SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

----------X

INDEX NO. 154484/2017

ALFRED DOUGLAS,

Plaintiff,

MOTION SEQ. NO. 001 and 002

- v -

ROSELAND DEVELOPMENT ASSOCIATES, LLC, ALGIN MANAGEMENT CO., LLC, and PAVARINI MCGOVERN, LLC,

DECISION + ORDER ON MOTION

Defendants.

----------X

ROSELAND DEVELOPMENT ASSOCIATES, LLC, ALGIN MANAGEMENT CO., LLC, and PAVARINI MCGOVERN, LLC,

Third-Party
Index No. 595782/2017

Defs./TP Plaintiffs,

-against-

DFC STRUCTURES LLC and DIFAMA CONCRETE, INC.,

TP Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 85, 88, 89, 90, 94, 95

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 91, 92, 93, 96, 97, 98

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action commenced by plaintiff Alfred Douglas, third-party defendants DFC Structures ("DFC") and DiFama Concrete, Inc. ("DiFama") move (motion sequence 001) for an order, pursuant to CPLR 3212, granting summary judgment: 1) dismissing plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6); 2) dismissing the claims for common-law

indemnification, contractual indemnification, and breach of contract for failure to procure insurance asserted against them by defendants/third-party plaintiffs Roseland Development Associates, LLC ("Roseland"), Algin Management Co., LLC ("Algin"), and Pavarini McGovern, LLC ("Pavarini"); 3) granting DiFama's counterclaim for common-law indemnification as against Pavarini; and 4) for such other and further relief as this Court deems just and proper. Plaintiff opposes the motion.

Defendants/third-party plaintiffs Roseland, Algin, and Pavarini move (motion sequence 002) for an order: 1) dismissing the complaint pursuant to CPLR 3211 and/or 3212; 2) granting them summary judgment on their third-party claims against DFC and DiFama for contractual indemnification and breach of contract for failure to procure insurance; 3) dismissing the counterclaims against them; and 4) for such other and further relief as this Court deems just and proper. Plaintiff, DFC, and DiFama oppose the motion.

After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on January 9, 2017 in which plaintiff, an employee of DiFama, was injured at a construction site located at 242 West 53rd Street in Manhattan ("the site" or "the project" or "the premises") when he tripped on a piece of concrete as he exited a temporary bathroom on the ground floor of the project. NYSCEF Doc No. 24. 17. The premises were owned by Roseland and managed by Algin. Doc. 70. In or about April 2015, Roseland, the owner of the premises, entered into an agreement with Pavarini ("the contract") pursuant to which the latter was to serve as the construction manager for the project, which entailed the construction of a new rental apartment building at the site. Doc. 57. Paragraph 3.3.11 of the contract required that "[t]o the

fullest extent permitted by law and, with respect to ordinary negligence . . . [Pavarini] shall indemnify and hold [Roseland and] the entities required hereunder to be named as additional insureds" from any claims arising directly or indirectly from the performance of the work. Doc. 57.

Section 3.3.11.3 of the contract provided that:

> In claims against any of the Indemnitees by an employee of [Pavarini], a Trade Contractor, anyone directly or indirectly employed by them or anyone for whose acts or omissions they may be liable, the indemnification obligation under this Section 3.3.11 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for [Pavarini] or a Trade Contractor under workers' or workmen's compensation acts, disability benefits acts, or other employee benefit acts.

Doc. 57.

The Insurance Rider to the contract required, inter alia, that the Trade Contractor was to procure commercial general liability insurance with a single combined limit for bodily injury, personal injury, and property damage of at least $5 million per occurrence and aggregate, which limit could be provided through a combination of primary and excess/umbrella policies, although the primary policy had to have a minimum of a $2 million policy limit, and a minimum of at least $2 million per occurrence. Doc. 57 at Ex. F. Additionally, the trade contractor was required to name Pavarini, Roseland, and Algin as additional insureds. Doc. 57 at Ex. F.

After being hired, Pavarini prepared a safety plan for the project (Doc. 58) and, as agent of Roseland, entered into a trade agreement with third-party defendant DFC pursuant to which the latter was to act as the superstructure concrete trade contractor on the project. Doc. 59. Article 9(A) of the general conditions of the trade agreement provided, inter alia, that:

> To the greatest extent permitted by law, each Trade Contractor shall indemnify . . . save and hold [Roseland] . . . [Pavarini] . . . [and] all parties listed as additional insured[s] in this Trade Contract . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to be connected with:

1. The performance of work by [DFC], or any act or omission of [DFC];

2. Any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work [was] being performed or in the vicinity thereof . . . while [DFC was] performing the work . . .

Doc. 59.

