises and notes that the lease agreement names Tower as the "ground lessee/landlord" for the Premises (Poltie aff, ¶ 6; NYSCEF Doc. No. 282). He then states that Retail is "a leasehold estate" that "did not have any relationship" to the Project (*id.* at 6).

Affidavit of Ilissa Sternlicht (Time's Director of Property Management)

Ilissa Sternlicht affirms that on the date of the accident, she was the director of property management for Time. She was involved in the Project. She states that Time was the tenant of the Premises and Tower was its landlord. She states that Time hired Turner to provide construction management services for the Project, and further states that Time was "noted to be the Owner of the Project" on the agreement between Time and Turner (Sternlicht aff, ¶ 7; NYSCEF Doc. No. 283). Time did not contract with any other entity with respect to the Project (*id.* at 8). Time was never informed of any unsafe condition at the Project and did not supply tools or equipment, nor supervise any workers at the Project.

Affidavit of Dean Zuidema (Security's Vice President)

Dean Zuidema testified that at the time of the accident, he was the vice president and a part owner of Security. Zuidema states that Turner hired Security to provide "security work" at the Project (Zuidema Aff, ¶ 4; NYSCEF Doc. No. 284). Security then subcontracted that work to Bigman. According to Zuidema, Security was unaware of any unsafe condition and did not supply any tools or equipment, nor supervise any workers at the Project.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a dras-tic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The Labor Law § 240 (1) Claim (Motion Sequence Number 007)

Defendants move for summary judgment dismissing the 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]).

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's accident was caused due to a trip and fall. Defendants argue that the accident was not caused by their failure to provide or erect necessary safety devices as required by section 240 (1) and, therefore, this section is inapplicable to plaintiff's accident (*see 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"). Notably, plaintiff does not oppose dismissal of this claim.

Accordingly, defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against them.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 005 and 007)

Plaintiff moves for summary judgment in his favor as against the WFP Defendants, Time and Turner on that part of his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (1). Defendants move for summary judgment dismissing the entirety of the section 241 (6) claim.

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:
>
> * * *
>
> (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 nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501–502). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Preliminarily, defendants argue that the WFP Defendants and Security are not proper Labor Law defendants, such that they may not be liable to plaintiff under Labor Law § 241 (6).[1] Plaintiff argues that they are proper defendants.

> "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]). Accordingly, for a party to be "vicariously liable as an agent of the property owner for injuries sustained under the statute," it must have "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Turning to Security, it has failed to establish as a matter of law that it was not an agent of an owner or contractor. While Zuidema's affidavit states that Security did not direct, control or supervise plaintiff or Bigman, Zuidema is silent with respect to what duties Security was actually given. More specifically, while Zuidema's affidavit notes that he attached a true and accurate copy of Turner's contract with Security, that contract is not in the record.

Therefore, the court cannot determine the scope of Security's work, or whether it was contractually delegated the authority to oversee the injury producing work – i.e. covering holes at

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[1] Turner does not challenge that it is a proper Labor Law defendant. Time was a tenant who "fulfilled the role of owner by contracting to have work performed for [its] benefit" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], *quoting Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Accordingly, Time is an "owner" for the purposes of the Labor Law and a proper Labor Law defendant.

the Project – such that it obtained a nondelegable duty to conform to Labor Law § 241 (6). Zuidema's statement that Security delegated the entirety of its work to Bigman does not relieve it of any nondelegable duties it may have obtained under its contract (which is not in evidence on these motions). Accordingly, Security has not established its *prima facie* entitlement to summary judgment dismissing the claim as against it on the ground that it is not a proper Labor Law defendant.

The WFP Defendants argue that they are not proper Labor Law defendants because they are not owners or contractors or agents of either. In support of this position, they rely on Poltie's affidavit, which asserts that Tower is the "ground lessee / landlord" of the Premises, while Retail is the "leasehold estate" (Poltie aff, ¶ 6). Importantly, Poltie's affidavit does not contain sufficient foundation to establish the WFP Defendants' status as owners or otherwise. Poltie is an employee of non-party Brookfield and does not attest to any personal knowledge with respect to the WFP Defendants, their structure, or their relationship to the Premises. Accordingly, defendants fail to present sufficient evidence that would allow the court to determine whether either of the WFP Defendants are proper Labor Law defendants.

