SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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THOMAS BYRNE and KAREN BYRNE,

Plaintiffs,

- v -

LEND LEASE (US) CONSTRUCTION INC., LEND LEASE (US) CONSTRUCTION LMB INC., FIVE STAR ELECTRIC CORP., and EXTELL WEST 57TH STREET LLC,

Defendants.

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INDEX NO. 153864/2016

MOTION DATE 10/08/2021, 10/08/2021, 10/08/2021

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 146, 167, 168, 169, 170, 177

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 147, 149, 150, 151, 152, 153, 161, 162, 163, 164, 165, 166, 178, 179, 180, 181, 182

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 148, 154, 155, 156, 157, 158, 159, 160, 171, 172, 173, 174, 175, 176, 183, 184

were read on this motion for SUMMARY JUDGMENT.

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

In this action arising out of a construction site accident, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants Extell West 57th Street LLC (Extell) and Lend Lease (US) Construction LMB Inc. (Lend Lease) (motion sequence number 004).

Lend Lease and Extell move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims, cross claims, and counterclaims asserted against them. In addition, Lend Lease and Extell move for summary judgment on their cross claims for contractual indemnification against defendant Five Star Electric Corp. (Five Star) (motion sequence number 005).

Five Star moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims against it (motion sequence number 006).

BACKGROUND

On May 21, 2013, plaintiff Thomas Byrne (plaintiff) was injured on a construction project for a high-rise building known as One57, located at 157 West 57th Street, New York, New York (NY St Cts Elec Filing [NYSCEF] Doc No. 97 ¶ 1). Extell was the owner of the project (*id.* ¶ 2). Extell hired Lend Lease as the construction manager for the project (*id.* ¶ 3). Lend Lease hired Five Star as the main electrical contractor on the project (NYSCEF Doc No. 119 ¶ 22). Plaintiff was employed as a journeyman carpenter by nonparty R&J Corporation (R&J) on the date of the accident (NYSCEF Doc No. 97 ¶ 12).

Plaintiff testified at his deposition that, on the date of the accident, he was assigned to build kitchen soffits for the apartments in the residential portion of the building on the 25th floor (NYSCEF Doc No. 105, plaintiff tr at 64, 72). According to plaintiff, there was a waste or vent pipe protruding up from the concrete floor where a kitchen island was going to be installed (*id.* at 87–88). There also were electrical wires called BX cables coming up from the floor (*id.*). The electricians had wound the excess cables into a "hoop" and attached them to the pipe (*id.*). Plaintiff was provided with two Baker scaffolds to access the elevated area on the double drop ceiling (*id.* at 37–38). One of the scaffolds was about three feet tall, and the other scaffold was about five feet

tall (*id.* at 38). Plaintiff testified that he had to place one of the scaffolds "right directly over" the pipe and bundle of wires that protruded up from the floor in order to access his work area (*id.* at 89, 90–91).

According to plaintiff, he placed two bundles of materials that he needed for his work on top of the lower scaffold (*id.* at 105–106). Plaintiff then started to climb up the rungs of the ladder on the side of the lower scaffold with his hands positioned on the top rung (*id.* at 106–107). After plaintiff climbed two or three rungs, the scaffold started to tip (*id.* at 108–109, 113). As the scaffold was tipping towards him, plaintiff reached out with one hand and grabbed the other, taller scaffold (*id.* at 109–110, 121–122). However, once he grabbed the other scaffold, it also tipped over towards him, and both scaffolds and all of the materials that were on the scaffolds fell on top of him (*id.* at 124–126, 129). Plaintiff remained on the floor until other workers eventually came over and removed the scaffolds that were on top of him (*id.* at 130). Plaintiff realized that his left pant leg had become caught on the bundle of wires (*id.* at 120, 124, 136–137).

Hugh Boyle testified that he was Five Star's general foreman on the job at One57 (NYSCEF Doc No. 127, Boyle tr at 7, 9). His duties were "basically running the job from the electrical standpoint" (*id.* at 9). Five Star determined the length of the BX cables needed (*id.* at 29–30). Five Star's electrician exercised discretion in placing the wires, but Five Star "tr[ies] to tie it up to be safe" (*id.* at 37). Five Star employed a BX foreman, who oversaw a crew of BX cable installers (*id.* at 40–45). The BX foreman was responsible for the safe installation of the BX cable, which was to be installed according to the drawings (*id.* at 47–48, 70). Five Star also employed a full-time project manager (*id.* at 57). Boyle did not know whether the BX foreman inspected the area after the BX cable was installed (*id.* at 74). He was unaware of the condition of the BX roll that was attached to the waste pipe on the 29th floor kitchen island (*id.*).