The general conditions of the trade agreement provided, inter alia, that the indemnification provision thereof "shall not be construed to indemnify any Indemnitee for its own negligence if not permitted by law or to eliminate or reduce any other indemnification or right which [Roseland], [Pavarini], or Architect has by law." Doc. 59 at Art. 9 (C).

The trade contract also provided that DFC procure, inter alia, commercial general liability insurance with a combined single limit for bodily injury, personal injury, and property damage of at least $10 million per occurrence and aggregate. Doc. 59. The limit could "be provided through a combination of primary and umbrella/excess liability policies; however the primary policy [was required to] have a minimum of a $2 million policy limit, and a minimum of at least $2 million per occurrence. Doc. 59. Additionally, DFC was to name, Pavarini, Roseland and Algin, among others, as additional insureds. Doc. 59.

DFC and DiFama obtained general liability coverage from Hiscox Insurance Company in the amount of $2 million per occurrence and $4 million in the aggregate. Doc. 60. DiFama obtained excess coverage from Arch Insurance Company in the amount of $3 million per occurrence and a total aggregate limit of $5 million. Doc. 61.

In May 2017, plaintiff commenced the captioned action against Roseland, Algin, and Pavarini, alleging that he was injured on January 9, 2017 as a result of their negligent ownership,

control, management and/or maintenance of the premises. Doc. 1. He further alleged that the said defendants violated Labor Law sections 200, 241(6) and 240(1). Docs. 1, 11.

Roseland, Algin and Pavarini joined issue by their answer filed July 21, 2017, denying all substantive allegations of wrongdoing and asserting various affirmative defenses. Doc. 6.

On September 27, 2017, Roseland, Algin, and Pavarini commenced a third-party action against DFC and Di Fama. Doc. 9. As a first cause of action against DFC, the said defendants sought contractual indemnification. Doc. 9. As a second cause of action against DFC, the said defendants sought common-law indemnification. Doc. 9. As a third cause of action against DFC, the said defendants sought attorneys' fees. Doc. 9. As a fourth cause of action against DFC, the said defendants sought damages for breach of contract to procure insurance. Doc. 9.

As a first cause of action against DiFama, Roseland, Algin, and Pavarini sought contractual indemnification. Doc. 9. As a second cause of action against DiFama, the said defendants sought common-law indemnification. Doc. 9. As a third cause of action against DiFama, the said defendants sought attorneys' fees. Doc. 9. As a fourth cause of action against DiFama, the said defendants sought damages for breach of contract to procure insurance. Doc. 9.

In their amended answer to the third-party complaint, DFC and DiFama denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Doc. 18. DFC and DiFama also asserted first counterclaim against Roseland, Algin, and Pavarini sounding in common-law and contractual indemnification and a second counterclaim sounding in contribution. Doc. 18. Roseland, Algin and Pavarini denied all allegations in the counterclaims. Docs. 19 and 20.

In his bill of particulars dated October 6, 2017, plaintiff alleged that he was injured "on the ground floor of the building . . . just outside the entrance to a bathroom shanty." Doc. 11 at par. 5.

Plaintiff claimed that the defendants were negligent and that they violated sections 200, 241(6) and 240(1) of the Labor Law. Doc. 11 at par. 6. Plaintiff also alleged that defendants violated the following sections of the New York State Industrial Code: 23-1.5, 23-1.5(c)(3), 23-1.6, 23-1.7(d), 23-1.7(e)(1) and (e)(2), 23-1.7(f), 23-1.15, 23-1.16, 23-1.22(b), 23-2.5, 23-5.1, 23-5.1(j), 23-5.3, 23-5.4, 23-5.5, and 23-5.6. Doc. 11 at par. 6.

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that he was employed as a carpenter's steward by DiFama and that he began working at the site in 2016. Doc. 53 at 25-28, 55-56. On the day of his alleged accident, the plaintiff was in the sub-basement of the building being built when he had to use a temporary bathroom which was located on the ground floor. Doc. 53 at 68-69, 82-83. In order to access the ground floor, he walked up a set of stairs. Doc. 53 at 82. Once he left the stairway, he had to walk approximately 75 feet to reach the bathroom. Doc. 53 at 86. As he walked towards the bathroom on the first floor, he observed debris, including scattered pieces of concrete as well as dust and insulation. Doc. 53 at 87-89. He did not know where the pieces of concrete came from, did not see anyone working with concrete on the ground floor, and did not know how long the concrete had been there. Doc. 53 at 87-88, 92.

The plaintiff recalled that dumpsters filled "with garbage and stuff" "create[ed] a pathway towards the bathroom." Doc. 53 at 89-90, 102. He did not know who brought the dumpsters there or who lined them up, but recalled that laborers filled them with garbage. Doc. 53 at 90-91, 103-104. Nor did he know who employed the laborers. Doc. 53 at 91-92.

