SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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INDEX NO. 155834/2017

MOTION DATE

MOTION SEQ. NO. 004 005 006

MICHAEL MCGOVERN,

Plaintiff,

- v -

CBRE, INC, SUMMIT GLORY, LLC, IRONSHORE HOLDINGS (US) INC., STRUCTURE TONE, LLC,

Defendants.

DECISION + ORDER ON MOTION

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CBRE, INC., SUMMIT GLORY, LLC, IRONSHORE HOLDINGS (US) INC., STRUCTURE TONE, LLC,

Third-party Plaintiffs,

-against-

Third-Party
Index No. 595360/2018

LIBERTY CONTRACTING CORP., SWEENEY & HARKIN CARPENTRY & DRYWALL CORP.,

Third-party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 133-156, 189, 196, 203, 204, 209-211, 215, 217-219

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 157-176, 193, 197, 201, 202, 205, 206, 212-214, 223-225

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 177-188, 192, 194, 195, 198-200, 207, 208, 216, 220-222

were read on this motion for summary judgment.

Third-party defendant Liberty Contracting Corp. moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the third-party complaint and all claims and cross

claims against it. Defendants/third-party plaintiffs CBRE, Inc., Summit Glory, LLC, Ironshore Insurance Services, LLC s/h/a Ironshore Holding (U.S.), Inc., and Structure Tone, LLC (collectively, defendants/third-party plaintiffs) oppose. Plaintiff and third-party defendant Sweeney & Harkin Contracting and Drywall Corp. (Sweeney) each oppose in part. (Mot. seq. 4).

Sweeney moves pursuant to CPLR 3212 for an order granting it summary dismissal of all third-party and cross claims against it and granting common law indemnification and contribution against Liberty. Defendants/third-party plaintiffs oppose. Plaintiff and Sweeney each oppose in part. (Mot. seq. 5).

Defendants/third-party plaintiffs move for an order pursuant to CPLR 3211 and/or CPLR 3212 partially dismissing plaintiff's complaint against it, granting summary judgment on their third-party complaint against Liberty and Sweeney and dismissing any cross claims against them. Plaintiff, Liberty, and Sweeney each oppose in part. (Mot. seq. 6).

I. PERTINENT BACKGROUND

A. Relevant contract provisions

Structure Tone, as general contractor on the construction site where the accident occurred, entered into practically identical subcontractor agreements with Liberty (NYSCEF 154) and Sweeney (NYSCEF 179), the following provisions of which are at issue:

> 4.2 Additional Insureds: All insurance required by this Agreement (excluding only Worker's Compensation Insurance & Professional Liability Insurance) must name Structure Tone, Inc.; the owner of the project, the owner of the property where project is located; all parties required to be indemnified by Contract Documents; all parties required to be indemnified as additional insureds…
>
> 11.2 To the fullest extent by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc., the owner of the project, the owner of the property where the job/project is located, and all parties required to be indemnified by the prime contract entered into by Structure Tone, Inc. in connection with the job/project work, and any of their trustees, officers, members, directors, agents, affiliates, parents, subsidiaries, and servants and employees from and against any and all claims, suits, liens, judgments,

> damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, sub-subcontractors, its officers, directors, agents, employees and Subcontractors in connection with the performance of any work by subcontractor, its employees and sub-subcontractors pursuant to this Subcontract/Purchase Order or a related Proceed Order. Subcontractor will defend and bear all costs of defending any action or proceedings brought against Structure Tone, Inc. and or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or defaults.

Additionally, Sweeney submits a master subcontract agreement (NYSCEF 174) which contains the following indemnification clause:

> 1.0 To the fullest extent permitted by law, Subcontractor shall indemnify, defend and hold harmless Structure Tone, Inc., the Owner, the Architect and all of their parents, subsidiaries, affiliates, agents, officers and employees from and against all claims, damages, losses, penalties, intellectual property law violations, and expenses, including, but not limited to, attorney's fees and court costs, arising out of, or resulting from the performance, or failure in performance, of Subcontractor's Work and obligations as provided in the Contract Documents, including any extra Work, and from any claim, damage, loss or expense which (1) is attributable to bodily injury, sickness, disease, death, injury to or destruction of tangible property including the loss of use resulting therefrom, and (2) is caused in whole or in part by any acts, omissions or negligence of Subcontractor or anyone directly or indirectly employed by Subcontractor or anyone for whose acts Subcontractor may be liable regardless of whether it is caused in part by the acts, omissions or negligence of a party indemnified hereunder.

