SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17

Justice

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INDEX NO. 452625/2015

NOAH LIU, SANDY LIU,

Plaintiff,

MOTION DATE 03/10/2021, 03/10/2021, 03/10/2021

- v -

MOTION SEQ. NO. 007 008 009

SAFON LLC,SAFON LLC,JOSEPHSON LLC,WHITESTAR CONSULTING & CONTRACTING, INC.,NEWMARK & COMPANY REAL ESTATE, INC.,ALL BOROUGH GROUP SERVICE INC.,

DECISION + ORDER ON MOTION

Defendant.

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WHITESTAR CONSULTING & CONTRACTING, INC.,

Plaintiff,

Third-Party
Index No. 43091/2015E

-against-

JT CONSTRUCTION & MANAGEMENT INC.

Defendant.

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WHITESTAR CONSULTING & CONTRACTING, INC.,

Plaintiff,

Second Third-Party
Index No. 595057/2018

-against-

COOL BREEZE A/C, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 204, 205, 206, 208, 212, 214, 215, 217, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 289, 290

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 207, 210, 211, 213, 216, 218, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 291, 292, 293, 294, 295, 296, 297

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The following e-filed documents, listed by NYSCEF document number (Motion 009) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 298, 299, 300

were read on this motion to/for AMEND CAPTION/PLEADINGS .

Motion sequence numbers 007, 008 and 009 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a construction project manager on May 1, 2013, when, while present at a construction site located at 26 Washington Street, New York, New York (the Premises), he slid down a ramp built over a staircase.

In motion sequence number 007, defendants Safon, LLC d/b/a The Moinian Group (Safon), Josephson LLC, d/b/a The Moinian Group (Josephson) (together, the Moinian defendants) and Newmark & Company Real Estate, Inc. d/b/a Newmark Grubb Knight Frank (Newmark) (collectively, the Owner defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them, and for summary judgment in their favor on their cross claim for common-law indemnification against defendant/third-party plaintiff/second third-party plaintiff Whitestar Consulting & Contracting, Inc. (Whitestar).

In motion sequence number 008, Whitestar moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and third-party counterclaims as against it.

In motion sequence number 009, plaintiff Noah Liu (plaintiff) moves, pursuant to CPLR 3025 (b), for leave to file a supplemental summons and an amended verified complaint.

In connection with motion sequence number 007, plaintiff cross-moves for summary judgment in his favor as to liability on his common-law negligence and Labor Law §§ 200 and 240 (1) claims against the Owner defendants.

In connection with motion sequence number 008, plaintiff cross-moves for summary judgment in his favor as to liability on his common-law negligence and Labor Law §§ 200 and 240 (1) claims against Whitestar.[1]

BACKGROUND

On the day of the accident, the Moinian defendants were the owners of the Premises. Newmark was the property manager for the Premises. Newmark, at the behest of the Moinian defendants, hired Whitestar as the general contractor for a project at the Premises that entailed the renovation of several floors of the Premises (the Project). Whitestar, in turn, hired all subcontractors for the Project, including third-party defendant JT Construction Management, Inc. (JT). Plaintiff was an owner of JT, and its project manager for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident, he was an owner of JT. He was also JT's project manager for the Project. His duties included estimating projects, hiring and scheduling crew and generally overseeing JT's work. Plaintiff was also involved in negotiating JT's contract with Whitestar for the Project. He was present at the Premises every day, though not for the full day. The Premises was a twenty-five-story building, equipped with several elevators and a freight elevator.

JT was hired to perform drywall installation, spackling, tiling and painting. JT's work took place on several floors of the Premises, including "16, 17, 26, lobby and cellar" (plaintiff's tr at 31). Plaintiff would typically inspect JT's work, including the work in the cellar.

[1] By decision and order dated June 7, 2016, Whitestar obtained a default judgment against third-party defendant JT Construction Management, Inc. (JT).

Sometimes he took an elevator into the cellar. Sometimes he took a stairway. Plaintiff could not recall if JT was doing any work in the cellar on the day of the accident.

On the day of the accident, plaintiff entered the building, met with JT's co-owner, Wang Ting, and proceeded to walk towards the stairway to the basement to begin his daily inspection of JT's worksites. He and Ting walked through several doors to the staircase area. The stairs were located behind a door and were approximately eight feet wide.