Matthew Ross, a site safety manager employed by Lend Lease, testified that he worked at the premises in 2013 (NYSCEF Doc No. 126, Ross 10/6/20 tr at 8). The project was for a mixed-use building: half residential and half hotel (*id.* at 9). Adam Dewey, a former Lend Lease employee, created an accident report about the accident (*id.*). Ross was on site on May 21, 2013 (*id.* at 10). After R&J's foreman called Ross, he responded to plaintiff, who was on the 29th floor (*id.*). Ross did not recall if there were any witnesses to plaintiff's accident (*id.* at 16). Plaintiff told Ross that "he fell getting on the Baker scaffold. He was on the ground. Someone had to come to pull the Baker scaffold off him" (*id.*). Plaintiff complained that his back hurt (*id.*). Ross did not remember whether plaintiff was upright or in some other position when he arrived on the 29th floor (*id.* at 19). Plaintiff was using R&J's Baker scaffold (*id.* at 20). Five Star installed the BX cable where the waste pipe was installed (NYSCEF Doc No. 126, Ross 11/18/20 tr at 29). According to Ross, the BX cable had to be "in place safely and securely," i.e., coiled up and not lying on the floor so as to present a tripping hazard (*id.*). The BX cable provided power to the kitchen island (*id.* at 31). Ross stopped the work if he saw a tripping hazard (*id.* at 43). According to the daily reports, on May 16, 2013, Five Star was working in the ground floor mechanical room, second floor, third floor, and C-1 (*id.* at 61). Five Star did layout work on the 29th floor on April 16, 2013 (*id.* at 64–65). On April 9, 2013, Five Star performed layout work on the 29th floor (*id.* at 66). Five Star did punch list work on the 29th floor on April 3, 2013 (*id.* at 66–68).

Richard Albergo testified that he was employed by R&J as a sub-foreman on the project in 2013 (NYSCEF Doc No. 128, Albergo tr at 11). On the date of the accident, plaintiff called him to tell him that he had an accident (*id.* at 12, 15). He did not remember which floor plaintiff was on (*id.* at 13). Albergo ran up the stairs after plaintiff called him (*id.* at 13–15). Plaintiff was framing the ceiling on the particular floor he was working on (*id.* at 14). When he arrived on the

floor, plaintiff was lying on the floor in the area right next to the scaffold (*id.* at 16). Plaintiff had a "big gash" on his hand and was bleeding (*id.*). The scaffold was next to plaintiff (*id.*). Albergo asked plaintiff what happened, and plaintiff said, "I got hung up on some plumbing thing or wires on a plumbing thing and it stopped him from going up . . . and fell backwards" (*id.* at 20, 21). He said he fell over "whatever was in the middle there," he believed it was a loop vent, which was put in place when they poured the concrete (*id.*). Dewey, a superintendent, came up to ask plaintiff questions (*id.* at 21). Albergo helped plaintiff into the elevator and brought him down to the nurse's office (*id.* at 17).

An accident report states that "IP was climbing up the front of the scaffold when his foot got caught on a roll of bx cable located on a kitchen island waste pipe, adjacent to the scaffold" (NYSCEF Doc No. 142 at 2). The accident report indicates that "[a]s he felt himself lose his balance he grabbed the bakers scaffold for support. The scaffold was not heavy enough to support his weight and began to tip, causing him to fall and the scaffold to follow on top of him" (*id.*).

Dewey testified that he was a safety manager employed by Lend Lease in 2013 (NYSCEF Doc No. 139, Dewey tr at 11). Dewey performed safety inspections and reported any issues to the appropriate parties (*id.* at 12). He was there every day in 2013 (*id.* at 16). He did not recall who took a photograph that was annexed to the accident report (*id.* at 45–46).