After the plaintiff exited the bathroom, he took one step down from the bathroom onto the concrete floor and twisted his left foot when he stepped on a piece of concrete about half the size

of his fist. Doc. 53 at 95-98. This caused him to fall forward and to strike a dumpster and the concrete floor. Doc. 53 at 99.

Deposition Testimony of Brian Frederick of Pavarini

Bryan Frederick, a superintendent for Pavarini, testified at his deposition that the said company was the general contractor or construction manager retained by Roseland for the project and that, in that capacity, it supervised the construction trades. Doc. 54 at 14, 23-24. One of those trades was DiFama, a subcontractor which poured the concrete floors. Doc. 54 at 22. Frederick believed that DiFama was the same entity as DFC. Doc. 54 at 22.

Pavarini was at the site daily; had the authority to stop a contractor's work if it observed an unsafe condition or work practice; and had its own laborers at the project, who were responsible for general housekeeping, maintenance and cleaning of debris. Doc. 54 at 24-28. Pavarini's laborers used dumpster containers stored on the ground floor to dispose of debris. Doc. 54 at 38-39, 86-87, 97. Although Pavarini usually asked DiFama to dispose of concrete debris, it also cleaned concrete debris itself if it presented a hazard. Doc. 54 at 96. The dumpsters were stored in rows and were either empty or filled with debris. Doc. 54 at 30. According to Frederick, the dumpsters were "positioned in such a way that they were adjacent to the bathroom shanty, however, leaving a hallway or passageway in between them with adequate space to walk and access the bathroom shanty." Doc. 54 at 30-31. The dumpsters on the first floor would have been filled by Pavarini's workers or DiFama's workers. Doc. 54 at 32.

Pavarini was responsible for dumping the contents of the dumpsters after they were brought to the first floor. Doc. 54 at 37. If debris fell out of one of the dumpsters on the first floor, Pavarini was responsible for putting it back into the dumpster. Doc. 54 at 38, 69. Pavarini was also responsible for cleaning debris on floors which had been turned over to it by DiFama. Doc. 54 at

26-27, 33. If debris was created when a trade received a delivery, that trade was responsible for cleaning it. Doc. 54 at 27. Pavarini's daily report for January 9, 2017 reflected that DiFama was working on floors 21-23. Doc. 54 at 51-52, Doc. 63.

Frederick further recalled that, in January 2017, a masonry trade named Sal Vio was building masonry walls with cement block at two basement levels and on the first floor. Doc. 54 at 86. This work created cement debris which may have been stored in dumpsters on the first floor and which Pavarini was to dispose of. Doc. 54 at 86-87.

Deposition Testimony of Mirsad Muminovic of Pavarini

Mirsad Muminovic, a labor foreman for Pavarini on the date of the incident who also appeared for a deposition, testified that he performed debris removal and supervised Pavarini's laborers to ensure they properly maintained and cleaned the site. Doc. 54 at 17, 27-28. Pavarini's workers cleaned the first floor at the end of each workday. Doc. 55 at 86. As of January 2017, Pavarini had "overall" responsibility for cleaning and maintaining the first floor and did periodic walkthroughs to ensure that they area was clear of debris. Doc. 55 at 30, 62-63. Muminovic did not recall any complaints regarding concrete debris on the first floor. Doc. 55 at 35-36.

Pavarini used a carting company named Cardella to provide "mini containers" used to remove debris from the site. Doc. 55 at 28-30. Before Cardella picked up the containers, Pavarini's laborers brought them to the first floor by the temporary bathroom. Doc. 55 at 58-60. Pavarini's laborers were instructed to ensure that the contents of the containers did not fall out and, if they did fall out, to put them back into the container. Doc. 55 at 61-63.

At 7 a.m. on the day of the plaintiff's alleged accident, Cardella was scheduled to pick up the containers at the site. Doc. 55 at 119-122, Doc. 66. According to Muminovic, who was at the project that day, Pavarini laborers brought the containers to the area adjacent to the loading dock,

and near the temporary bathroom, and arranged them in parallel rows for pickup. Doc. 55 at 124-125, 143-145.

Muminovic testified that Sal Vio installed concrete masonry units on the first floor using mortar that was mixed on the first floor. Doc. 55 at 64-65. During the course of its work, Sal Vio created cement debris and was responsible for cleaning it up. Doc. 55 at 68. Exhibit "C" at 68:15-23. Muminovic complained to Sal Vio's foreman about the company's failure to clean up mortar and/or cement debris created by its masonry work. Doc. 55 at 72-73. However, Muninovic also admitted that, if Sal Vio did not clean its own debris, then Pavarini would clean it. Doc. 55 at 138.