Plaintiff opened the door to the stairwell and noted that the light level in front of the stairs was dim (*id.* at 103). He and Ting entered the stairway room and turned to the left to begin walking down the stairs (*id.* at 77). Plaintiff then "grabbed the rail" at the top of the stairway and took a step onto the stairs (*id.* at 97). Instead of stepping on a stair, plaintiff's foot contacted the top of a plywood ramp (the Ramp) that had been laid down over half of the double-wide stairway, causing him to lose his balance and slide down the Ramp (*id.* at 106 ["There was no step, it was a ramp, and then I immediately started sliding"]). Plaintiff estimated that he ended up sliding "20 feet, 25 feet" (*id.* at 109), before he landed on the cellar's concrete floor, injuring his left ankle.

After the accident, plaintiff learned that the Ramp was installed to move an HVAC unit either into or out of the cellar. He did not know who installed the Ramp and had never seen it before (*id.* at 133). Plaintiff also testified that there were no notices or warning signs about a ramp on the stairway, and nothing was blocking it to prevent people from inadvertently stepping on it.

Further after the accident, plaintiff testified, he was told that JT workers had installed the Ramp over the stairway at the direction of Whitestar. He learned this from "[his] foreman, [his] crews, the project manager. Everyone confirms" (plaintiff's second tr at 8). Specifically,

plaintiff learned from his foreman and Whitestar's project manager, Richard James, that the work had been requested via a verbal change order (*id.* at 44).

Several months after the accident, plaintiff spoke with James and learned that the Ramp was built at the request of second third-party defendant Cool Breeze A/C, Inc. (Cool Breeze) (*id.* at 11). Plaintiff was not aware of whether Whitestar directed JT to install handrails (*id.* at 15).

Deposition Testimony of Alphie Toro (Newmark's Vice President)

Alphie Toro (Toro) testified that on the day of the accident she was a vice president at Newmark, a real estate management company. Her responsibilities included oversight of the property managers and on-site managers for several buildings, including the Premises. Newmark hired Whitestar as the general contractor for the Project. Newmark did not hire any other contractors or subcontractors. She was unfamiliar with JT.

Toro was shown Whitestar's contract for the Project and stated that it was unsigned and contained several errors. She was aware that work was performed by Whitestar pursuant to a proposal, but she was unsure if an executed contract existed.

Toro was unfamiliar with the accident prior to receiving notice that plaintiff was filing a claim (Toro tr at 26). Newmark never received an accident report. According to Toro, Newmark did not investigate the accident, as that was not Newmark's responsibility.

Toro did not know who installed the Ramp. She was also unaware of any complaints regarding lighting in the accident area.

Deposition Testimony of Richard Franco (Newmark's Property Manager)

Richard Franco (Franco) testified that on the day of the accident, he was the property manager for the Premises. Toro was his boss. Safon was the owner of the Premises. His duties included general oversight of the daily operation of the building. He was present at the Premises

every day. Part of his work included walking the Premises and inspecting the Project. If he saw an unsafe practice, he would report it to Whitestar.

Franco was aware that Whitestar was the general contractor, hired by Newmark pursuant to a bidding process. He was unaware of any other subcontractors on the Project. According to Franco, Whitestar was responsible for all safety decisions on the Project.

Franco was familiar with the Ramp. He described it as a delivery ramp leading to the basement level. The staircase was "double-wide," and the Ramp took up "[a]pproximately half of it" (Franco tr at 28). The stairway was designated for contractor use by Newmark. Its intended use was to transport material. It was not a walkway (*id.* at 70). Franco did not know which subcontractor installed the Ramp. Franco also did not know of any safety requirements for the Ramp, and he did not raise any issues regarding it with Whitestar.

As to the lighting, Franco testified that the lighting in the basement area "was all temporary lighting" but on the ground floor, the lighting was normal installed lighting (*id.* at 37). He recalled the lighting in the area as "adequate" (*id.* at 69).

Deposition Testimony of Joe Caponigro (Whitestar's Owner)

Joe Caponigro (Caponigro) testified that on the day of the accident, he was the owner and president of Whitestar, a general contractor. Whitestar was hired by Newmark as the general contractor for the Project. Caponigro was shown a copy of an AIA contract for the Project with Newmark, and confirmed that it was unsigned.