Plaintiffs commenced an action under Index No. 161266/13 against Extell (NYSCEF Doc No. 99). Thereafter, plaintiffs commenced this action against Lend Lease and Five Star (NYSCEF Doc No. 100). By stipulation dated June 13, 2016, the parties agreed to add Extell to the instant action, and plaintiffs agreed to discontinue the original action (NYSCEF Doc No. 101). Plaintiffs thereafter filed an amended/supplemental summons and amended verified complaint, asserting

causes of action under Labor Law §§ 240 (1), 241 (6), and 200 and under principles of common-law negligence against Lend Lease, Extell and Five Star (NYSCEF Doc No. 102).

In their answers, Lend Lease and Extell assert cross claims for indemnification, contribution, and breach of contract against Five Star (NYSCEF Doc No. 103).

DISCUSSION

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73–74 [2020] [internal quotation marks and citation omitted]; *see also* CPLR 3212 [b]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553–554 [1st Dept 2010]).

A. Falsus in Uno Doctrine

Five Star contends that the complaint must be dismissed pursuant to the falsus in uno doctrine. According to Five Star, plaintiff testified that he did not know if the wire caught his pants on the way up the scaffold, or when he fell, but later changed his testimony and falsely stated that the wire caught his pants on his way up the scaffold.

> "The falsus in uno doctrine permits a factfinder to disregard entirely the testimony of a witness who has willfully testified falsely with respect to any material fact. The doctrine, however, is 'not mandatory,' and the court is free to credit any part of a witness's testimony that it deems true and disregard what it deems false"

(*DiPalma v State of New York*, 90 AD3d 1659, 1660 [4th Dept 2011], quoting *People v Johnson*, 225 AD2d 464, 464 [1st Dept 1996]).

To begin, "it is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]; *accord Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] ["The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned"]).

Even if the doctrine of falsus in uno applies, Five Star has not shown that plaintiff gave any testimony that is demonstrably false. The court cannot conclude that plaintiff falsely testified that the wire caught his pants as he climbed up the scaffold, even though he previously testified that he did not feel the wire catch his pants (NYSCEF Doc No. 134, plaintiff tr at 169, 170, 174–175). It is quite possible that he was confused by some questions, and simply clarified his testimony. Accordingly, the branch of Five Star's motion seeking dismissal of the complaint based upon the falsus in uno doctrine is denied.

B. Labor Law § 240 (1)

Plaintiffs move for partial summary judgment on the issue of liability under Labor Law § 240 (1) against Extell and Lend Lease. According to plaintiffs, they are entitled to judgment under the statute because the scaffold tipped over and caused plaintiff to fall. Plaintiffs also submit an affidavit from a construction site safety expert, Kathleen Hopkins (Hopkins), who opines that the scaffolds should have been secured to either the floor or wall by anchoring, and had they been secured in this manner, they would have remained stable and upright when plaintiff's leg became caught on the cables (NYSCEF Doc No. 98, Hopkins aff, ¶¶ 24-27). Hopkins states that the

scaffolds needed outriggers to remain steady and upright (*id.*, ¶ 21). Plaintiffs further contend that the scaffolds had to be secured for the purposes of his work.

Lend Lease and Extell argue, in opposition to plaintiffs' motion, and in support of their own motion, that there was nothing wrong with the scaffold and plaintiff had used the scaffold for hours before his accident took place. Lend Lease and Extell maintain that the scaffold did not cause plaintiff to fall; rather, he fell when his pant leg became snagged on the BX cable. They point out that Albergo offered a competing version of the accident: when Albergo arrived at the scene of the accident, the scaffold was in an upright position and not on top of plaintiff. Lend Lease and Extell also cite Albergo's testimony that plaintiff told him that he fell when he got "hung up on some plumbing thing or wires on a plumbing thing" (NYSCEF Doc No. 128, Albergo tr at 19). Furthermore, the accident report indicates that plaintiff fell when he became caught on the cable (NYSCEF Doc No. 129 at 2).

Five Star maintains that, as an electrical contractor, it cannot be held liable under Labor Law § 240 (1). In addition, Five Star argues that plaintiff is not a credible witness and that his testimony should be disregarded in its entirety. According to Five Star, plaintiff's placement of the scaffold next to the vent pipe was the sole proximate cause of his accident.

