SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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INDEX NO. 154088/2016

BUJAR BACOVA, SERVETTE BACOVA,

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 004 005 006 007

PARAMOUNT LEASEHOLD, L.P., SHAWMUT WOODWORKING & SUPPLY, INC., d/b/a Shawmut Design and Construction, CORD CONTRACTING CO. INC.,ALL-SAFE LLC and LEVIN MANAGEMENT CORPORATION,

DECISION + ORDER ON MOTION

Defendant.

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SHAWMUT WOODWORKING & SUPPLY, INC., d/b/a Shawmut Design and Construction,

Third-Party
Index No. 595533/2016

Third-Party Plaintiff,

-against-

CORD CONTRACTING CO. INC. and ALL-SAFE LLC

Third-Party Defendant.

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PARAMOUNT LEASEHOLD, L.P.

Second Third-Party
Index No. 595823/2016

Second Third-Party Plaintiff,

-against-

HARD ROCK CAFE INTERNATIONAL (USA), INC.

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 305, 337, 341, 348, 349, 350, 351, 352, 353, 354, 355, 374, 385, 390, 391, 395, 397, 401, 402, 403, 404, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 427, 428, 429

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 338, 342, 356, 357, 358, 359, 360, 361, 375, 381, 382, 383, 387, 392, 398, 432, 433

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 339, 343, 362, 363, 364, 365, 366, 367, 376, 378, 379, 380, 389, 393, 399, 430, 431

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 340, 344, 345, 346, 347, 368, 369, 370, 371, 372, 373, 377, 384, 386, 388, 394, 400, 405, 406, 421, 422, 423, 424, 425, 426

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions and cross-motion are determined as follows:

In this action Plaintiff, Bursar Bacova ("Bacova"), seeks to recover for injuries sustained when he allegedly tripped and fell at a premises located at 1501 Broadway, New York, New York. At the time, Bacova was employed by Second Third-Party Defendant Hard Rock Cafe International (USA), Inc. ("Hard Rock") as a facility manager. Hard Rock leased the portion of the premises where the accident occurred from Defendant Paramount Leasehold, L.P. ("Paramount"), the purported owner of 1501 Broadway, and operated a Hard Rock Café at the premises. Paramount determined to conduct renovations at its premises which included, among other things, relocating the primary entrance of Hard Rock from Broadway to West 43rd Street as well as installation of an elevator and stairs. Paramount contracted with Defendant Shawmut Woodworking & Supply, Inc ("Shawmut") to act as the general contractor and with Defendant Levin Management ("Levin") to act as construction manager. Shawmut retained Defendants Cord Construction Company, Inc. ("Cord") and All-Safe, LLC ("All-Safe") as subcontractors on the project.

Plaintiff alleges that on April 8, 2016, at approximately 10:15 am, he was walking in the project area in Hard Rock's premises when he tripped on plywood boards installed beneath scaffolding which were allegedly not taped down or secured. The plywood boards were installed to protect the floor beneath the scaffolding during a renovation project. Cord installed the plywood boards and All-Safe erected the scaffolding in the area where plaintiff fell. In his amended complaint, Plaintiff pleads causes of action against Paramount Shawmut, Cord and All-Safe under Labor Law §241[6] and §200, as well as for common-law negligence. In a separate action against Levin, Plaintiff pled claim all the above claims as well as one under Labor Law §240. These actions were consolidated by order of the Court dated December 12, 2018 (NYSCEF Doc No 157).

Now, all parties have filed motions for summary judgment. Defendants Paramount, Shawmut and Levin move (Motion Seq No 4) for summary judgment dismissing Plaintiff's complaint and against Cord and All-Safe on its claims for contractual indemnification and failure to procure insurance. Plaintiffs oppose the motion and cross-move (Motion Seq No. 4) for summary judgment on the Labor Law §241[6] and §200 claim and for leave to amend its bill of particulars. Hard Rock opposed Plaintiff's cross-motion but took no position on the motion by Defendants Paramount, Shawmut and Levin. Cord and All-Safe separately oppose Plaintiff's cross-motion.