Whitestar provided its own laborers, but subcontracted all other construction work to various other companies, including JT. JT was hired to perform interior carpentry and painting. At the time of the accident, Whitestar's construction director was Daniel McBride, and the on-site superintendent was Richard James (James).

Caponigro was not present at the Premises at the time of the accident. Once he learned of it, he went there later that day. He was unaware of any witnesses.

Caponigro also testified that it was his understanding, based on what James, his superintendent told him, that JT constructed the Ramp. The Ramp was used by Cool Breeze to move a large HVAC unit into the basement. According to Caponigro, Cool Breeze employees were present at the Premises on the day of the accident.

Deposition Testimony of Richard James (Whitestar's Superintendent)

Richard James testified that on the day of the accident, he was employed by Whitestar as the superintendent of the Project. His duties included general oversight of the subcontractors' work and site safety. His responsibilities also included investigating any accidents that occurred on site and preparing accident reports. James testified that he was present at the Premises every day.

James was familiar with JT and plaintiff. JT's work included work in the basement, but he was unsure when they began that work. James also testified that he saw plaintiff on a regular basis and witnessed him assisting JT's workers (James tr at 25 [plaintiff "was there with his guy laying out the tracks, the studs. He made deliveries, helped with guys offloading trucks as well"]).

James was aware of the Ramp, but he was unaware of who built it (*id.* at 33). It was installed approximately one week before the accident. The Ramp had handrails on both sides. He saw workers pushing containers down the ramp. He warned these workers to not walk down the ramp because doing so was a "safety issue" (*id.* at 35). To prevent workers from walking down the Ramp, James "had it cordoned off and taped off" with yellow caution tape (*id.* at 35) and cones (*id.* at 40). James personally directed a Whitestar laborer to cordon off the Ramp a

"[c]ouple days before" the accident (*id.* at 35). The caution tape and cones could be removed as needed.

James was present on the day of the accident, but he did not witness it. He received a call from a laborer that plaintiff had been injured in a fall. James arrived at the accident location shortly thereafter. James saw plaintiff being taken away in a wheelchair by an EMT (*id.* at 31). James did not speak with plaintiff before he was removed from the site. After the accident, James interviewed some of the workers – including some JT workers.

James further testified that JT crews were working in the basement on the day of the accident (*id.* at 49-50).

Deposition Testimony of Daniel McBride (Whitestar's Director of Construction)

Daniel McBride (McBride) testified that on the day of the accident, he was Whitestar's director of construction for the Project. His duties included reviewing proposals and bids, project estimates, and negotiating construction agreements. He would also visit the project two times a week to check on its progress. James reported directly to him.

McBride did not witness the accident, and he was not present on the Premises at the time of the accident. Rather, on the day of the accident, James called McBride and informed him of the accident and McBride travelled to the Premises thereafter. McBride testified that James informed him that plaintiff was injured while sliding down the Ramp. He did not know if James witnessed or investigated the accident.

According to McBride, the Ramp was constructed and installed by JT pursuant to a change order (McBride tr at 37). The change order was issued by "Whitestar to JT" (*id.* at 79). McBride also testified that a wooden barricade was placed at the top of the Ramp to prevent

people from falling. McBride did not know who built the barricade or when it was built, or if the barricade was present on the day of the accident.

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). Finally, evidence must be "construed in the light most favorable to the one moved against" (*Kershaw*, 114 AD3d at 82). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Motion to Amend the Complaint (Motion Sequence Number 009)

Plaintiff moves to amend the complaint to add a cause of action sounding in Labor Law § 240 (1).

> "Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise . . . , although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment"

Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354-55 [1st Dept 2005] [internal quotation marks and citations omitted]; *see also 360 W. 11th LLC v ACG Credit Co. II, LLC,* 90 AD3d 552, 553 [1st Dept 2011]).

As an initial matter, this motion for leave to amend is filed several months post note of issue and subsequent to the filing of summary judgment motions. This, in and of itself, is not sufficient grounds to deny leave to amend.

The active complaint currently alleges a single negligence claim by plaintiff against defendants and a derivative claim by plaintiff Sandy Liu (NYSCEF Doc. No. 276). The new complaint – denominated a third amended complaint – alleges a negligence claim and a Labor Law §§ 200, 240 (1) and 241 (6) claims against defendants (the derivative claim appears to be removed) (NYSCEF Doc. No. 221, ¶¶ 134-138). It also adds a damages claim sounding in lost wages (NYSCEF Doc. No. 221, ¶ 131).