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in relevant part, as follows:

> "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) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in

elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *see also Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 491 [1995], *rearg denied* 87 NY2d 969 [1996]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Consequently, a plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) claim (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

As a preliminary matter, the court notes that it is undisputed that Extell was the owner of the project (NYSCEF Doc No. 97 ¶ 2; NYSCEF Doc No. 167 ¶ 2). "Liability under § 240 (1) rests on the fact of ownership, and whether the owner has contracted for the work or benefitted from it are legally irrelevant" (*Spagnuolo v Port Auth. of N.Y. & N.J.*, 8 AD3d 64, 64 [1st Dept 2004]).

In addition, there is no dispute that Extell retained Lend Lease as the construction manager. Lend Lease does not contest that it "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863–864 [2005]). As the Court of Appeals has held, "[t]he label of construction manager versus general contractor is not necessarily

determinative" (*id.* at 864). Accordingly, the court finds that Lend Lease may be held liable under sections 240 (1) and 241 (6).

Five Star contends that it is not a responsible party under Labor Law § 240 (1). In response, plaintiffs concede that Five Star is not an appropriate defendant with respect to their section 240 (1) claim (NYSCEF Doc No. 155 at 4). Thus, Five Star is entitled to dismissal of plaintiffs' Labor Law § 240 (1) claim. In light of this determination, the court need not reach Five Star's remaining arguments in support of dismissal of this claim.

Here, plaintiffs have established prima facie entitlement to judgment under section 240 (1) (*see Rroku v West Rac Contr. Corp.*, 164 AD3d 1176, 1176 [1st Dept 2018]; *Alvarez v 1407 Broadway Real Estate LLC*, 80 AD3d 524, 524 [1st Dept 2011). Plaintiff testified that the scaffold tipped over, causing plaintiff to fall and the scaffold to fall on top of him (NYSCEF Doc No. 105, plaintiff tr at 108–109, 123). Plaintiff also stated that he was not provided with any other safety devices (id. at 47–49). Given that a core objective of Labor Law § 240 (1) is to prevent a worker from falling, plaintiffs have shown a statutory violation as a matter of law (*see Garcia v 1122 E. 180th St. Corp.*, 250 AD2d 550, 551 [1st Dept 1998]).

Lend Lease and Extell have not established prima facie entitlement to summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim. In addition, Lend Lease and Extell have failed to raise an issue of fact as to their liability. Although Lend Lease and Extell argue that plaintiff was injured when his pant leg became caught on the roll of BX cable, they have not presented any admissible evidence contradicting plaintiff's account that the scaffold tipped over and caused him to fall to the floor.

Defendants rely heavily on Albergo's testimony that plaintiff "said [he] got hung up on some plumbing thing or wires on a plumbing thing and it stopped him from going up . . . , and [he]

fell backwards. He couldn't reach the scaffold and he fell backwards" (NYSCEF Doc No. 169, Albergo tr at 19–21). "While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment 'where it is the only evidence upon which the opposition to summary judgment is predicated'" (*Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018], quoting *Narvaez v NYRAC*, 290 AD2d 400, 401 [1st Dept 2002]). Here, this hearsay is the only evidence submitted to support the claim that plaintiff fell solely because his pant leg became caught on the BX cable. Furthermore, contrary to defendants' contention, plaintiffs were not required to prove that the scaffold was defective (*see Martinez-Gonzalez v 56 W. 75th St., LLC*, 172 AD3d 616, 617 [1st Dept 2019] ["Plaintiff was not required to show that the scaffold was defective"]; *accord Ross v 1510 Assoc. LLC*, 106 AD3d 471, 471 [1st Dept 2013]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290–291 [1st Dept 2002]).

Moreover, "[t]he fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment on his behalf" (*Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004]). Alberto's testimony that he observed the scaffold upright after the accident (NYSCEF Doc No. 169, Albergo tr at 24–25), does not materially contradict plaintiff's account as to how the accident occurred (*see Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005] [unwitnessed fall from ladder did not bar summary judgment where there was no substantiated challenge to the plaintiff's credibility]; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001] [plaintiff's motion for partial summary judgment under Labor Law § 240 (1) should have been granted "(w)here, as here, there is no substantiated challenge to credibility"]). Furthermore, the accident report, even if admissible, supports plaintiffs' claim that a violation of section 240 (1) occurred. It states that "[t]he scaffold was not heavy enough to support [plaintiff's]

weight and began to tip, causing him to fall and the scaffold to follow on top of him" (NYSCEF Doc No. 170 at 2).