B. Complaint, third-party complaint, and bill of particulars

It is alleged in the complaint that on September 12, 2016, plaintiff, in the course of his employment by Sweeney, was "violently precipitated unto the ground" while walking on the fifth floor of the premises located at 28 Liberty Street in Manhattan, thereby sustaining injuries. Plaintiff asserts a cause of action for negligence against defendants/third-party plaintiffs. (NYSCEF 1).

By verified bill of particulars dated December 5, 2017, plaintiff clarifies that he was employed as a carpenter at the jobsite and alleges violations of Labor Law §§ 200 and 241(6), Industrial Code §§ 23-1.5, 23-1.7, 23-1.11, and 23-2.4, and the rules and regulations of OSHA." He alleges injuries to his right hip, lumbar spine, and cervical spine. (NYSCEF 142).

Defendants/third-party plaintiffs allege in their third-party complaint that they are entitled to indemnification and contribution from Liberty and Sweeney and that, pursuant to their subcontract agreements, both are in breach of an agreement to purchase insurance. They also seek attorney fees. (NYSCEF 20).

C. Relevant procedural history

By decision and order dated June 24, 2019, Liberty's prior motion for the summary dismissal of the third-party complaint against it was granted to the extent of dismissing defendants'/third-party plaintiffs' breach of contract cause of action for failure to procure insurance; the motion was otherwise denied as premature. (NYSCEF 71).

D. Material facts

1. Undisputed facts

Based on the parties' statements of material fact and responses thereto, the following facts are undisputed:

(1) The accident occurred on the fifth floor of 28 Liberty Street, New York, New York on September 12, 2016.

(2) Summit owns the premises where the accident occurred; CBRE is the managing agent; Ironshore was the tenant of the third, fourth, and fifth floors of the building when the accident occurred; Structure Tone was hired by Ironshore to serve as general contractor at the jobsite; Sweeney was hired by Structure Tone as a subcontractor to perform drywall and ceiling work at the jobsite; and Liberty was hired by Structure Tone as a subcontractor to perform demolition work at the jobsite.

(3) Structure Tone entered into subcontractor agreements with Sweeney and Liberty, each of which contained an indemnification agreement.

(4) Plaintiff was working as a shop steward for Sweeney at the time of the accident, which occurred as a result of that work.

(5) Plaintiff received all of his job-related instructions and materials solely from Sweeney.

(6) The accident occurred in a large room with sufficient lighting; plaintiff did not see any debris or other condition on the floor before the alleged accident despite passing through that area shortly beforehand.

(7) Plaintiff was caused to fall by a quarter-inch high pin that protruded from the floor and blended in with it. After the accident, plaintiff could not locate the pin without sweeping his foot along the floor.

(8) Sweeney's supervisor inspected the area of the alleged accident before he began work on the day of the accident and saw nothing out of place.

(9) There were no complaints or notifications of unsafe conditions at the site conveyed by Sweeney to Structure Tone.

(10) Liberty performed demolition at the jobsite on the fifth floor some time before the alleged accident.

2. Additional relevant deposition testimony

Plaintiff testified that he was caused to fall when the toe of his right boot caught the pin, and that a chunk of the sole of his boot was torn out. While he had seen pins sticking out of the floor at the jobsite before his accident, he had not seen the pin that caused his accident, although it looked like it had been there for a while. The pin was removed and disposed of before photographs of it could be taken. (NYSCEF 144)

Structure Tone's field supervisor testified that Liberty performed demolition work on the

jobsite on some nights, and that it demolished a wall the night before the accident. He was uncertain of this as Structure Tone had purged its project file. He believed that the pin was from the original construction, which had occurred 20 to 30 years prior, and that it was exposed due to work performed by Liberty.