Notably, plaintiff's motion does not seek leave to add any claim except the Labor Law § 240 (1) claim. Plaintiff does not address the merits of any other claim that plaintiff has included in the "third amended complaint." Moreover, in the bill of particulars directed to the Owner defendants, dated October 22, 2015, plaintiff affirmatively stated that he is "not making a lost wage claim" (NYSCEF Doc. No. 223, p 5 ¶ 13) and in the bill of particulars directed to Whitestar, plaintiff affirmatively stated that he is "not making a claim for lost wages" (*id.* at p 24 ¶ 14). To allow plaintiff to add such a claim at this late date would prejudice defendants.

Given the foregoing, plaintiff's application for leave to amend the complaint is denied.

That said, to the extent that defendants argue that plaintiff's Labor Law claims must be dismissed because the amended complaint fails to allege such claims, defendants are incorrect (*see e.g. Murtha v Integral Constr. Corp.,* 253 AD2d 637 [1st Dept 1998] [allowing Labor Law

claims to proceed even though "plaintiff's complaint consisted of one cause of action sounding in negligence," because plaintiff's bill of particulars included allegations that "defendant had violated Labor Law §§ 200, 240 and 241" along with specific claims of said violations]).

Here, the complaint sounds only in negligence, but the bill of particulars includes the following language: "It is alleged that defendants violated § 200, 240 (1) . . . and 241 (6) of the Labor Law of the State of New York" (NYSCEF Doc. No. 223 p 7, ¶ 19). Moreover, defendants clearly understood that plaintiff's claims sounded in the Labor Law, notwithstanding plaintiff's failure to explicitly plead such claims, because defendants have moved for summary judgment dismissing the (non-pleaded) Labor Law claims and addressed such claims on the merits in their respective summary judgment motions.

Accordingly, as plaintiff's amended complaint and bill of particulars sufficiently allege claims under Labor Law § 200, 240 (1) and 241 (6), this Court will address the merits of each such claim in this decision and order.

Procedural Issues

Timeliness of Plaintiff's Cross Motion against Whitestar (Motion Sequence Number 007)

Whitestar argues that plaintiff's cross motion for summary judgment in his favor is untimely.

Here, there was a 60-day post-note of issue deadline for the filing of dispositive motions. Given that the note of issue was filed on January 9, 2020, motions would need to be filed on or before March 9, 2020.[2] The instant cross motion for summary judgment was filed on August 25, 2020, several months late.

[2] Covid protocols (9 NYCRR 8.2.2.8) did not go into effect until March 20, 2020. Therefore, any Covid related stays do not apply to this timeliness analysis.

In *Brill v City of New York* (2 NY3d 648, 652 [2004]), the Court of Appeals determined that courts should not consider late summary judgment motions without "a satisfactory explanation for the untimeliness" – i.e. showing good cause for the delay – even if it means permitting less than meritorious claims or defenses to continue to trial. That said, a cross motion seeking relief that is nearly identical to the relief sought in a timely motion for summary judgment is not untimely (*see Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304 [1st Dept 2006] [cross motion that "was largely based on the same arguments raised in [the movant's] timely motion" was not untimely and was properly considered]).

Here, Whitestar's timely motion seeks dismissal of the complaint – including the insufficiently pled Labor Law claims addressed above – while plaintiff's cross motion seeks summary judgment in his favor on the same claims. Therefore, even though plaintiff's cross motion is untimely, the court will consider it.[3]

The Labor Law § 240 (1) Claim (Motion Sequence Numbers 007, 008 and Plaintiff's Cross Motions)

Owner defendants and Whitestar each move for summary judgment dismissing the Labor Law § 240 (1) claim as against them. Plaintiff cross-moves for summary judgment in his favor as to liability on the same claim against all defendants.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a

[3] Whitestar also argues that plaintiff's cross motion is not nearly identical to its own motion because plaintiff relies upon an expert's affidavit that was not disclosed prior to plaintiff's filing of the cross motion. This is unavailing, as "CPLR 3212(b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR § 3101(d) was not furnished prior to the affidavit's submission" (*Brown v 43-25 Hunter, L.L.C.*, 178 AD3d 493, 494, fn 1 [1st Dept 2019]). Such reliance on a new expert's testimony does not render a cross motion functionally dissimilar to the original motion.