Next, plaintiff asserts that the WFP Defendants are, in fact, owners and, therefore, proper Labor Law defendants. Plaintiff relies on the same language in the Poltie affidavit, as well as a copy of the deed between non-party Battery Park City Authority (BPCA), as "Lessor," and Tower, as "Lessee" (the Deed) (NYSCEF Doc. No. 144). The Deed, however, does not mention Retail; nor does it establish that Tower was an "owner" as contemplated by the Labor Law.

Accordingly, neither plaintiff, nor defendant, have established, as a matter of law, whether the WFP Defendants are proper Labor Law defendants.

Turning now to the substance of the section 241 (6) claim, the court notes that plaintiff lists multiple violations of the Industrial Code in the bill of particulars. Except for section 23-1.7 (e) (1) and (2), plaintiff does not oppose their dismissal. These uncontested provisions 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, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Sectcion 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]; *see also Singh v Young Manor, Inc.*, 23 AD3d 249, 249-250 [1st Dept 2005]). Section 23-1.7 (e) (1) 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."

Here, plaintiff alleges that while he was in a passageway, he tripped and fell over a "condition[] which could cause tripping" – namely the uncovered hole (*id.*). Defendants do not contest that the Hole was a condition that could cause tripping; rather, they argue that the area where plaintiff fell was not a passageway, but a general working area. If the area where plaintiff fell was not a passageway, then Section 23-17 (e) (1) would not apply to the accident (*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] [1]).

Specifically, plaintiff testified that his accident occurred in a "corridor" (plaintiff's third tr, at 34), with "[c]olumns to the left and the office cubicle spaces to the right" (*id.* at 36) that was "[t]hree to six feet" wide (*id.*). According to plaintiff, he needed to traverse this corridor to access his work area.

> "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. In other words, it pertains to an interior or internal way of passage inside a building"

(*Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67 [1st Dept 2018]). Based on this testimony, plaintiff established, *prima facie*, that his accident occurred in a passageway.

In opposition, defendants argue that photographic evidence disputes plaintiff's description of the accident location and thus raises a triable issue of fact. Specifically, defendants point to two photographs (NYSCEF Doc. No. 290) that purport to depict the accident location as a wider, open area.

While these photographs call plaintiff's testimony into question, it is unclear whether they depict the accident location and accurately reflect the condition of the accident location on the day of the accident. Specifically, plaintiff's testified that the photographs did not depict his accident location and did not generally reflect the level of construction at the time of his accident (*see* plaintiff's second tr at 160-161).[2] In addition, Donnelly testified that he was unsure about whether the photographs he took depicted the actual accident location.

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[2] It is noted that counsel for defendants asked plaintiff whether he considered the accident location a "working area" (the area governed by section 23-12.7 [e] [2]) and that plaintiff answered "yes" (plaintiff's second tr at 40). However, merely because plaintiff was asked for his opinion on the nature of the accident location does not establish, as a matter of law, that the area was a "working area" as contemplated by the Industrial Code, as opposed to a passageway.

Nevertheless, these photographs conflict with plaintiff's testimony regarding the nature of the accident location and raise a question of fact that a jury must determine (*see e.g. Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"]).

Finally, the court notes that both parties submit conflicting expert affidavits attesting to whether the accident location was a passageway. This issue further underscores the existence of questions of fact regarding the nature of the accident location that preclude summary judgment (*id.*).

To the extent that defendants argue that the hole was integral to the work being performed, they provide no evidence that the holes were part of any work being performed at the time of plaintiff's accident.

Accordingly, as questions of fact remain as to whether the accident location was a passageway as contemplated by section 23-1.7 (e) (1), plaintiff is not entitled to summary judgment in his favor on this claim as against the WFP Defendants, Time and Turner, nor are the defendants are not entitled to dismissal of same.

Section 23-1.7 (e) (2)

Industrial Code 12 NYCRR 23-1.7 (e) (2) governs "working areas." It is sufficiently specific to support a Labor Law § 241 (6) claim (*Vieira v Tishman Constr. Corp.*, 255 AD2d at 235). It provides the following:

> "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."

(id.). By its plain language, this industrial code provision requires only that working areas be free from dirt and debris, scattered tools or materials, and sharp projections.