Cord moves (Motion Seq No 5) for summary judgment dismissing Plaintiffs' complaint, the third-party complaint, and all crossclaims. Plaintiff opposes the motion and Defendant Paramount proffered partial opposition. All-Safe moves (Motion Seq No 6) for summary judgment dismissing

Plaintiffs' complaint and all crossclaims. Plaintiff opposes the motion and Defendant Cord proffered partial opposition. Hard Rock moves (Motion Seq No 7) for summary judgment dismissing Plaintiffs' complaint, the second third-party complaint and all crossclaims. Plaintiff opposes the motion and Defendant All-Safe proffered partial opposition.

Plaintiff's Deposition

Plaintiff testified that on the day of the accident he was the "facility manager" at the Hard Rock Café and supervised a team of four workers, but only one worked during his shift. He averred his duties were to perform repairs at the premises, to direct his workers to do repairs and/or to engage outside companies to perform repairs. Plaintiff stated that each day he would meet with a representative of Shawmut and that no work could proceed without his and his supervisor's approval. In response to an inquiry as to whether he had a supervisor on the premises at the time he volunteered: "I was the one in charge for the construction and repairs". However, Plaintiff acknowledged that he never gave instructions or directions to any construction workers. Plaintiff testified that construction was performed at the location for six to seven months before his accident. Plaintiff acknowledged that he did not assist in the construction of the staircase and that his workers did not perform any physical work on the project.

Prior to his accident, Plaintiff was with one of his workers, Marco Martinez ("Marco"), examining an elevator at the premises that needed repair. Plaintiff testified that, thereafter, he and Marco were walking and talking heading to their "next task". Immediately before he fell, Plaintiff was between 15 and 20 feet from the elevator on a wooden floor when his foot caught on a piece of plywood which caused him to trip and fall to the ground. A square scaffold was also at the location and Plaintiff was walking between two vertical posts and under a horizontal crossbar connecting the two when he tripped. Plaintiff averred that the plywood covering the floor began at the crossbar on the scaffold. He stated the plywood and scaffold were installed by Shawmut between two weeks and a month prior to protect the flooring during the project. He claimed the area in question was "a little dark" because some lights were removed after customer complaints.

In photographs marked at his first deposition on March 1, 2017, Plaintiff identified black rubber and carpeted mats on top of the plywood, but he could not remember whether the mats were there on day he fell. Later in his deposition, when showed Exhibit D, Plaintiff identified the area where he fell, but stated the mat in the photograph was not there when he fell. In the photograph marked as Exhibit K, Plaintiff was unable to identify the area where his foot caught because it was covered with a mat. Plaintiff's deposition continued September 7, 2017, and after viewing a video taken by Marco of the accident site, he claimed, in contradiction to his earlier testimony, that a mat was present when he fell. Plaintiff attempted to clarify his testimony and asserted that he meant the mat was present, but not in the correct place. He said it should have been four or five inches closer to his location. As to the cause of his fall, Plaintiff testified that he tripped because of the mat and the movement of the plywood. Plaintiff continued that he did not know whether his foot got caught on the loose plywood or the mat, but it was "[one] of them". At his February 2018 deposition, Plaintiff testified that when an incident report was prepared, he reported the plywood caused him to fall and did not mention the mat. Plaintiff was certain, however, that the scaffolding did not cause his accident and that he never noticed the loose plywood before the accident. Additionally, Plaintiff stated that his accident occurred two feet before the scaffold rather than at its threshold.

Marco Martinez Deposition – Non-Party

Marco Martinez ("Marco") testified that on the day of the incident he was employed by Defendant Hard Rock as a "facilities tech" and his duties were "preventive maintenance". He was supervised by Plaintiff. Marco stated that no Hard Rock facilities people were involved in the construction at the premises or in the placement of the plywood planks at issue. Marco stated that Hard Rock personnel were permitted to walk under the scaffold before the accident and that he walked by that area 100 times per day prior to Plaintiff's fall. Marco averred that Hard Rock conducted daily inspections of the premises. He initially testified the inspections included the floor under the scaffold, but later retracted that comment.