> building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Importantly, Labor Law § 240 (1) provides special protection for workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or

structure" (Labor Law § 240 [1]). Here, there is no question that JT was involved in protected construction activities. Defendants argue that plaintiff – as an owner/supervisor – is not a "worker" under Labor Law § 240 (1) in that he was not performing any actual labor at the time of the accident. Testimony, however, sets forth that plaintiff was regularly present at the Premises and often assisted his workers in their work (James tr at 25 [plaintiff "was there with his guy laying out the tracks, the studs. He made deliveries, helped with guys offloading trucks as well"]). Otherwise, plaintiff was present to perform regular progress inspections throughout the construction.

In other words, plaintiff was "a member of a team that undertook an enumerated activity under a construction contract" even if he was not performing the enumerated activity at the time of the accident (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *see e.g. Channer v. ABAX Inc.,* 169 AD3d 758, 759-60 [2nd Dept. 2019] [plaintiff, whose only job was to inspect, was a covered person under section 240 (1)]). Accordingly, plaintiff is within the class of persons – i.e., a "worker" – protected by Labor Law § 240 (1).

Turning now to the accident itself, plaintiff alleges that, while attempting to descend a flight of stairs, he stepped onto the Ramp instead, which caused him to slide down the Ramp and become injured. As alleged, plaintiff's accident does not fall within the scope of Labor Law § 240 (1).

> "[A] plaintiff in a section 240 (1) action who was injured because he or she fell must establish that (1) the task required the plaintiff to work at an elevation, (2) the plaintiff was exposed to the effects of gravity at that elevation and fell as a direct result of the force of gravity, and (3) the protective devices envisioned by the statute, e.g. ladders, scaffolds and similar devices, were designed to prevent the hazard that caused the fall"

(*Jones v 414 Equities LLC*, 57 AD3d 65, 73 [1st Dept 2008]).

Here, plaintiff's task involved inspecting his workers' ongoing construction work in the basement. Plaintiff was physically standing on the floor – a non-elevated surface – immediately prior to his accident. In addition, there is no evidence in the record establishing that plaintiff was required to work from an elevation at any time.

Further, there is also no evidence that a falling object caused plaintiff to fall down the Ramp, such that a falling object analysis could be applied to his accident (*see e.g. Fabrizi v 1095 Ave. of the Ams., L.L.C.,* 22 NY3d 658, 663 [2014] [to apply falling object liability, an object that causes injury to plaintiff must be "'hoisted or secured' or 'require[] securing for the purposes of the undertaking'"] [internal citation omitted]).

Plaintiff relies on, among other things, *McCann v Central Synagogue*, 280 AD2d 298, 299 [1st Dept 2001] for the proposition that the Ramp was a device designed to raise and lower materials, and that it was not properly secured to prevent plaintiff from sliding down its surface. The facts in *McCann,* however, are inapposite to those of the instant action.

In *McCann,* the plaintiff was engaged in an elevation related activity – pushing a heavy debris filled cart up an insufficiently secured ramp. While plaintiff was pushing the cart up the ramp, the cart tipped sideways and fell off the unsecured side of the ramp, taking the plaintiff with it.

Here, plaintiff was not engaged in any such elevation-related activity. Rather, he was merely attempting to walk down a flight of stairs.

In short, the powerful protections of section 240 (1) are not triggered where a plaintiff, while walking on a non-elevated surface, inadvertently steps onto and then slides down a ramp. Such an event is a general hazard of the workplace that falls outside the scope of section 240 (1) (*Makarius,* 76 AD3d at 807).

Accordingly, as plaintiff was not engaged in an elevation-related activity, Owner defendants and Whitestar are entitled to summary judgment dismissing the Labor Law § 240 (1) claim as against them and plaintiff's motion for summary judgment in his favor as to his Labor Law § 240 (1) claims is denied.

The Labor Law § 241 (6) Claim (Motion Sequence Numbers 007, 008 and Plaintiff's Cross Motions)

Owner defendants and Whitestar each move for summary judgment dismissing the Labor Law § 241 (6) claim as against them. Plaintiff cross-moves for summary judgment in his favor as to liability on the same claim against all defendants.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> * * *
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241 (6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a

proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Here, plaintiff lists multiple violations of the Industrial Code in his bills of particulars. Except for section 23-1.30, plaintiff does not affirmatively seek relief or oppose their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Importantly, plaintiff never affirmatively alleged a violation of Industrial Code 12 NYCRR 23-1.30 in his bill of particulars. Nor does plaintiff seek to amend his bill of particulars to add such a claim.