Here, plaintiff alleges that he tripped when he stepped on the uncovered Hole. The Hole is neither dirt, debris, a scattered tool, material or a sharp projection, such that it would fall under the ambit of this Industrial Code provision.

While there is testimony establishing that the Hole had debris in it, plaintiff does not allege in the complaint or his bill of particulars that such debris caused or contributed to his accident. Similarly, plaintiff does not allege that any sharp protrusion from the hole caused his accident (*see Lambert v J.A. Jones Constr. Group, LLC,* 18 Misc 3d 800, 803 [Sup Ct, Bronx County 2007] [dismissing section 1.7 [e] [2] claim where the record raised "no factual issue that debris or scattered tools or materials . . . contributed to plaintiff's fall" and where the plaintiff did not allege that a "sharp edge or protrusion in the hole contributed to his fall"]). Further, plaintiff's testimony is silent with respect to such claims.

Accordingly, defendants have established their entitlement to summary judgment dismissing that part of the Labor Law § 241 (6) claim predicated on a violation of Industrial Code § 23-1.7 (e) (2).

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 007)

Plaintiff moves for summary judgment in his favor on the common-law negligence and Labor Law § 200 claims as against Turner. Defendants move for summary judgment dismissing the same.

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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]). In addition, a defendant must have "actual or constructive notice of the purportedly unsafe condition" (*Singh v Black Diamonds LLC*, 24 AD3d at 140). Notably, "the mere fact that a general contractor had overall responsibility for the safety of the work done by the subcontractors is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013] [internal quotation marks and citation omitted]).

However, where an injury stems from a dangerous condition on the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 when the owner or contractor "'created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Here, plaintiff's accident was caused when he tripped on the uncovered and insufficiently secured Hole in the concrete slab of the Premises. This accident implicates both the means and methods of the work at the Premises and a hazardous condition inherent in the premises.

Means and Methods Analysis

Defendants argue that they did not have any ability to control or supervise plaintiff's work. The means and methods analysis, however, does not fall on whether a defendant had the authority to control plaintiff's work, but whether a party can control the "injury producing work" (*Naughton v City of New York*, 94 AD3d at 11).

That said, the record is devoid of any evidence establishing that the WFP defendants, Time or Security had the authority to supervise or control the injury producing work – i.e. securing the hole. Further, importantly, plaintiff does not oppose their dismissal. Accordingly, the WFP Defendants, Time and Security are entitled to summary judgment dismissing these claims as against them under the means and methods analysis.

Turning to Turner, it acted as a general contractor. Typically, a general contractor or construction manager who has mere general supervisory control over onsite safety would not be liable under Section 200 or the common-law via a means and methods analysis (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007] [that an entity "may have had the

authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [it] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014] [where a defendant "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [defendant] liable for plaintiff's injuries under Labor Law § 200"]).

Here, there is no evidence in the record establishing that Turner supervised or controlled the actual injury producing work – i.e. covering or securing of holes on the ninth floor. Nor did they supervise plaintiff or his work. Rather, Turner had a general supervisory responsibility for safety, of the type that does not give rise to liability under Labor Law § 200 or the common-law (*Hughes,* 40 AD3d at 309; *Bisram,* 116 AD3d at 476).

While Saunders testified that Turner was responsible in general for covering floor openings (Saunders tr at 77 ["It's the general contractor's responsibility to cover all floor openings"]), his testimony was not based on personal knowledge of Turner's contractual responsibilities. To the extent that Turner's contractual responsibilities included taking "all reasonable precautions and conform[ing] to all safety provisions" including providing "reasonable protection" (Allran's affirmation in opposition, exhibit 2 [the Time/Turner Contract], section 16.1; NYSCEF Doc. No. 324) such requirements evidence only general supervisory responsibilities. Accordingly, Turner is entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it under a means and methods analysis.

Hazardous Condition Analysis

Unlike the means and methods analysis, hazardous condition analysis does not require supervision and control over the injury producing work (*Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the workplace created by or known to the contractor]).

There is no dispute that none of the parties actively created the subject Hole. Plaintiff contends, however, that Turner knew or should have known of the subject Hole because its own employees were the site safety supervisors, who walked the floors every day. Plaintiff further contends that Donnelly's testimony that he saw Turner supervisors walk past the various uncovered holes on the ninth floor on days prior to the accident (Donnelly tr at 87) supports the position that Turner should have known of the condition. Plaintiff also points to the testimony of Costello, Turner's project superintendent, who testified that the Hole should have been covered (Costello tr at 89). Based on this, plaintiff argues that Turner breached its duty to protect against a hazardous condition.