Muminovic had no recollection of DiFama working on the first floor during the days preceding plaintiff's accident or of it bringing any containers to the first floor during that time period. Doc. 55 at 130, 150-151. According to Muminovic, DiFama was responsible for bringing any debris it created on a higher floor down to the ground floor. Doc. 55 at 146-147.

Deposition Testimony of Vadim Ally of DiFama

Vadim Ally, a carpenter steward and concrete safety manager for DiFama, testified that, by January 2017, the street level ground floor had been turned over to Pavarini, which was thus responsible for cleaning debris in that location. Doc. 56 at 30-31, 49-52, 78-79, 85-86, 141-142. Ally's log confirmed that DiFama had turned the ground floor over to Pavarini by the date of plaintiff's accident and he insisted that the company would not have left concrete debris on a floor it had turned over. Doc. 56 at 33, 51-52, Doc. 67. Ally was not familiar with DFC. Doc. 56 at 16.

Joseph Chan, the Chief Financial Officer of DFC, was deposed in a different action involving the premises. Doc. 80.[1] In that action, plaintiff named Roseland, Algin, and DiFama as defendants and DFC was named as a third-party defendant. Doc. 80. Chan testified, inter alia, that

[1] The action in which Chan was deposed was *Bennici v Roseland Development Associates, LLC, et al*, New York County Index Number 160530/17. Doc. 80.

DFC did not have any assets or employees (Doc. 80 at 13-15); Gary Felsher owned both DFC and DiFama (Doc. 80 at 14); while in business, DFC had two officers, he and Felsher (Doc. 80 at 15-16); Chan was CFO of DFC and DiFama but was an employee of DiFama (Doc. 80 at 14-16); the person who negotiated contracts for DFC did so on behalf of DFC and DiFama (Doc. 80 at 51-52); while DFC and DiFama were in business, DFC entered into contracts and DiFama performed the work pursuant to them (Doc. 80 at 20-22); and DFC and DiFama both ceased doing business in 2020 (Doc. 80 at 35-36).

The note of issue was filed on August 27, 2021. Doc. 48.

Motion For Summary Judgment By DFC And DiFAMA (Motion Sequence 001)

DFC and DiFama now move, pursuant to CPLR 3212 (motion sequence 001), for summary judgment: 1) dismissing plaintiff's claims pursuant to Labor Law sections 240(1) and 241(6); 2) dismissing the claims against them by Roseland, Algin and Pavarini sounding in common-law and contractual indemnification and breach of contract to procure insurance; and 3) granting DiFama's claim for common-law indemnification as against Pavarini. Docs. 50-68. In support of the motion, DFC and DiFama argue that plaintiff's claim pursuant to Labor Law section 240(1) must be dismissed since his injury did not arise from their failure to provide him with protection against an elevation-related risk. Doc. 68. DFC and DiFama further assert that plaintiff's claim pursuant to Labor Law section 241(6) must be dismissed since each of the Industrial Code sections upon which the claim is predicated is inapplicable to the facts of this case or a violation thereof was not a proximate cause of plaintiff's injuries. Doc. 68. DiFama further asserts that, as plaintiff's employer, it cannot be sued for contribution or common-law indemnification since plaintiff has not sustained a "grave injury" as defined by Workers Compensation Law section 11. Doc. 68. DFC and DiFama also maintain that the contribution and common-law negligence claims against

them must be dismissed since there is no evidence that they had actual or constructive notice of the alleged condition, were not responsible for maintaining the area in question, and that Pavarini was negligent in maintaining the area. Doc. 68. Additionally, DFC and DiFama argue that the contractual indemnification claims against them by Roseland, Algin and Pavarini must be dismissed since those entities have not proven that they were free of negligence. Doc. 68. DFC and DiFama also assert that, if they are liable on the claim for contractual indemnification against them, then they are entitled to summary judgment on their counterclaim for common-law indemnification against Pavarini, the entity which was negligent. Doc. 68. Finally, DFC and DiFama argue that the claim against them by Roseland, Algin and Pavarini for breach of contract for failure to procure insurance must be dismissed since they procured the required insurance coverage. Doc. 68.

In opposition to the motion, plaintiff acknowledges that Labor Law section 240(1) is inapplicable herein and that Labor Law section 241(6) claim is applicable herein only insofar as it is predicated on Industrial Code sections 23-1.7(e)(1) and (e)(2). Doc. 88. Plaintiff maintains that those two sections of the Industrial Code clearly support his claim pursuant to Labor Law section 241(6) since the area where he fell was a "passageway" within the meaning of 23-1.7(e)(1) and was a "working area" pursuant to 23-1.7(e)(2), and that the concrete on which he tripped was not integral to the work being performed. Doc. 88. Plaintiff further asserts that his common-law negligence claim and claim pursuant to Labor Law section 200 cannot be dismissed since Pavarini failed to establish that it did not have notice of the alleged condition. Doc. 88.[2]

[2] An affirmation identical to that filed by plaintiff in opposition to the motion by DFC and DiFama under motion sequence 001 was filed in opposition to the motion for summary judgment filed by Roseland, Algin, and Pavarini under motion sequence 002. Docs. 88, 91.