In the field supervisor's view, Structure Tone was responsible for cleaning the jobsite at the end of each day and ensuring that it was safe for each day to follow. He testified that after Liberty performed a demolition at the jobsite, it would be responsible for doing an initial broom sweep of the area, and that Structure Tone would follow up and make sure the site was secure. (NYSCEF 147, 148).

Liberty's dispatcher testified that, according to job sheets he prepared, Liberty performed work on the fifth floor of the jobsite on August 6, 2016, and on August 31, 2016, it removed window blinds on the third and fifth floors, which, according to the job sheets, was the last time Liberty performed work at the site before plaintiff's accident. He qualified his testimony to the extent that the job sheets do not reflect all of the work performed by Liberty on a given site and/or on a given day, and testified that when Liberty was demolishing walls, it was responsible for removing pins, screws, and nails from the floor. Structure Tone would conduct a walkthrough at the end of the day and notify Liberty if it was not satisfied with the conditions. (NYSCEF 149).

Sweeney's supervisor testified that he was working in a nearby room when plaintiff's accident occurred, and he heard but did not see him fall. He stated that plaintiff showed him the pin after the accident, and that he believed that it was used to hold down a piece of track for a wall that had been demolished, although he did not know when. He removed the pin with a claw hammer and disposed of it even though no photographs were taken of it. His job included

inspecting the area where Sweeney employees worked, and he inspected the accident area before plaintiff started working there and saw nothing out of place. (NYSCEF 150).

II. DISCUSSION

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

A. Arguments common to all the motions

Movants argue that plaintiff fails to allege an Industrial Code violation sufficient to support his Labor Law § 241(6) claims absent proof that they violated Industrial Code §§ 23-1.7 and 1.11, and 23-1.5. They also maintain that as the pin was one-quarter inch long, it constitutes a nonactionable trivial condition. Liberty adds that plaintiff's Labor Law § 241(6) claim fails as the pin was an integral part of the work being performed. (NYSCEF 134, 159, 188).

In opposition, plaintiff asserts that the pin does not constitute a trivial defect as a matter of law, as other factors apart from its size must be considered, and that Industrial Code §§ 23-1.5, and 23-1.7(e) apply and support his Labor Law § 241(6) claim. (NYSCEF 204, 206, 208).

1. Analysis

a. Trivial defect

Whether a condition is trivial turns on the width, depth, elevation, irregularity, and appearance of the defect, as well as the time, place, and circumstance of the injury. (*Trincere v Cty. of Suffolk*, 90 NY2d 976, 977-78 [1997]). The precise dimensions of the defect are not dispositive (*Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [3/16 inch depression not trivial as edges sharp]); a trivial defect may constitute a snare or trap (*Glickman v City of New York*, 297 AD2d 220 [1st Dept 2002]).

While a quarter-inch height differential in a floor or walkway may be nonactionable in some circumstances (*Trincere* 90 NY2d at 977-78 [walkway height differential of under one inch deemed trivial]; *Forrester v Riverbay Corp*, 135 AD3d 448 [1st Dept 2016] [uneven floor on which fur from plaintiff's slippers got caught was trivial]), the defect in issue here is a sharp object protruding from the ground that ripped out a portion of plaintiff's boot when he walked on it. Such evidence differentiates the pin on which plaintiff caught his boot from objects found to be trivial in cases cited by movants. Movants thus fail to establish, *prima facie*, that the pin constitutes a trivial defect as a matter of law.

b. Labor Law § 241(6) claim

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*,

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

As plaintiff does not dispute that Industrial Code §§ 23-1.11, and 23-2.4 do not apply here, and as Code § 23-1.5 is too general to support a cause of action under Labor Law § 241(6) (*Martinez v 342 Property LLC*, 128 AD3d 408, 409 [1st Dept 2015]), at issue is whether movants demonstrate that there was no violation of § 23-1.7(e)(2).