Marco averred he saw Plaintiff's accident occur and that it was caused when he tripped on the plywood where its edge met the uncovered floor of the Hard Rock. He testified the plywood planks were not attached to each other in any manner. March stated that the edge of the plywood at that area was not beveled, not flush with the floor, that the height differential was approximately one-half inch, and the plywood would deflect when stepped on. Marco did not notice the flexion of the plywood before the accident. Marco authenticated a video he took of the area shortly after Plaintiff fell. Marco testified that a mat was on top of the plywood, but not "on the wood where the accident happened". He stated it was further back under the scaffold and Plaintiff's feet did not get caught or tangled in the mat when he fell. Marco testified that the mats belonged to Hard Rock, were placed there by Hard Rock's personnel and were present the entire time the scaffold was in place. However, he testified that an outside vendor's personnel would move the mats as part of its overnight cleaning process.

Mike Kastrati – Paramount

Mike Kastrati ("Kastrati"), an employee of non-party Newmark Real Estate ("Newmark"), was produced for a deposition by Defendant Paramount. Kastradi testified that Newmark is the managing agent for the premises and that he has been the superintendent of 1501 Broadway since 1983. He averred that as far as he knew Paramount owns the building and that he is paid by check from an account in Paramount's name. Yet, Kastrati testified he's never met or had contact with anyone from Paramount. He stated that repairs of Hard Rock's space are not part of the leasing agreement. Although he knew about the lobby project, Kastrati was not aware of construction in the lower level of Hard Rock's space not the presence of the scaffold and plywood planking. He was also not aware if Newmark or Paramount conducted daily inspections of the Hard Rock space or if anyone from Newmark was responsible for safety on the project.

Matthew Sinatra – Shawmut

Matthew Sinatra ("Sinatra"), an employee of Defendant Shawmut, testified that on the day in question he was assistant project superintendent for Shawmut, a general contractor. He averred he supervised the overnight work from 11pm to 6am. In general, the project involved relocation of the entrance to Hard Rock and was initiated by Defendant Paramount. Shawmut was the general contractor for the project and was responsible to hire the subcontractors and coordinate the work. Sinatra testified that Defendant Cord were the carpenters on the project who were on-site only part-time. Defendant All-Safe was a scaffolding subcontractor which, prior to the accident, was at the project for two days and constructed a scaffold/work platform. Sinatra stated that after erecting the scaffold, Hard Rock requested it be modified to permit access under it for its employees.

Prior to erection of the scaffold/work platform, the Hard Rock's wood floors were protected with brown paper, Homasote, a soft particle board and plywood. Sinatra stated the Homasote was ¾ inch thick and the plywood was between ½ inch to ¾ inch thick. He described that the plywood sheets were cut to size and "butted" against one another. The seams where the sheets met were covered with Flat Stock, a metal strip two inches wide and approximately 1/16 inch thick and secured with screws. Where the protective flooring ended and met the Hard Rock's wood floor, a ramp was created out of a strip of plywood and was connected to the protective floor by Flat Stock. Sinatra stated that the edge which met Hard Rock's floor was chamfered and blue in color to alleviate a tripping hazard. Where the chamfer met Hard Rock's floor, the plywood was not attached because, according to Sinatra, it would have damaged same. Sinatra testified the protective flooring was installed only by Defendant Cord, he supervised the installation, and it was completed to the approval of Shawmut. Sinatra was not aware of the beveled edge coming loose or of any complaints or incidents regarding the protective flooring prior to the accident. But he stated that such grievances would have been made to his supervisor Bill Corcoran.

Mark Grippo - Shawmut

Chris Amato ("Amato"), an employee of Defendant Shawmut, testified that he was a laborer on the project at issue and his duties included cleanup and to report hazards if seen. He stated that the plywood planks under the scaffold were installed by Cord and that Shawmut did not play any role in that task. He was unaware how long the plywood was in place prior to April 8, 2016, whether he worked on that day or when his last shift was before then. He also did not remember seeing any hazardous conditions under the scaffold prior to the incident. Amato averred that he could not remember if he remedied any condition after the accident nor could he recall whether he was asked to do same.

Chris Amato – Cord

Chris Amato ("Sinatra"), an employee of Defendant Cord, testified that he worked as a carpenter on the project at Hard Rock's premises. He stated he performed "ticket work" at the site for Shawmut and would complete whatever tasks assigned by Corcoran or Sinatra. One of the projects Shawmut directed him to complete installation of the protective flooring under the scaffold. He confirmed Sinatra's description of the composition of the protective flooring but added the area was originally closed off by a drape. Amato testified he received a verbal work order for the job from Bill Fitzpatrick, an employee of Cord, which did not include making the area under the scaffold "passable".