As an initial matter, there is no testimony or evidence supporting that the WFP defendants, Time or Security knew or should have known of the subject uncovered Hole. Accordingly, they are entitled to summary judgment dismissing these claims as against them under the hazardous conditions analysis.

In opposition, defendants make several arguments. Specifically, they argue that (1) the hole was *de minimis* and, therefore, not actionable, (2) that there is no evidence supporting that they had actual knowledge of the condition and (3) there is no evidence establishing how long the hole was uncovered prior to plaintiff's accident.

First, defendants' argument that the Hole (whether it was five-inches by five-inches by three-inches deep, or four-inches by four-inches by two-inches deep) is *de minimis* is unpersuasive. Defendants cite to no caselaw that holds that a hole similar to the Hole is too trivial to create liability, and their attempt to compare the Hole to a seam between flagstones is unavailing.

Next, as to actual notice, the record is devoid of any evidence that Turner, in fact, knew of the subject Hole. However, as to constructive notice, questions of fact remain as to whether Turner should have known of the unsecured Hole and whether it existed in its uncovered state for long enough to allow Turner to remedy the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] ["To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it").

Specifically, there is testimony that Turner employees regularly walked the Premises specifically looking for safety issues (Donnelly tr. at 87; Costello tr at 18, 19). Costello testified that a condition such as the uncovered Hole was one that should have been corrected. Further, there is testimony from Donnelly that uncovered holes, such as the Hole, existed from the beginning of the Project, and were typically uncovered.

To the extent that Turner cites to its own daily logs, which do not indicate the existence of any hazardous condition on the ninth floor, such evidence merely underscores the question of fact raised by the above testimony.

To the extent that Turner argues that the Hole was open and obvious, such an argument applies only to plaintiff's comparative negligence and does not negate the broader duty to maintain the workplace in a safe condition (*see DeJesus v F.J. Sciame Constr. Co., Inc.*, 20

AD3d 354, 354 [1st Dept 2005]; *Maza v University Ave. Dev. Corp.*, 13 AD3d 65, 65 [1st Dept 2004]).

Accordingly, Turner is not entitled to dismissal of these claims under the hazardous condition analysis. Given these questions of fact, plaintiff is also not entitled to summary judgment in his favor on these claims as against Turner.

Thus, given the foregoing, the WFP Defendants, Time and Security are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them, Turner is not entitled to the same, and plaintiff is not entitled to summary judgment in his favor on the same as to Turner.

Defendants' Contractual Indemnification Claim Against Allran
(Motion Sequence Numbers 006 and 008)

Finally, defendants move for summary judgment in their favor on their third-party claim for contractual indemnification as against Allran. Allran moves for summary judgment dismissing the same.

Additional Facts Relevant to This Issue

By "Agreement," dated August 28, 2013, Turner and Allran contracted for Allran's electrical services at the Project. (Allran's notice of motion, exhibit 7; NYSCEF Doc. No. 168) (the Allran Agreement). The Allran Agreement includes an indemnification provision that provides the following:

> "[Allran] assumes the entire responsibility and liability for any and all actual or potential damage or injury . . . caused by, resulting from, arising out of or occurring in connection with the execution of the Work . . . . [Allran] agrees to indemnify and save harmless the Indemnified Party from and against any and all such claims . . . that the Indemnified Party may directly or indirectly sustain . . ."

(*id.*, § XXIII) (the Turner/Allran Indemnification Provision).[3]

The scope of Allran's work is contained in a separate, related and undated document, entitled "Subcontract Work Order" (Allran's notice of motion, exhibit 6; NYSCEF Doc. No. 167) (the Work Order). As relevant, Allran's scope of work included the following:

> "[Allran] shall layout and coordinate all floor penetrations for furniture systems, millwork, kitchen equipment, fixtures and appliances as part of this contractor's work. Include for temporary protection covers or protection for all electrical raceways and cell systems. Upon completion of floor cell system work, this contractor shall secure all floor plates"
>
> (*id.*, p 4, item 106).