Accordingly, plaintiffs' motion for partial summary judgment under Labor Law § 240 (1) is granted. The branch of Lend Lease and Extell's motion seeking dismissal of plaintiffs' section 240 (1) claim is denied. Since Five Star is not a responsible party under section 240 (1), the branch of Five Star's motion seeking dismissal of plaintiffs' section 240 (1) claim is granted.

C. Labor Law § 241 (6)

Labor Law § 241 (6) provides as follows:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a "nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). Labor Law § 241 (6) is not self-executing because it depends upon an outside source, the Industrial Code (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982], *rearg denied* 56 NY2d 805 [1982]). The Court of Appeals has held that,

> "for purposes of the nondelegable duty imposed by Labor Law § 241 (6) and the regulations promulgated thereunder, a distinction must be drawn between the provisions of the Industrial Code mandating compliance with concrete specifications and those that establish general safety standards by invoking the '[g]eneral descriptive terms' set forth and defined in 12 NYCRR 23-1.4 (a). The former give rise to a nondelegable duty, while the latter do not"

(*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

Thus, to prevail under Labor Law § 241 (6), the plaintiff must plead and prove the violation of a specific and applicable Industrial Code provision, and show that the violation was a proximate cause of the accident (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). A "plaintiff's failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)" (*Kowalik v Lipschutz*, 81 AD3d 782, 783 [2d Dept 2011] [internal quotation marks and citation omitted]).

The court first turns to Lend Lease and Extell's motion for summary judgment. In opposition to Lend Lease and Extell's motion, plaintiffs only rely on 12 NYCRR 23-5.1 (b) (NYSCEF Doc No. 151 at 16–17). Accordingly, plaintiffs have abandoned reliance on the remaining Industrial Code provisions cited in their bill of particulars (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]).

The First Department has determined that section 23-5.1 (b) is insufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim (*Alberto v DiSano Demolition Co., Inc.*, 194 AD3d 607, 608 [1st Dept 2021]; *Varona v Brooks Shopping Ctrs. LLC*, 151 AD3d 459, 461 [1st Dept 2017]; *Kosovrasti v Epic [217] LLC*, 96 AD3d 695, 695 [1st Dept 2012]; *but see O'Connor v Spencer [1997] Inv. Ltd. Partnership*, 2 AD3d 513, 513 [2d Dept 2003]). As this court is bound by First Department precedent (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), the court holds that this section is too general to support plaintiffs' section 241 (6) claim. Accordingly, Lend Lease and Extell are entitled to dismissal of plaintiffs' Labor Law § 241 (6) claim.

The court next turns to Five Star's motion for summary judgment. Five Star contends that it cannot be held liable under Labor Law § 241 (6). It is undisputed that Five Star was neither an owner nor a contractor. Thus, Five Star may only be held liable as an agent of either an owner or contractor.

As the Court of Appeals has explained statutory agency,

> "When the work giving rise to the duties [under Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that 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, 318 [1981]).

In light of the evidence that Five Star installed the BX cable that caught plaintiff's pant leg, and that the BX cables "had to be in place safely and securely" (NYSCEF Doc No. 126, Ross 11/18/20 tr at 26; NYSCEF Doc No. 127, Boyle tr at 24–25), there are questions of fact as to whether Five Star may be held liable under Labor Law § 241 (6) as a statutory agent (*see Coretto v Extell W. 57th St., LLC*, 137 AD3d 677, 678 [1st Dept 2016]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192–193 [1st Dept 2011]).

Plaintiffs only rely on 12 NYCRR 23-1.7 (e) in opposition to Five Star's motion (NYSCEF Doc No. 17-19). Thus, plaintiffs have abandoned reliance on the remaining Industrial Code sections cited in their bill of particulars (*see Kempisty*, 92 AD3d at 475).

Industrial Code § 23-1.7 provides as follows:

"(e) Tripping and other hazards.

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

(12 NYCRR 23-1.7).

Under First Department case law, sections 23-1.7 (e) (1) and (2) are sufficiently concrete to serve as predicates for a Labor Law § 241 (6) claim (*Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]; *Smith v McClier Corp.*, 22 AD3d 369, 370 [1st Dept 2005]).