On March 24, 2016, two days after completing the installation, he was sent back because Hard Rock complained about a lack of access under the scaffold. Sinatra instructed him to make corrections to the protective flooring so the area could be a passageway. Amato averred that he removed plywood to reach and cut back the Homasote at the access points of the under-scaffold area. He also installed a beveled edge at the meeting point with the Hard Rock's floor. Amato stated that there was a ¼ to ½ inch space between the beveled edge and the Hard Rock's floor. He did not know if stepping on the beveled edge with great weight would cause it to deflect and did not test if it deflected.

Maxim Gagneron—Levin

Maxim Gagneron ("Gagneron"), the Vice President of construction and development, testified that he began working for Levin in March of 2018. Gagneron stated that Levin was the construction manager for the project at issue and closed out the project for Shawmut, the general contractor. He

described Levin's role as "overseeing the project" which Gagneron averred meant "review the work in place, review the requisition for payment, review the drawings to make sure that what they put in place is in compliance" with the project documents. He testified he had the authority to instruct Shawmut to correct non-complying work and to stop the work.

Roy Vice—Levin

Roy Vice ("Vice"), a former employee for Levin, testified that when the incident occurred, he was Vice President of development. His summarized Levin's business as management of shopping centers and that his position involved construction oversite and work for the Levin Trust. Vice initially explained that Levin's role at 1501 Broadway was manager of the two trusts which were equal owners of the property. He later testified that Levin was "hired to oversee all construction in the building" by Paramount. Vice stated that an entity called Newmark was the property manager which oversaw the operations of 1501 Broadway.

Concerning the project at issue, Vice averred that Levin participated in hiring the contractors, including selecting Shawmut, and entered agreements with the contractors on behalf of the trust. He described the project as a four-year rehabilitation of the entire building. Vice was at the project one to two times per week to conduct project meetings with a dozen people, including "the consultants, architects, engineers, light consultant, general contractors and Shawmut contractors." He acknowledged doing weekly walkthroughs with Shawmut at the project to check the progress of the work but denied performing inspections during the ongoing instructions.

Vice asserted that Hard Rock was responsible for the areas where construction equipment was located, including scaffolds, when construction was not ongoing. During active constriction, Hard Rock personnel were not allowed in those areas. In periods where construction was occurring and Hard Rock was operating, Vice testified that Shawmut and Hard Rock determined, via verbal daily agreement, whether an area was safe to access.

Thomas Stack—All-Safe

Thomas Stack ("Stack"), a former employee of All-Safe, testified that he was a scaffold construction foreman for All-Safe during the renovations at 1501 Broadway. He stated that All-Safe installed the scaffold at the accident location after the protective floor was installed by another contractor. Stack averred that the installation took two days and occurred on March 19th and 20th. He claimed that someone from Shawmut was required to be present at the location while their work proceeded. He denied having any role in placing mats at the location. Stack was unsure of whether he performed work at the premises April 7, 8 or 9, 2016. He testified that he had no interaction with Paramount or Hard Rock during the installation.

Discussion

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the

motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of triable material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

At the outset, to the extent Plaintiff has pled a cause of action based on Labor Law §240[1], it fails as a matter of law since a trip and fall accident is not elevation related (*see Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768, 769 [1st Dept 2012]; *Sanchez v 74 Wooster Holding, LLC*, 201 AD3d 755 [2d Dept 2022]).

An issue common to all the motions is whether Plaintiff was performing "covered work" under Labor Law §241[6]. That section provides that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with those rules (*see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). The duty imposed under Labor Law §241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (*id.*).

To come with the special class of persons for whom the Labor Law was created a "plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]). Therefore "[n]ot every employee lawfully on the property is necessarily affiliated with the construction work … or is otherwise 'frequenting the premises within the meaning of Labor Law § 241 (6)' … The statutory protection does not extend, for example, to employees performing routine maintenance tasks at a building that happens to be undergoing construction or renovation" (*Blandon v Advance Contr. Co.*, 264 AD2d 550, 552 [1st Dept 1999]). Stated differently, a plaintiff must be "a member of a team that undertook an enumerated activity under a construction contract" (*Prats v Port Auth.*, 100 NY2d 878, 882 [2003]).