In reply, DFC and DiFama argue that plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code section 23-1.7(e)(1), must be dismissed since plaintiff was not injured in a "passageway." Doc. 94. They further assert that plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code section 23-1.7(e)(2), must be dismissed since plaintiff was not injured in a "working area." Doc. 94.

Motion For Summary Judgment By Roseland, Algin and Pavarini (Motion Sequence 002)

Roseland, Algin, and Pavarini move (motion sequence 002): 1) to dismiss plaintiff's negligence claim and claims pursuant to Labor Law sections 200, 240(1) and 241(6) against them pursuant to CPLR 3211 and 3212; 2) granting them summary judgment on their third-party complaint against DFC and DiFama; and 3) dismissing the counterclaims against them. Doc. 83. In support of their motion, Roseland, Algin and Pavarini argue that the plaintiff's claim pursuant to Labor Law section 200 must be dismissed since they did not supervise his work and neither created nor had actual or constructive notice of the alleged condition. Doc. 83. They assert that the plaintiff's claim pursuant to Labor Law section 240(1) must be dismissed since he was not injured as the result of a significant height differential. Doc. 83. Additionally, Roseland, Algin and Pavarini maintain that plaintiff's Labor Law section 241(6) claim must be dismissed since the Industrial Code sections alleged by plaintiff are either inapplicable herein and/or are insufficiently specific to support a claim under the statute. Doc. 83. They further contend that DFC's and DiFama's counterclaims for contribution and common-law indemnification must be dismissed because there is no evidence of their negligence. Doc. 83. Finally, they assert that they are entitled to contractual indemnification from DFC and DiFama, which were alter egos of one another. Doc. 83.

For the reasons stated in its opposition to the motion by Roseland, Algin, and Pavarini, plaintiff maintains that his claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e)(1) and (e)(2) cannot be dismissed. Doc. 91. Plaintiff further asserts that his common-law negligence claim and claim pursuant to Labor Law section 200 cannot be dismissed since Pavarini failed to establish that it did not have notice of the alleged condition. Doc. 91.

In an affirmation in partial opposition, DFC and DiFama argue that they have no objection to the dismissal of the plaintiff's claim pursuant to Labor Law section 241(6) since it is based on inapplicable sections of the Industrial Code. Doc. 87. However, they oppose the branch of the motion by Roseland, Algin, and Pavarini seeking the dismissal of plaintiff's negligence and Labor Law section 200 claims against them because Pavarini was allegedly negligent in creating a dangerous condition and in failing to remedy the same. Doc. 87. DFC and DiFama further assert that Roseland, Algin, and Pavarini are not entitled to summary judgment on their counterclaims for contribution and common-law indemnification. Doc. 87. Finally, DFC and DiFama oppose the branch of the motion by Roseland, Algin and Pavarini seeking contractual indemnification from them. Doc. 87.

In reply, Roseland, Algin, and Pavarini argue that section 23-1.7(e)(1) is inapplicable herein since the area where plaintiff was injured was not a passageway and that section 23-1.7(e)(2) is inapplicable because plaintiff was not injured in a working area. Doc. 97. They further assert that, although Pavarini was responsible for debris removal at the site, DiFama was the only trade which created concrete debris at the site. Doc. 97. They also maintain that they had no notice of the alleged condition and did not supervise plaintiff's work. Doc. 97.

Roseland, Algin and Pavarini further assert that DFC and DiFama's counterclaims for contribution and common-law indemnification must be dismissed since DFC and/or DiFama created the concrete debris and because they (Roseland, Algin, and Pavarini) neither created nor had notice of the alleged condition. Doc. 98. They further assert that they are entitled to contractual indemnification from DFC and DiFama given the clear terms of the indemnification provision in DFC's trade agreement with Pavarini, even if such indemnification is partial. Doc. 98.

LEGAL CONCLUSIONS

Motion For Summary Judgment By DFC And DiFAMA (Motion Sequence 001)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). "The proponent must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "This burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Given that plaintiff has withdrawn his claim pursuant to Labor Law section 240(1), that branch of the motion by DFC and DiFama seeking summary judgment dismissing plaintiff's claim pursuant to that section is denied as moot.