Industrial Code § 23-1.7(e)(2) applies to "tripping and other hazards," providing that:

> (2) . . . 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.

A single pin or nail protruding from the floor, while not constituting an "accumulation of dirt and debris," constitutes a "sharp projection" under the statute. (*Lenard v 1251 Americas Assoc.*, 241 AD2d 391 [1st Dept 1997] [door stop which caused plaintiff to trip constituted sharp projection]; *cf. Mooney v BP/CG Center II, LLC*, 179 AD3d 490 [1st Dept 2020] [single screw did not constitute accumulation of debris or sharp object where it did not protrude from ground and was "clearly defined or distinct"]).

Although the exact origin of the pin is unknown, it is undisputed that such pins would be

removed when found at the jobsite. Thus, the pin, as placed, cannot have constituted an "integral part of the work performed." (*Cf. Colon v Carnegie Hall Soc., Inc.*, 159 AD3d 655 [1st Dept 2018] [extension cord on which plaintiff tripped necessary to perform work at jobsite; dismissal of Labor Law claim based on Industrial Code § 23-1.7(e)(1) warranted]).

Movants thus fail to demonstrate, *prima facie*, that they did not violate Code § 23-1.7(e)(2) of the Industrial Code.

III. LIBERTY'S MOTION FOR SUMMARY JUDGMENT

A. Contentions

Liberty asserts that as it last performed demolition work at the jobsite over one month before plaintiff's accident, and that as the pin was not discovered despite daily inspections during that time, it could not have created or had notice of it. Absent a basis for holding it liable for plaintiff's injuries under common law negligence or Labor Law, Liberty denies liability for indemnification or contribution, and without a valid claim for contractual indemnity, Liberty argues that defendants/third-party plaintiffs cannot recover attorney fees. (NYSCEF 134)

Liberty offers the affidavits of two of its forepersons, in which they reiterate that the job sheets indicate that they last performed work at the jobsite on August 6, 2016, and that at the end of each shift at the jobsite they would sweep and remove all protruding objects like nails and pins with scrapers. (NYSCEF 152, 153)

In partial opposition, plaintiff contends that as Structure Tone's supervisor admitted that Liberty was responsible for ensuring that no nails were left behind at the jobsite, Liberty's authority to supervise and control the injury-producing work provides a basis for finding it liable under Labor Law. And, as Structure Tone's supervisor testified that Liberty had demolished a wall at the jobsite the night before plaintiff's accident, and that the pin at issue came from that

wall, he also maintains that Liberty likely created the dangerous condition. (NYSCEF 204).

In separate opposition, defendants/third-party plaintiffs assert that the affidavits of Liberty's forepersons are not sufficiently reliable as neither was at the jobsite and thus had no personal knowledge of when Liberty was there, and that the testimony of Structure Tone's supervisor shows that Liberty workers were at the jobsite shortly before the accident and were performing work which likely caused the accident. Thus, Liberty's indemnification obligations to defendants/third-party plaintiffs under the subcontract are triggered, regardless of whether it was negligent. (NYSCEF 211).

In separate opposition, Sweeney also contends that at minimum, there is a triable issue of fact as to whether Liberty caused plaintiff's accident. (NYSCEF 215).

In reply, Liberty contends that Structure Tone's supervisor's testimony that it was there the night before the accident is unreliable and unsubstantiated, and that Structure Tone's purge of its records despite the reasonably anticipated litigation, should not be held against Liberty. It otherwise reiterates its arguments. (NYSCEF 217-219).

B. Analysis

Pursuant to the contract between Liberty and Structure Tone, Liberty agreed to indemnify Structure Tone for "costs arising in whole or in part and in any manner from the acts, omissions, breach or default of [Structure Tone]." While Liberty denies having created the condition which caused plaintiff's accident, there is conflicting testimony as to when Liberty last performed work at the jobsite and whether its work caused the accident. Thus, there are triable issues of fact as to whether Liberty caused plaintiff's accident. (*Vega v Metropolitan Transp. Auth.*, 133 AD3d 518 [1st Dept 2015] [conflicting deposition testimony on key issue sufficient to raise triable issue of fact to defeat summary judgment]).