In the present case, Plaintiff was not employed by any entity performing the renovation work and he admitted at his deposition that neither he nor his workers performed work on the project. Plaintiff proffered no testimony his overall purpose in the project or work at the time the accident occurred was even incidental to the construction project. Plaintiff defined his role with Hard Rock as a facilities manager who was responsible for making small "repairs" to the premises. He further described his workers' daily activities as "maintenance". This evidence demonstrates that Plaintiff was ostensibly "a superintendent of a building that was undergoing demolition and construction, [and] is not within the class of persons entitled to invoke the protection of Labor Law § 240 (1) and § 241 (6)" (*Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468 [1st Dept 2008]; *Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005]; *see also Bayo v 626 Sutter Ave. Assoc., LLC*, 106 AD3d 648, 649 [1st Dept 2013]).

In opposition, Plaintiff failed to raise an issue of fact concerning his role and activities concerning the construction project. Plaintiff's testimony that the work at the site could not proceed without his approval does not bring him within the ambit of the Labor Law. Merely permitting construction to proceed does not "directly contribute toward 'a significant physical change to the configuration or composition of the building or structure'" (*Hargobin v. K.A.F.C.I. Corp.*, 282 AD2d 31, 35 [1st Dept 2001], *citing Joblon v Solow*, 91 NY2d 457, 465 [1998]). Further, there is no proof that this daily approval process encompassed performing essential on-going inspections of the contractor's

work (*cf. Eliassian v G.F. Constr., Inc.*, 190 AD3d 947, 948 [2d Dept 2021]; *Channer v ABAX Inc.*, 169 AD3d 758, 760 [2d Dept 2019]). Plaintiff's reliance on *Longo v Metro-North Commuter R.R.*, 275 AD2d 238 [1st Dept 2000] is misplaced. In that case, the plaintiff's task on the construction project was to protect "workers from any dangers arising from moving trains or contact with the third rail" such that "he was an integral part of the work crew, full time on a daily basis" (*id.* at 239). In this case, Plaintiff's role in the construction was too attenuated to be entitle him to protection under the statute (*see generally Martinez v City of New York,* 93 NY2d 322, 326 [1999]).

Labor Law §200 is a codification of the common-law duty of landowners and general contractors, as well as their agents, to provide a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d at 352). "A claim for common-law negligence may lie even though there is no Labor Law § 200 liability" (*Mullins v Ctr. Line Studios*, 194 AD3d 421, 422 [1st Dept 2021]). "Claims for personal injury under the statute and the common law fall into two broad 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" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Although "[t]hese two categories should be viewed in the disjunctive" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]), meaning that cases ordinarily fall into one category or another, this principle is not absolute and a plaintiff may claim that an accident was caused by both a defect in the premises and the manner in which the work was performed (*see eg Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2d Dept 2018]).

Here, the condition at issue, a plank of plywood and a carpeted mat, must be analyzed under the dangerous condition standard as it "was not part of the work plaintiff was performing" (*DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467 [1st Dept 2019]; *see also Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405 [1st Dept 2020]; *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588 [1st Dept 2018]; *Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]). Similarly, Plaintiff's claim as to the adequacy of the lighting at the area constitutes a premises condition as plaintiff must establish that "defendants knew or should have known that the existing lighting was [in]adequate given the use and design of the [premises]" (*Peralta v Henriquez*, 100 NY2d 139, 145 [2003]; *see also Yacoub v 1540 Wallco, Inc.*, 104 AD3d 408 [1st Dept 2013]).

Where the accident is a consequence of a defective condition on a premises "'a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], *citing Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). "A contractor may be liable in common-law negligence and under Labor Law § 200 in cases involving an allegedly dangerous premises condition 'only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it'" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660 [2d Dept 2015], *citing Martinez v City of New York*, 73 AD3d 993, 998 [2d Dept 2010]; *see also Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]). "'[A] subcontractor . . . may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area'" (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2d Dept 2011], *citing Tabickman v Batchelder St. Condominiums by the Bay, LLC*, 52 AD3d 593, 594).