Since plaintiff has withdrawn his claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.5, 23-1.5(c)(3), 23-1.6, 23-1.7(d), 23-1.7(f), 23-1.15, 23-1.16, 23-1.22(b), 23-2.5, 23-5.1, 23-5.1(j), 23-5.3, 23-5.4, 23-5.5, and 23-5.6, the branch of the motion by DFC and DiFama seeking to dismiss that claim is denied as moot as well.

Thus, the only remaining part of plaintiff's claim pursuant to Labor Law section 241(6) is that predicated on Industrial Code sections 23-1.7(e)(1) and (e)(2). Those sections provide 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.

Although the regulations do not define the term "passageway" (*Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 494 [1st Dept 2022] [*citation omitted*]), the Appellate Division, First Department has defined it as "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]).

Here, since the plaintiff testified that dumpsters filled "with garbage and stuff" "create[ed] a pathway towards the bathroom" (Doc. 53 at 89-90, 102), Frederick testified that the dumpsters were "positioned in such a way that they were adjacent to the bathroom shanty . . . leaving a hallway or passageway in between them with adequate space to walk and access the bathroom shanty" (Doc. 54 at 30-31), and Muminovic testified that Pavarini laborers brought the containers to the area adjacent to the loading dock, near the temporary bathroom, and arranged them in parallel rows for pickup (Doc. 55 at 124-125, 143-145), it is evident that DFC and DiFama have

failed to establish their prima facie entitlement to summary judgment dismissing plaintiff's section 241(6) claim as predicated on 23-1.7(e)(1) (*see Torres v Forest City Ratner Cos., LLC*, 89 AD3d 928 [2d Dept 2011] [plaintiff fell on floor in building in which he had been working, and to his left was a row of trash containers and to his right was a hoist or lift which was the only way to exit the building]; *Aragona v State*, 74 AD3d 1260 [2d Dept 2010] [where plaintiff fell while carrying materials along corridor created by lumber and construction material, a triable issue of fact existed regarding whether he fell in a passageway]).

Nor have DFC and DiFama established their prima facie entitlement to summary judgment dismissing the plaintiff's section 241(6) claim as predicated on Industrial code section 23-1.7(e)(2). Although the DFC and DiFama assert that the plaintiff did not fall in the specific area where he was working, this does not preclude a finding that his accident occurred within "a working area" covered by section 23-1.7(e)(2) since there is evidence in the record that he regularly traversed the area to reach the temporary bathroom. (*See Smith v Hines GS Properties, Inc*., 29 AD3d 433 [1st Dept 2006] [where workers regularly traversed spot where accident occurred a question of fact was presented as to whether plaintiff's fall occurred in "a working area" within the meaning of section 23-1.7(e)(2)]). Additionally, plaintiff testified that his accident occurred in an area where he saw debris including scattered pieces of concrete. Doc. 53 at 87-89.

The branch of the motion by DFC and DiFama seeking summary judgment dismissing the common-law negligence claim against them by Roseland, Algin and Pavarini is denied. Since DFC and DiFama have not demonstrated that they are free from negligence, a question of fact remains regarding whether the liability of Roseland, Algin and Pavarini, if any, for the acts of DFC and DiFama is solely vicarious. (*See Royland v McGovern & Co., LLC*, 203 AD3d 677 [1st Dept 2022]). Although DFC and DiFama were working on floors 21-23 on the date of plaintiff's

accident, they did not establish as a matter of law that they were not responsible for any of the concrete debris on the ground floor on the date of the accident. As noted previously, Muminovic testified that DiFama was responsible for bringing any debris it created on a higher floor down to the ground floor and, thus, the debris on which plaintiff fell could have been present as a result of DiFama's actions. Doc. 55 at 146-147. Nor did DFC and DiFama establish that they did not have any deliveries during the relevant time period which, as Frederick noted, may have created debris which DFC and DiFama would have been required to clean. Doc. 54 at 27.

DiFama argues that, as plaintiff's employer, Workers' Compensation Law section 11 bars any claim against it for contribution and common-law indemnification unless plaintiff sustained a "grave injury". However, this contention is disingenuous since that statute expressly permits indemnification claims "based upon a provision in a written contract." (*Rodrigues v N & S Bldg. Contrs*., 5 NY3d 427, 432 [2005] *citing* Workers' Compensation Law section 11). Additionally, although DFC, and not DiFama, entered into the trade agreement with Pavarini, pursuant to which DFC agreed to hold Roseland, Algin and Pavarini harmless from any claims arising from its work, it was DiFama, and not DFC, which performed the concrete work at the site. Thus, issues of fact clearly exist regarding whether DFC and DiFama were alter egos and, thus, whether DiFama may be liable to Roseland, Algin and Pavarini pursuant to the trade agreement. (*See generally, Henderson v Gyrodyne Co. of Am., Inc*., 123 AD3d 1091 [2d Dept 2014]).