In this case, Five Star has failed to meet its burden of demonstrating that sections 23-1.7 (e) (1) and (e) (2) are inapplicable. Indeed, Five Star only makes a conclusory assertion that "[n]one of these subsections are applicable to [the] facts alleged" (NYSCEF Doc No. 145 at 13). Even if plaintiff was not injured in a passageway (*see Canning v Barneys N.Y.*, 289 AD2d 32, 34–35 [1st Dept 2001]), defendants have failed to meet their burden of establishing that plaintiff was not injured in a "working area" as the result of a "sharp projection" (*see Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007] [issues of fact as to whether piece of wood embedded in trench and/or bent nail protruding from the wood were "sharp projections" in violation of section 23-1.7 (e) (2)]; *Kerins v Vasser Coll.*, 293 AD2d 514, 515 [2d Dept 2002] [issue of fact as to whether cracked pane of glass on double door constituted a sharp projection]). Plaintiff testified that his pants become caught on the end of a wire with a "fish hook" end (NYSCEF Doc No. 105, plaintiff tr at 123, 137). Therefore, Five Star is not entitled to dismissal of plaintiffs' Labor Law § 241 (6) claim.

D. Labor Law § 200 and Common-Law Negligence

Lend Lease and Extell argue that plaintiffs' Labor Law § 200 and common-law negligence should be dismissed because: (1) they did not exercise any control over plaintiff's or R&J's work or its use of the scaffolds, and did not supervise the manner in which Five Star performed its electrical installation; and (2) they did not create or have notice of any dangerous condition.

Five Star argues that the BX cables were "safe and proper" and that it did not create any dangerous condition on the site.

In response, plaintiffs contend that the accident resulted from the unsecured scaffolds and the BX cable in the middle of the floor where plaintiff had to perform his work. Plaintiffs assert that defendants have failed to meet their burden on summary judgment.

It is well settled that 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Claims under Labor Law § 200 and the common law fall under two categories: 'those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed'" (*Jackson v Hunter Roberts Constr., L.L.C.*, -- AD3d -- , 2022 NY Slip Op 03321, *1 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

> "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work"

(*id.* [internal quotation marks omitted]).

Here, plaintiffs' accident resulted from the unsecured scaffolds and the bundle of BX cable.

To the extent that the accident stemmed from the unsecured scaffolds, Lend Lease and Extell have demonstrated that they did not "actually exercise[] supervisory control over the injury-producing work" (*id.*). Plaintiff testified that he was using Baker scaffolds that were provided by R&J (NYSCEF Doc No. 125, plaintiff tr at 34, 39). Plaintiff's straw boss told him where he would be working (*id.* at 48, 61, 62). While plaintiffs argue that Lend Lease's representatives conducted multiple inspections of the site each day and had the authority to stop the work (NYSCEF Doc No. 126, Ross 11/18/20 tr at 42–43; NYSCEF Doc No. 127, Boyle tr at 69, 75), "that general level of

supervision is not enough to warrant holding it liable for plaintiff's injuries" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013], citing *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380–381 [1st Dept 2007]; *see also Gray v Balling Constr. Co.*, 239 AD2d 913, 913 [4th Dept 1997] [general supervisory authority contained within contract was insufficient to create liability under Labor Law § 200]).

Nevertheless, to the extent that plaintiff's accident resulted from the BX cable, Lend Lease and Extell have failed to establish prima facie entitlement to summary judgment. The BX cable "was not a condition created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff's arrival on the . . . floor that day" (*Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]). Lend Lease and Extell only offer a conclusory assertion that they neither "caused or created the dangerous condition or had notice of the condition that caused the accident involving plaintiff" (NYSCEF Doc No. 120 at 8). They have failed to establish when the area was last inspected prior to the accident, or that the BX cable with the "fish hook" end could not have been detected based upon a reasonable inspection (*see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015] [triable issues of fact as to constructive notice of the defective condition since the record was unclear as to when the staircase was last inspected prior to plaintiff's fall]). Defendants cannot meet their burden by pointing out gaps in plaintiffs' proof (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). Accordingly, the branch of Lend Lease and Extell's motion as to these claims is denied, "regardless of the sufficiency of [plaintiffs'] opposing papers" (*Winegrad*, 64 NY2d at 853).