To be entitled to summary judgment on their Labor Law §200 claim, which has been observed to be a "rare case" (*Langer v MTA Capital Constr. Co.,* 184 AD3d 401, 402 [1st Dept 2020]), Plaintiffs

were required to establish *prima facie* proof of each element of this cause of action (*see generally Tatom v Andrews Intl., Inc.*, 178 AD3d 981 [2nd Dept 2019]). To establish its negligence cause of action, "the [P]laintiff . . . must prove: (1) that the premises were not reasonably safe; (2) that the [D]efendant . . . was negligent in not keeping the premises in a reasonably safe condition; and (3) that . . . [D]efendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing [Plaintiff's] injury" (PJI 2:90; *Basso v Miller*, 40 NY2d 233 [1976]; *Tatom v Andrews Intl., Inc.*, 178 AD3d 981 [2nd Dept 2019]; *Davis v Commack Hotel, LLC*, supra at 502). Summary judgment to a plaintiff on the issue of a defendant's negligence may be granted where "'there is no conflict at all in the evidence' and 'the defendant's conduct fell far below any permissible standard of due care'" (*Davis v Commack Hotel*, 174 AD3d 501 [2nd Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]). However, proof of the absence of Plaintiff's comparative fault is not necessary to obtain partial summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Defendants, on the other hand, were required to demonstrate, *prima facie*, that one or more of the essential elements of these claims are negated as a matter of law (*see Poon v Nisanov,* 162 AD3d 804 [2nd Dept 2018]; *Nunez v Chase Manhattan Bank,* 155 AD3d 641 [2nd Dept 2017]). Therefore, all Defendants were required to show they did not create the hazardous condition (*see eg Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). An owner must also demonstrate it did not have actual or constructive notice of that condition for a sufficient length of time to discovery and remedy same (*id.*). A contractor or subcontractor is only required to show it lacked constructive notice if it had the authority to supervise a plaintiff's work or the work area in general (*see Doto v Astoria Energy II, LLC*, supra; *Poracki v St. Mary's Roman Catholic Church*, supra). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employee to discovery and remedy it (*see Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.,* 185 AD3d 671 [2d Dept 2020]; *see also Gordon v American Museum of Natural History, supra).*

The argument by Shawmut and Paramount that Labor Law §200 was not applicable as they were not a general contractor or owner, respectively, is without merit. "The protection of Labor Law § 200 . . . is not confined to construction work but codifies the common-law duty of an owner or employer to provide employees a safe place to work" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [1st Dept 2000]; *see also Landron v Wil-Cor Realty Co. Inc.*, 187 AD3d 407 [1st Dept 2020]). This section covers all places to which the Labor Law applies, and it extends to persons involved in "normal" processes at those locations (*see Jock v Fien*, 80 NY2d 965, 967 [1992]). Thus, Shawmut and Paramount, as the indisputable general contractor on the project and owner of the premises, can be liable under Labor Law §200 irrespective of the fact that Plaintiff was not employed by either of these entities or involved in the construction project (*see Paradise v Lehrer, McGovern & Bovis, Inc.*, 267 AD2d 132, 134 [1st Dept 1999]; *see also Rocha v GRT Constr. of N.Y.*, 145 AD3d 926, 928 [2d Dept 2016]).

Levin, however, was neither a contractor nor an owner. The testimony suggested Levin was a construction manager but there was no proof it functioned as an agent of the owner of the premises or that it had supervisory control and authority over the work being done. Therefore, Labor Law §200 was not applicable to Levin (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Johnsen v City of New York*, 149 AD3d 822 [2d Dept 2017]). Also absent was the existence of a common-law duty owed to Plaintiff by Levin (*see Espinal v Melville Snow Contrs.,* 98 NY2d 136, 140 [2002]).

Concerning the liability of Shawmut and Paramount under Labor Law §200, the deposition of Amato showed that Cord built the protective flooring. Marco testified the carpeted mats belonged to Hard Rock and were placed at the location by its "bussers". The testimony of Sinatra, Kastratis and Plaintiff revealed that neither Shawmut nor Paramount had any control over Plaintiff, an employee of Hard Rock. The carpeted mats were the responsibility of Hard Rock and were not part of the construction project. As to the adequacy of the lighting at the accident situs, Plaintiff merely testified that the area was "a little dark" and never stated it was a cause of his fall. He also acknowledged that he did not remember if temporary lighting installed under the scaffold was removed and that he was unaware of any complaints concerning the lighting at the area prior to the accident. However, it is apparent that Shawmut had overall control over the construction project and the work site. Thus, it was incumbent upon Shawmut and Paramount to demonstrate they lacked actual and constructive notice only of the condition of the protective flooring which Plaintiff claims contributed to his accident.