In addition, a "general contract rider" (the Rider) is annexed to the Work Order (*id.*). It provides, as relevant:

> "Electrical subcontractor shall include removal of existing debris & wiring in cell system (survey to ensure all is decommissioned) and reset and screw down of all floor trench covers to align flat and smooth with floor"
>
> (*id.*, Rider, § 43).
>
> "This subcontractor is responsible for all safety cone and tape protection at any open floor cell locations where work is being performed until the cell system is safe and secured"
>
> (*id.*, Rider, § 44).

"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

[3] Indemnified Party is a defined term. It includes, amongst others, the "Contractor [Turner], the Owner [identified as Time in a separate document], any party required to be indemnified pursuant to the General Contract" (Allran's notice of motion, exhibit 7, § XXIII; NYSCEF Doc. No. 168).

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 when he tripped over the improperly secured Hole in the concrete slab of the ninth floor of the Project. Questions of fact remain as to whether securing the Hole fell within the scope of Allran's work and, therefore, whether the Turner/Allran Indemnification Provision was triggered.

Specifically, the subject indemnification provision is limited to any injury arising out of Allran's work, as defined by its scope of work. Allran's scope of work, however, may not have included the Hole.

To wit, while defendants argue that the Hole was a part of the floor's cell system that should have been secured (which would fall within the scope of Allran's work under "item 106"), Allran argues that the Hole was not part of their work, since they did not create the Hole and it may not have been a part of a cell system or an electrical raceway.

Initially, Allran is correct that Rider § 43 does not apply to plaintiff's accident. Section 43 requires Allran to "reset and screw down all floor trench covers." There is no evidence that the subject hole was a floor trench.

Next, as to Allran's general scope of work, witness and expert testimony call into question the nature of the Hole, such that a determination at this time would be inappropriate. Specifically, while plaintiff and Costello characterized the hole as a floor box, there is no testimony or evidence which establishes that it was an "electrical raceway" or part of the "cell system" that should have been covered as required in Allran's scope of work. Further, expert testimony disputes the nature of the floor box, raising additional questions of fact that a jury must determine.

A similar issue arises with respect to section 44 of the Rider, which states that Allran was "responsible for all safety cone and tape protection at any open floor cell locations where work is being performed" (Allran's notice of motion, exhibit 6, Rider; NYSCEF Doc. No. 167). Importantly, there is no evidence on the record for this motion that establishes that "work [was] being performed" in the accident area, such that the requirements of Rider § 44 would apply.

Accordingly, as questions of fact remain as to whether the Hole was a part of the floor cell system, the court cannot determine whether Allran was, as a matter of law, responsible for covering or otherwise securing it.

Thus, defendants are not entitled to summary judgment in their favor on their third-party claims for contractual indemnification as against Allran. Similarly, Allran is not entitled to summary judgment dismissing the same as against them.

To the extent that defendants seek a determination of whether they are proper additional insureds under Allran's insurance policy, such determination would require the presence of the

insurance company in this action. As Allran's insurer is not a defendant in this action, and this claim is not before this court, this court may not rule on this issue.[4]

Defendants' Common-Law Indemnification and Contribution Claims Against Allran (Motion Sequence Number 006 and 008)

Defendants move for summary judgment in their favor on their common-law indemnification and contribution claims against Allran. Allran moves for summary judgment dismissing the same. "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).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citations omitted]).

Each of these matters requires a determination to be made with respect to Allran's negligence. As discussed above, questions of fact remain regarding whether the accident arose from Allran's work and, therefore, whether Allran was negligent in failing to cover the subject hole.

[4] The court notes that Defendants and Allran's insurer are parties to a declaratory judgment action related to this action. The subject of that action is a determination of this very issue (*see* Defendants' notice of motion [motion sequence 008], exhibit V [declaratory judgment summons and complaint, bearing no index number]; NYSCEF Doc. No. 241]).

Accordingly, defendants are not entitled to summary judgment in their favor on their common-law indemnification and contribution claims as against Allran. Allran is also not entitled to summary judgment dismissing the same.