B. Sweeney's motion for summary judgment

1. Contentions

Sweeney contends that defendants/third-party plaintiffs' claims for indemnification and contribution are barred as plaintiff did not suffer a grave injury as defined by the Workers' Compensation Law, and that any negligence is attributable to Liberty and Structure Tone, not Sweeney. Thus, Sweeney did not trigger the obligation of indemnification or contribution; rather, it is owed common law indemnification and contribution from Structure Tone and Sweeney. It additionally maintains that defendants/third-party plaintiffs' breach of contract for failure to procure insurance claim should be dismissed as it procured the requisite insurance, as evidenced by the attached certificate of insurance. (NYSCEF 159).

In partial opposition, Liberty reiterates its position that it is without fault with respect to plaintiff's accident, relying on its allegation that it last performed relevant work on the jobsite a month before the accident. It posits that if the accident was a result of its work, then Liberty and Structure Tone would both be liable for failing to inspect the site properly or note the condition at that time. It asserts that evidence as to the origin of the pin or how long it was in existence as a dangerous condition is fatally speculative and that Sweeney's disposal of the pin without photographing it should be held against it. (NYSCEF 201).

In separate partial opposition, plaintiff argues that Sweeney has failed to establish that it did not have constructive notice of the dangerous condition. (NYSCEF 206).

In separate partial opposition, defendants/third-party plaintiffs assert that the Workers' Compensation Law does not bar their claims for indemnification and contribution pursuant to their contract, and that Sweeney need not have been negligent to trigger its indemnification and contribution obligations under the contract; rather, there is a sufficient connection to their work.

They also deny that Sweeney's certificate of insurance is sufficient to prove it was properly insured. (NYSCEF 214).

In reply, Sweeney asserts that it is undisputed that plaintiff did not suffer a grave injury. Thus, it maintains that all claims for common law indemnification or contribution must be dismissed and it disputes defendants/third-party plaintiffs' argument that the indemnification and contribution provisions of its contract with Structure Tone are triggered absent negligence on its part. It otherwise reiterates its arguments. (NYSCEF 223-225).

2. Analysis

a. Grave injury

As it is undisputed that plaintiff did not suffer a grave injury as defined by Workers' Compensation Law § 11, Sweeney, as plaintiff's employer, cannot be held liable for common law indemnification or contribution. (*Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 402 [2001]).

b. Contractual indemnification and contribution

While the parties dispute the impact of the operative indemnification and contribution clauses of the subcontractor agreement between Sweeney and Structure Tone, it is clear from both provisions that they are triggered by any liability arising from Sweeney's "acts or omissions." As it is undisputed that plaintiff was injured while performing work for Sweeney, to the extent that defendants/third-party plaintiffs are held liable in negligence to plaintiff, they are entitled to indemnification from Sweeney. (*Madkins v 22 Little West 12th Street, LLC*, 191 AD3d 434 [1st Dept 2021]).

c. Common law indemnification against Liberty

As issues of fact remain as to whether Liberty created the condition which caused

plaintiff's accident, Sweeney's request for an order of indemnification against it is premature. (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]).

In light of this result, there is no need to address Sweeney's alleged spoliation of evidence.

d. Breach of contract for failure to procure insurance

Although the certificate of liability insurance offered by Sweeney as evidence of its compliance with the insurance procurement provision set forth in article 4.2 of the contract with Structure Tone (NYSCEF 179) constitutes evidence of the contract between them, it does not constitute "conclusive proof that coverage was procured" (*Shala v Park Regis Apartment Corp.*, 192 AD3d 607, 608 [1st Dept 2021], quoting *Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]). Thus, absent additional evidence of compliance with the insurance procurement provision, Sweeney fails to meet its *prima facie* burden of proving that it is entitled to dismissal of defendants/third-party plaintiffs' claim for breach of contract for failure to procure insurance. (*See Shala*, 192 AD3d at 608 [issues of fact precluded dismissal of defendant's insurance procurement claim where certificate of insurance was only proof submitted]).