The testimony of Sinatra, Grippo and Kastratis proved both Shawmut and Paramount were without actual knowledge of any defect in the protective flooring. An absence of constructive notice is clearly apparent from the testimony of Marco who, as a "facilities tech", was tasked with daily inspections of Hard Rock's premises. He passed the area, in his estimation, more than 100 times per day before the accident and never noticed any problem with the floor. This included deflection of the plywood, which he did not notice until after Plaintiff's accident. In opposition, Plaintiff failed to identify any facts that would raise a question on the issue of notice.

Accordingly, Plaintiff's Labor Law §200 claim against Shawmut and Paramount fails. The common-law negligence cause of action is similarly defective.

With respect to Defendant All-State, the deposition testimony demonstrated it did not install the protective floor or the mats which Plaintiff claims contributed to his fall. Further, Plaintiff admitted that the scaffold installed by All-State played no role in the incident and Plaintiff's testimony does not establish the lighting caused his fall. The evidence demonstrated All-State had no general control over the work site and no control over Plaintiff's work (*see Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 481 [1st Dept 2007]; *Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892 [3rd Dept 2002]; *cf. Gallagher v Levien & Co.*, 72 AD3d 407 [1st Dept 2010]). Like Levin, All-State owed no common-law duty to Plaintiff (*see Espinal v Melville Snow Contrs.*, supra).

As to Cord, it is undisputed that it installed the plywood flooring Plaintiff claims caused his accident. But as the testimony demonstrated Cord had no control over the Plaintiff or the work site in general, a Labor Law §200 claim may not be maintained against a subcontractor like Cord (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 554 [1st Dept 2009]; *Frisbee v 156 R.R. Ave. Corp.*, 85 AD3d 1258, 1259 [3d Dept 2011]). Nevertheless, Cord had a duty to perform its work in a non-negligent manner and that obligation extended to the Plaintiff since the allegation that Cord negligently installed the protective flooring is encompassed by the "force or instrument of harm" exception under *Espinal* (*see Mullins v Ctr. Line Studios*, supra; *Giannas v 100 3rd Ave. Corp.*, 166 AD3d 853 [2d Dept 2018]; *see also Urban v No. 5 Times Sq. Dev., LLC*, supra; *Bell v Bengomo Realty, Inc.*, supra). Cord did not establish, as a matter of law, that the installation the protective flooring was performed without negligence. Likewise, Plaintiff did not demonstrate *prima facie* that the plywood and other materials were negligently installed. Further, as Plaintiff offered conflicting testimony as to the cause of his fall, he raised an issue of fact on the issue of causation.

Accordingly, Plaintiff's Labor Law §200 claims against All-State and Cord fail as does the common-law negligence claim against All-State. Yet, Plaintiff's common-law negligence cause of action against Cord is viable.

Regarding the branch of the motion by Defendants Paramount, Shawmut and Levin for summary judgment on their claims for contractual indemnification from Defendants Cord and All-Safe, "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Where there is no legal duty to indemnify, an agreement containing that obligation must be strictly construed so as not to create an unintended responsibility (*see eg Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* supra at 65).

Section 5[p] of the subcontracts between Shawmut and Cord as well as All-Safe contain identical provisions which read, in pertinent part, as follows:

> To the full extent permitted by applicable law, failure. Subcontractor agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder.

Based upon the contract language the obligation of Cord and All-Safe to indemnify Paramount, Shawmut and Levin is triggered not only in the case of their negligence, but also when "arising out of or resulting from any work and caused in whole or in part by any act or omission of Subcontractor" (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490-491 [1st Dept 2018]). Since the testimony and findings of the Court supra demonstrate Plaintiff's accident was entirely unrelated to All-Safe's actions, the claim for contractual indemnification against it fails (*see DeGidio v City of New York*, 176 AD3d 452, 454 [1st Dept 2019]). As against Cord, it is undisputed that it installed the protective plywood flooring and that Plaintiff testified that the loose plywood, along with the mat, were causes of his fall. But reading Plaintiff's testimony, as the Court must, in a light most favorable to Cord, leaves an ambiguity as to whether Plaintiff's accident arose out of Cord's work at all. At his September 7, 2017, deposition, Plaintiff stated that he did not know if the mat was lying flat. Plaintiff averred that when he tripped, he was "not sure" whether his foot contacted the plywood or the mat. He also did not know whether his foot "caught" the plywood, the mat or both. Based on this jumbled recount, the trier of fact could reasonably conclude that Plaintiff tripped solely on the mat, which was placed by Hard Rock, not Cord.