DFC and DiFama further maintain that the contractual indemnification claims against them by Roseland, Algin and Pavarini must be dismissed since those entities have not proven that they were free of negligence. This contention is without merit. In making this assertion, DFC and DiFama overlook that the indemnification clause in DFC's trade agreement with Pavarini requires DFC to indemnify Pavarini, Roseland and Algin "[t]o the greatest extent permitted by law" against

"[a]ny accident or occurrence which happens, or is alleged to have happened, in or about the place where such work [was] being performed or in the vicinity thereof . . . while [DFC was] performing the work . . ." The agreement also provided for indemnification where plaintiff's injury arose from DFC's work. Such a broad indemnification agreement is triggered solely by virtue of an accident occurring in the course of the employee's work (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 418 [1st Dept 2021]). Although DFC and DiFama maintain that they were not working on the ground floor at the time of the plaintiff's accident, Muminovic's testimony that DiFama was responsible for bringing debris it created on higher floors down to the ground floor precludes a finding that DFC and DiFama did not cause or contribute to plaintiff's accident as a matter of law. Further, since the indemnification provision contains a savings clause, it does not violate General Obligations Law section 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 209 [2008]; *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 590 [1st Dept 2018]).

DFC and DiFama are not entitled to summary judgment dismissing the claim against them by Roseland, Algin and Pavarini for breach of contract for failure to procure insurance. Although DFC and DiFama submit proof purporting to demonstrate that they procured insurance in accordance with the trade agreement, they do not explain how or why this documentation establishes that they fulfilled their insurance procurement obligations. Further, issues of fact exist regarding whether the required coverage was procured given that the Hiscox Insurance policy named both DFC and DiFama as insureds and the Arch excess policy named only DiFama. These issues of fact may be related to the issue of whether the entities were alter egos.

The branch of the motion by DFC and DiFama seeking summary judgment on their counterclaim for common-law indemnification against Pavarini is denied. "A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any

negligence . . . on its own part." (*Ramirez v Almah, LLC*, 169 AD3d 508, 509-510 [1st Dept 2019] [*citation omitted*]). Since DFC and DiFama have not established that they are vicariously liable for any acts by Pavarini, they are not entitled to this relief.

Motion For Summary Judgment By Roseland, Algin and Pavarini (Motion Sequence 002)

The branch of the motion seeking to dismiss plaintiff's negligence claim and claim pursuant to Labor Law section 200 is denied. Liability under section 200 and under the common-law arise from dangerous conditions at the premises or from the manner in which the work was performed. (*Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d 139 [1st Dept 2012]). Here, plaintiff's accident clearly arose from a dangerous condition at the site. Thus, liability can only be imposed on Roseland, Algin, and/or Pavarini if they created or had actual or constructive notice of the condition. *Cappabianca v Skanska USA Bldg., Inc.*, 99 AD3d at 144, *citing Mendoza v Highpoint Assoc. IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). Since these defendants have not established that they did not create or have actual or constructive notice of the condition, this claim cannot be dismissed. (*See Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020]). Although Roseland, Algin and Pavarini submit the plaintiff's testimony that he did not know who created the condition or how long it existed, they fail to submit any evidence regarding when the area was last inspected before the incident. (*see Simo v City of New York*, ___AD3d___, 165 NYS3d 853 [1st Dept, May 12, 2022]). For the same reason, Roseland, Algin and Pavarini are not entitled to the dismissal of the counterclaim against them by DFC and DiFama seeking contribution.

As discussed previously, plaintiff has withdrawn his claim pursuant to Labor Law section 240(1). Thus, that branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment dismissing plaintiff's claim pursuant to that section is denied as moot.

Since plaintiff has withdrawn his claim pursuant to Labor Law section 241(6) as predicated on Industrial Code sections 23-1.5, 23-1.5(c)(3), 23-1.6, 23-1.7(d), 23-1.7(f), 23-1.15, 23-1.16, 23-1.22(b), 23-2.5, 23-5.1, 23-5.1(j), 23-5.3, 23-5.4, 23-5.5, and 23-5.6, the branch of the motion by Roseland, Algin, and Pavarini seeking to dismiss this claim is denied as moot as well.

For the same reasons discussed in connection with the motion by DFC and DiFama, Roseland, Algin and Pavarini have failed to establish their prima facie entitlement to summary judgment dismissing the plaintiff's section 241(6) claim as predicated on Industrial Code sections 23-1.7(e)(1) and 23-1.7(e)(2).