C. Defendants/third-party plaintiffs' motion for summary judgment

1. Contentions

Defendants/third-party plaintiffs contend that plaintiff's Labor Law § 200 claim should be dismissed as against them absent constructive notice of the dangerous condition, as they did not supervise or control plaintiff's work, and as Liberty created the dangerous condition the night before. They argue that they are entitled to indemnification and contribution from Liberty and Sweeney pursuant to their respective subcontractor contracts as plaintiff's accident arose from

work performed by them. (NYSCEF 188).

In partial opposition, Liberty reiterates its position that it is without fault with respect to plaintiff's accident, and argues that Structure Tone's purge of its records despite pending litigation should be held against it and that testimony that Liberty performed work which caused the accident is speculative. (NYSCEF 199).

In separate partial opposition, plaintiff argues that defendants/third-party plaintiffs have not met their burden of showing that they had no constructive notice of the dangerous condition. (NYSCEF 208).

In separate partial opposition, Sweeney asserts that Structure Tone supervised the jobsite and was responsible for keeping it safe and would thus be liable for any negligence, that the indemnification provision of the master subcontractor contract controls, and that indemnification and contribution is triggered pursuant to it solely if there is bodily injury caused by its acts, omissions, or negligence, which is not the case here. Additionally, Sweeney maintains that pursuant to the General Obligations Law, an agreement to indemnify a party for its own negligence is unenforceable. (NYSCEF 216).

In reply, defendants/third-party plaintiffs assert that the master subcontractor contract is not incorporated by reference into the subcontract and is therefore inapplicable, although both provisions are triggered regardless of whether Sweeney was negligent. Additionally, they deny having created or having notice of the dangerous condition. They otherwise reiterate their arguments. (NYSCEF 220-222).

2. Analysis

a. Labor Law § 200 and common law negligence claims

Labor Law § 200 is "a codification of the common-law duty imposed upon an owner or

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

At issue is whether defendants/third-party plaintiffs had constructive notice of the dangerous condition. A defendant is charged with constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it (*Lopez v Dagan*, 98 AD3d 436, 438 [1st Dept 2012]). To demonstrate lack of constructive notice, a defendant must "produc[e] evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned." (*Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018], quoting *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). While the origin of the dangerous condition and when and if it became visible and apparent is unclear, the testimony is clear that Structure Tone was primarily responsible for keeping the jobsite clean and safe. And, while Structure Tone's supervisor testified that it would inspect the jobsite at the end of each workday and ensure that the site was clean and safe, he did not testify as to when the site was last inspected before plaintiff's accident. Thus, defendants/third-party plaintiffs fail to establish

prima facie that it lacked constructive notice of the dangerous condition. (*Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513 [1st Dept 2021] [testimony of typical course of conduct insufficient to make *prima facie* showing of lack of constructive notice absent evidence of when accident area was last cleaned or inspected]; *Barrett*, 167 AD3d at 520 [defendant failed to meet its burden where it did not produce sufficient evidence of inspection for the day of and prior to plaintiff's accident]).

In light of this result, there is no need to address Structure Tone's alleged spoliation of evidence.

b. Indemnification and contribution

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

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant Liberty Contracting Corp.'s motion for summary judgment (seq. 4) is denied; it is further

ORDERED, that third-party defendant Sweeney & Harkin Contracting and Drywall Corp.'s motion for summary judgment (seq. 5) is granted, to the extent of severing and dismissing all common law indemnification and contribution claims against it, and otherwise denied; it is further

ORDERED, that the motion of defendants/third-party plaintiffs CBRE, Inc., Summit Glory, LLC, Ironshore Insurance Services, LLC s/h/a Ironshore Holding (U.S.), Inc., and Structure Tone, LLC for summary judgment (seq. 6) is granted to the extent of dismissing plaintiff's claim based on Labor Law § 241(6) and on violations of sections 23-1.5, 23-1.11, and 23-2.4 of the Industrial Code, and otherwise denied; and it is further

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

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3/22/2022
DATE

BARBARA JAFFE, J.S.C.

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