Accordingly, the branch of the motion for summary judgment on the claim for contractual indemnification is denied.

The branch of the branch of the motion by Defendants Paramount, Shawmut and Levin for summary judgment on its claims for failure to procure insurance is denied as that issue was not addressed in their memorandum of law.

The branches of All-Safe's motion to dismiss all crossclaims against it is granted. As All-Safe has been determined not negligent, the claims for common-law indemnification are not viable (*see Herrero v 2146 Nostrand Avenue Associates, LLC*, 193 AD3d 421 [1st Dept 2021]). The claims for contractual indemnification fail for the reasons stated above. The crossclaims for failure to procure insurance against All-State are no longer viable. Section 9 of the subcontract provides that "Subcontractor's insurance shall apply to any Subcontract Work". As the accident did not relate to All-State's work, the section is not triggered.

The branches of Cord's motion to dismiss the crossclaims for contractual and common-law indemnification are denied as Plaintiff's negligence cause of action against it is still viable. The branch of the motion to dismiss the claims against it for failure to procure insurance is denied as that issue was not addressed in its memorandum of law.

The motion by Hard Rock to dismiss Paramount's third-party action is denied. Paragraph 45 of the lease provides that Hard Rock is required to indemnify Paramount for, *inter alia*, and from "any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of Tenant, in or about the Demised Premises". Contrary to Hard Rock's arguments, Plaintiff has claimed that one of the causes of his accident may have been a carpeted mat and the testimony uniformly demonstrates the mats at the accident location belonged to and were placed by Hard Rock personnel. As such, Hard Rock has not demonstrated *prima facie* that Paramount's third-party action is entirely defective.

Plaintiff also cross-moves to amend the complaint to allege violations of the New York City Building Code. Plaintiff seeks to plead reliance on New York City Building Code §3303.4.1 and §3303.4.1.1 [NYC Administrative Code, Title 33, Ch. 33]. Pursuant to section 3301.2 of the NYC Building Code, as these provisions are applicable only to "Contractors, construction managers, and subcontractors engaged in construction or demolition operations", the proposed codes are not applicable to Paramount and Levin. Substantively, these sections, which require that slipping and tripping hazards be "minimized", are nothing more than a codification of common-law principles which would constitute only some evidence of negligence (*see Elliott v City of New York,* 95 NY2d 730, 734 [2001]; *Juarez by Juarez v Wavecrest Mgmt. Team*, 88 NY2d 628, 645 [1996]). As to Shawmut and All-Safe, who have been determined not negligent as a matter of law, reliance on these sections is, therefore, futile. However, these sections are conceivably applicable to Cord as a "subcontractor" on the job who Plaintiff alleges created a tripping hazard. Based on the nature of the amendment, Cord has not demonstrated prejudice through hinderance in the preparation of its defense (*see Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981]; *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]).

Accordingly, it is

ORDERED that the motion (Motion Seq No 4) by Defendants Paramount, Shawmut and Levin is granted and Plaintiff's complaint and all crossclaims against these Defendants are dismissed, and it is

ORDERED that Plaintiffs' cross-motion (Motion Seq No 4) is granted only to the extent that they are permitted to amend their bill of particulars to plead reliance on New York City Building Code §3303.4.1 and §3303.4.1.1 [NYC Administrative Code, Title 33, Ch. 33] against Cord, but it is otherwise denied, and it is

ORDERED that Defendant Cord's motion (Motion Seq No 5) for summary judgment is granted only to the extent that all Plaintiff's claims under the Labor Law §§240[1], 241[6] and 200 are dismissed, but Plaintiff's common-law negligence claim remains, and it is

ORDERED that Defendant All-Safe's motion (Motion Seq No 6) is granted and Plaintiff's complaint and all crossclaims against this Defendant are dismissed, and it is

ORDERED that Second Third-Party Defendant Hard Rock's motion for summary judgment is denied.

8/4/2022
DATE

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III 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