The branch of the motion by Roseland, Algin and Pavarini seeking summary judgment on their contractual indemnification claim against DFC and DiFama is denied. Although the indemnity provision is enforceable "[t]o the greatest extent permitted by law", and thus does not run afoul of General Obligations Law section 5-322.1 since it does not allow Roseland, Algin or Pavarini to be indemnified for their own negligence, a conditional grant of contractual indemnification must be denied as premature at this juncture given that issues of fact exist as to what extent, if any, Roseland, Algin, and/or Pavarini were liable for the hazardous condition. (*see Spielmann v 170 Broadway NYC LP*, 187 AD3d 492 [1st Dept 2020]).

Roseland, Algin and Pavarini are not entitled to summary judgment on their common-law indemnification claim against DFC and DiFama since they have failed to establish as a matter of law that any liability they may have herein is strictly vicarious. (*Ramirez v Almah, LLC*, 169 AD3d at 509-510). Nor are they entitled to the dismissal of the counterclaim by DFC and DiFama seeking common-law indemnification since they have failed to establish as a matter of law that DFC and DiFama were not vicariously liable for their acts.

Roseland, Algin and Pavarini are not entitled to summary judgment on their claim against DFC and DiFama for attorneys' fees, since "[a]n award of attorneys' fees is a form of relief, not an independent cause of action". *Ihg Mgt. (Md.) LLC v West 44th St. Hotel LLC*, 2020 NY Misc LEXIS 2280 [Sup. Ct. New York County 2020] *citing Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 27 AD3d 217 [1st Dept 2006]). Nor has Roseland, Algin or Pavarini specified any provision of the trade agreement pursuant to which they would be entitled to such fees.

Finally, Roseland, Algin and Pavarini are not entitled to summary judgment on their claim against DFC and DiFama for breach of contract to procure insurance since they do not establish as a matter of law that DFC and DiFama failed to procure the insurance required by the trade agreement.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the branch of the motion by third-party defendants DFC and DiFama seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240(1) (motion sequence 001) is denied as moot insofar as plaintiff has withdrawn the said claim; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.5, 23-1.5(c)(3), 23-1.6, 23-1.7(d), 23-1.7(f), 23-1.15, 23-1.16, 23-1.22(b), 23-2.5, 23-5.1, 23-5.1(j), 23-5.3, 23-5.4, 23-5.5, and 23-5.6 is denied as moot insofar as plaintiff has withdrawn the said claim; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e)(1) and 23-1.7(e)(2), is denied; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment dismissing the contribution, common-law indemnification, and contractual indemnification claims against them by Roseland, Algin and Pavarini is denied; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment dismissing the claim against them by Roseland, Algin, and Pavarini for breach of contract to procure insurance is denied; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment on their counterclaim for common-law indemnification against DFC and DiFama is denied; and it is further

ORDERED that the branch of the motion by defendants/third-party plaintiffs Roseland, Algin and Pavarini seeking summary judgment dismissing plaintiff's negligence claim and claim pursuant to Labor Law section 200 (motion sequence 002) is denied; and it is further

ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 240(1) is denied as moot insofar as plaintiff has withdrawn the said claim; and it is further

ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.5, 23-1.5(c)(3), 23-1.6, 23-1.7(d), 23-1.7(f), 23-1.15, 23-1.16, 23-1.22(b), 23-2.5, 23-5.1, 23-5.1(j), 23-5.3, 23-5.4, 23-5.5, and 23-5.6 is denied as moot insofar as plaintiff has withdrawn the said claim; and it is further

ORDERED that the branch of the motion by DFC and DiFama seeking summary judgment dismissing plaintiff's claim pursuant to Labor Law section 241(6), as predicated on Industrial Code sections 23-1.7(e)(1) and 23-1.7(e)(2), is denied; and it is further

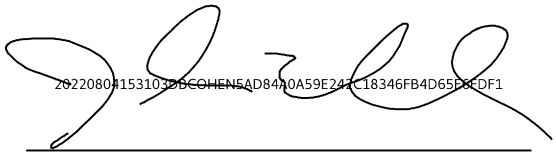
ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment on their contractual indemnification claim against DFC and DiFama is denied as premature; and it is further

ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment on their common-law indemnification claim against DFC and DiFama is denied; and it is further

ORDERED that the branch of the motion by Roseland, Algin and Pavarini seeking dismissal of the counterclaim against them by DFC and DiFama seeking common-law indemnification is denied; and it is further

ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment on their claim for attorneys' fees against DFC and DiFama is denied; and it is further

ORDERED that the branch of the motion by Roseland, Algin, and Pavarini seeking summary judgment on its claim against DFC and DiFama for breach of contract for failure to procure insurance is denied.



8/4/2022
DATE

DAVID B. COHEN, 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