Five Star has failed to demonstrate that it is not responsible under Labor Law § 200 or that it did not create a dangerous condition. "[A]n implicit precondition to this duty [under section

200] is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Rizzuto*, 91 NY2d at 352, quoting *Russin*, 54 NY2d at 317). Five Star asserts that the BX cable was "safe and proper." However, plaintiff testified that the BX cable did not have any protective covering, and that the end of the wire had been left exposed and that it looked like a "fish hook" (NYSCEF Doc No. 134, plaintiff tr at 137, 139). Therefore, Five Star is not entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims.

In light of the above, plaintiff has valid Labor Law § 200 and common-law negligence claims against Lend Lease, Extell, and Five Star.

E. Lend Lease and Extell's Contractual Indemnification Claim Against Five Star

Lend Lease and Extell move for contractual indemnification against Five Star, based on the following indemnification provision contained within Five Star's trade contract:

> "To the fullest extent permitted by law, Contractor [Five Star] agrees to defend, indemnify and hold harmless Construction Manager [Bovis Lend Lease LMB, Inc.] and Owner [Extell West 57th Street LLC], as well as any other parties which Construction Manager is required to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claim, cost, expense, or liability (including attorneys' fees, and including costs and attorneys' fees incurred in enforcing this indemnity), attributable to bodily injury, sickness, disease or death, or to damage to or destruction of property (including loss of use thereof), *caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Contractor*, its subcontractors and suppliers of any tier, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Contractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage, or destruction is caused by the sole negligence of a party indemnified hereunder. Contractor's obligation hereunder shall not be limited by the provisions of any Workers Compensation or similar act"

(NYSCEF Doc No. 130 at 316–317 [emphasis added]).

In opposition, Five Star contends that: (1) Lend Lease and Extell did not sufficiently plead a cross claim for contractual indemnification; (2) plaintiff's accident did not arise out of, result

from, or occur in connection with the performance of Five Star's work; (3) Lend Lease is not entitled to indemnification, as it is not a successor-in-interest to Bovis Lend Lease LMB Inc. or a parent or affiliate of Bovis Lend Lease LMB Inc.; and (4) there are questions of fact as to Lend Lease's negligence.

Contrary to Five Star's assertion, Lend Lease and Extell sufficiently pleaded a cross claim for contractual indemnification against it (*cf. A & J Produce Corp. v De Palo Indus.*, 215 AD2d 317, 317 [1st Dept 1995]). In their second cross claim, Lend Lease and Extell allege that "if the plaintiff was caused to sustain damages . . . through any carelessness, recklessness, acts, omissions, negligence and/or breach of duty, warranty and/or contract and/or strict tort liability other than of the plaintiff, then said injuries and damages arose out of the . . . acts, omissions, negligence and/or obligations, . . . and/or contract in fact or implied in law, upon the part of the codefendants, with *indemnification and save harmless agreement*, and or responsibility by them in fact and/or implied in law . . . ." (NYSCEF Doc No. 21, answer ¶ 31 [emphasis added]). The allegation that Five Star breached a contract that contained an indemnification and hold harmless agreement is a contract claim.

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492–493 [1st Dept 2016]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

To establish entitlement to full contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and

irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). A court may also grant conditional indemnification, which "serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he may expect to be reimbursed" (*Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-497 [1st Dept 2018] [internal quotation marks and citation omitted]). The First Department has ruled that an award of conditional indemnification is warranted where the indemnification provision does not purport to indemnify an indemnitee for his or her own negligence, even where there are issues of fact as to an indemnitee's active negligence (*see Cerverizzo v City of New York*, 116 AD3d 469, 472 [1st Dept 2014]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522–523 [1st Dept 2010]).

In the present case, Lend Lease and Extell have failed to establish that Lend Lease qualifies as an indemnitee. Five Star's trade contract defines the construction manager as "Bovis Lend Lease LMB, Inc." (NYSCEF Doc No. 130 at 6), not Lend Lease. Lend Lease and Extell make no arguments in their moving papers as to how Lend Lease is entitled to indemnification, and cannot meet their prima facie burden on reply (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"]).