Defendants' Breach of Contract for the Failure to Procure Insurance Claims against Allran (Motion Sequence Numbers 006 and 008)

Allran moves for summary judgment dismissing defendants' breach of contract claim as against them. Defendants move for summary judgment in their favor on the same claim. The Allran Agreement included an insurance procurement provision (defendants' notice of motion [motion sequence number 008], exhibit A, § XXIV, p 13 [the Insurance Procurement Provision]; NYSCEF Doc. No. 220]). It requires Allran to obtain a commercial general liability policy with an additional insured endorsement. Specifically, it required the following:

> "The coverage to be provided to the additional insureds shall be for all liability arising out of the Work"
>
> (*id.*).

It is undisputed that Allran procured insurance in the amount of $2 million per occurrence that includes an additional insured endorsement (*see* defendants' notice of motion [motion sequence number 008], exhibit W [the Allran Policy]; NYSCEF Doc. No. 242).

Here, defendants dispute whether Allran's policy fulfilled the insurance procurement requirements of the Allran Agreement. Specifically, they make two arguments: (1) the policy did not contain $5,000,000 of coverage as required by the Allran Agreement, and (2) the additional insured endorsement was insufficiently broad.

Defendants fail to establish entitlement to summary judgment in their favor.

As an initial matter, the Insurance Procurement Provision requires commercial general liability coverage in the amount of "(see Work Orders) / Occurrence" and "(see Work Orders)

General Aggregate" (defendants' notice of motion [motion sequence number 008], exhibit A, § XXIV, p 11). The annexed copy of the Work Order contains either blank spaces or redacted values. Accordingly, defendants have not established that Allran's policy was insufficient.

Next, while defendants argue that Allran's policy is insufficiently broad because they procured insurance that did not include the requisite "arises out of" language, the court notes that there are several additional insured endorsements included in the subject policy, one of which does include such language (defendants' notice of motion [motion sequence number 008], exhibit W, p 14); and one of which does not (*id.*, p 106). Neither party indicate which endorsement is the proper endorsement (or whether both apply here). Importantly, such determinations fall within the scope of the related declaratory action where the insurer is a defendant.

To the extent that defendants argue that Allran breached its contract because its insurer has refused to indemnify defendants, such argument is unpersuasive (*see Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [denying a breach of contract for the failure to procure insurance claim, noting that "[t]he insurer's refusal to indemnify [the additional insured] under the coverage purchased by [the insured] does not alter this conclusion"]).

Turning to Allran, its argument to dismiss rests solely on the existence of the insurance contract itself. That said, because of the questions raised by defendants regarding the sufficiency of the additional insured endorsement, a question of fact remains as to whether the insurance Allran procured was sufficient to satisfy the Insurance Procurement Provision of the Allran Agreement. Whether the damages may be minor, in light of defendants' own fully ensured status, does not change this outcome (*see e.g. Inchaustegui v 666 5th Ave., Ltd. Partnership,* 96

NY2d 111, 114 [2001] [limiting damages to out of pocket losses in failure to procure insurance claims]).

Thus, defendants are not entitled to summary judgment in their favor on their breach of contract for the failure to procure insurance claims against Allran and Allran is not entitled to summary judgment dismissing the same.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiffs William A. Coon and Lisa Coon's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 241 (6) claim predicated upon an alleged violation of Industrial Code 12 NYCRR 23-1.7 (e) (1) as against all defendants/third-party plaintiffs WFP Tower B Co. L.P. (Tower), WFP Retail Co. L.P. (Retail) (together, the WFP Defendants), Turner Construction Company (Turner) and Time, Inc. (Time), and for summary judgment on the common-law negligence and Labor Law § 200 claim as against Turner is denied; and it is further

ORDERED that third-party the motion of Allran Electric of N.Y. (Allran) (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint as against it, is denied; and it is further

ORDERED that the motion of Tower, Retail, Turner, Time and defendant Security Control Integrators, Inc. (Security) (collectively defendants) (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent that the with respect as to the following:

1) dismissing the Labor Law § 240 (1) claim as against defendants

2) dismissing those parts of the Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (e) (2) and all other abandoned provisions as against all defendants

3) dismissing the common-law negligence and Labor Law § 200 claim as against the WFP Defendants, Time and Security;

and the motion is otherwise denied; and it is further

ORDERED that defendants' motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment in their favor on their third-party claims against Allran is denied; and it is further

ORDERED that the remainder of the action shall continue.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: New York, New York
3/9/22

So Ordered:

Hon. Lynn R. Kotler, J.S.C.