Moreover, there is an issue of fact as to whether plaintiff's accident arose out of, resulted from and/or occurred in connection with Five Star's work (*see Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 136 [1st Dept 1989], *affd* 76 NY2d 172 [1990]). Plaintiff testified that his pant leg became caught on the BX cable (NYSCEF Doc No. 125, plaintiff tr at 120, 124). He also testified that "the casing of the wire itself, the steel casing was hooked into my pants," and the way that the wire had been cut made it look like a "fish hook" (*id.* at 137). Nevertheless, Ross testified

that the last time that Five Star performed any work on the 29th floor was about a month before the accident on April 16, 2013, when it did layout work, and that it also did work on the 29th floor on April 3, 2013 and April 9, 2013 (NYSCEF Doc No. 136, Ross 11/18/20 tr at 64–67). On May 16, 2013, Five Star was working on the ground floor mechanical room, second floor, third floor, and C-1, and not on the 29th floor (*id.* at 61). In view of this evidence, it has not yet been established that Five Star's acts or omissions were causally related to plaintiff's accident. That said, however, the fact that plaintiff's accident did not occur during the actual performance of Five Star's work is immaterial (*see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 271–272 [1st Dept 2007]).

Accordingly, Lend Lease and Extell are not entitled to summary judgment on their contractual indemnification claim against Five Star.

F. Lend Lease and Extell's Failure to Procure Insurance Claim Against Five Star

Lend Lease and Extell also move for summary judgment on their breach of contract claims against Five Star.

Five Star contends that it procured appropriate insurance as evidenced by its certificate of insurance, and the proper forum to determine whether coverage exists is a declaratory judgment action.

It is well established that an agreement to procure insurance is distinct from an indemnification or hold harmless agreement (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Generally, where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]). However, where the promisee has its own insurance

coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 935 [2d Dept 2015]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

Pursuant to the insurance requirements in exhibit C to Five Star's contract, Five Star was required to procure and maintain commercial general liability insurance with limits of $2 million per occurrence and aggregate, and umbrella insurance with limits of $5 million per occurrence and aggregate, naming Bovis Lend Lease LMB, Inc., its parents and affiliates and Extell as additional insureds on a primary, non-contributory basis (NYSCEF Doc No. 130 at 613).

Lend Lease and Extell have failed to establish that Five Star was required to purchase insurance for Lend Lease's benefit, i.e., it is a parent or affiliate of Bovis Lend Lease LMB, Inc.

The court turns to Extell's breach of contract claim against Five Star. Although Five Star submits a certificate of insurance (NYSCEF Doc No. 162), this evidence is insufficient to raise an issue of fact as to whether it procured insurance required by its contract (*see Prevost*, 155 AD3d at 536). Even though Zurich agreed to defend Lend Lease and Extell subject to a reservation of rights, Five Star procured a policy that limits coverage to liability "caused by [the named insured's] acts or omissions" (NYSCEF Doc No. 131 at 5). Five Star's contract states that "the use of any form . . . will not be acceptable if they limit coverage to the Additional Insureds for liability caused by their own acts or omissions, or those of the named insured (or someone acting on behalf of the named insured)" (NYSCEF Doc No. 130 at 613). Five Star also does not provide an umbrella policy in response to the motion.

Accordingly, the branch of Lend Lease and Extell's motion for summary judgment on their breach of contract claim is granted as to Extell only.

G. Cross Claims Against Five Star

Five Star moves for summary judgment dismissing Lend Lease and Extell's cross claims for common-law negligence, common-law indemnification, and contribution. As indicated above, Five Star has failed to demonstrate that it was not negligent (*see Winegrad*, 64 NY2d at 853). Five Star also does not address the contractual indemnification and breach of contract claims against it. Accordingly, Five Star is not entitled to dismissal of the cross claims against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of plaintiffs for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants Lend Lease (US) Construction LMB Inc. and Extell West 57th Street LLC is granted, with the issue of plaintiffs' damages to be determined at the trial of this action; and it is further

ORDERED that the motion (sequence number 005) of defendants Lend Lease (US) Construction Inc., Lend Lease (US) Construction LMB, Inc., and Extell West 57th Street LLC for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 241 (6) claim as against them, and granting defendant Extell West 57th Street LLC summary judgment on its breach of contract claim as to liability against defendant Five Star Electric Corp., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 006) of defendant Five Star Electric Corp. for summary judgment is granted to the extent of dismissing plaintiffs' Labor Law § 240 (1) claim

as against it, and plaintiff's Labor Law § 241 (6) claim except as to the alleged violation of 12 NYCRR 23-1.7 (e) as against it and is otherwise denied.

This constitutes the decision and order of the Court.

6/10/2022
DATE

RICHARD LATIN, J.S.C.

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