> "A failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim. . . . Rather, leave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant"

(*Jara v New York Racing Assn, Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011] [internal quotation marks and citations omitted"]).

As plaintiff has not sought to amend his pleading to add a violation of section 23-1.30, it is not properly before the court, and will not be considered.

Accordingly, as plaintiff has not opposed the dismissal of any pleaded Industrial Code violations, Owner defendants and Whitestar are entitled to summary judgment dismissing the Labor Law § 241 (6) claim in its entirety. Plaintiff is not entitled to summary judgment in his favor as to the same.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Numbers 007, 008 and Plaintiff's Cross Motions

Owner defendants and Whitestar move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Plaintiff cross moves for summary judgment in his favor against all defendants.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

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

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who

exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

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

Here, plaintiff alleges that he was injured when he stepped onto and then slid down the improperly secured Ramp. Securing of the ramp involves the means and methods of the work – i.e. the actual labor of constructing the required barriers and/or safety devices to provide protection against a fall. Accordingly, plaintiff's accident was caused by the means and methods of the work.[4]

The Owner Defendants

As to the Owner defendants, the record contains no evidence that they exercised actual supervision or control over the injury producing work – i.e. the securing/barricading of the top of the Ramp.

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[4] The parties also discuss plaintiff's accident under a dangerous condition theory. A dangerous condition, however, must arise from a condition "inherent in the premises" (*Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 [2d Dept 2008] [equipment brought in and left on site by subcontractor was not a condition inherent in the premises]). Here, a temporary ramp, built to facilitate the transport of materials down a stairway is not a condition inherent to the premises. Rather, the condition itself arises from the means and methods of the work – i.e. the failure to properly secure the ramp itself (*see O'Sullivan v IDI Const. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], affd, 7 NY3d 805 [2006] [holding that the alleged dangerous condition of "failing to safeguard workers against the tripping hazard caused by" a subcontractor's work fell within the means and methods analysis]).

That Newmark had personnel present at the Premises who walked the building and had authority to stop the work, such activity, without more, only establishes that Newmark had general supervisory control over the work. Such general supervisory control is insufficient to impute liability under section 200 or the common-law (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007] [that an entity "may have had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether [it] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence"]).

Accordingly, the Owner defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them and plaintiff is not entitled to summary judgment in his favor on the same claims.

Whitestar

As to Whitestar, there is evidence in the record reflecting that Whitestar was responsible for providing safety devices to cordon off the Ramp (James tr at 30 [to prevent workers from walking down the Ramp, James directed Whitestar's laborers to have the Ramp "cordoned off and taped off"]). Accordingly, the record indicates that Whitestar had some level of actual supervisory control over securing the Ramp, such that it could be liable under a means and methods analysis.

That said, there is no explanation in the record for (1) why the Ramp was not cordoned off at the time of the accident, (2) who removed the caution tape/cones/barricade that was supposed to be present, (3) when it was removed, or (4) whether the safety devices had been

removed for work related purposes. Each of these factors raise a material question of fact as to liability and precludes a finding of summary judgment for plaintiff or Whitestar.

Thus, Whitestar is not entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it and plaintiff is not entitled to summary judgment in his favor on the same claims.

Owner Defendants' Common-Law Indemnification Crossclaim Against Whitestar (Motion Sequence Numbers 007 and 008)

Owner defendants move for summary judgment in their favor on their common-law indemnification crossclaim as against Whitestar. Whitestar moves for summary judgment dismissing the same.

> "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'"

(*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]; *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [2011] ["[l]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]).

Here, Owner defendants have been found to be non-negligent with respect to plaintiff's accident. However, as discussed above, questions of fact remain regarding whether Whitestar was negligent in failing to sufficiently secure the Ramp. Accordingly, Owner defendants are not entitled to summary judgment in their favor on their common-law indemnification crossclaim against Whitestar and Whitestar is not entitled to summary judgment dismissing the same.

To the extent that Owner defendants seek dismissal of all cross claims alleged against them, they do not raise any arguments regarding such claims. Accordingly, that part of their motion is denied.

Owner Defendants' Contractual Indemnification Claim Against Whitestar (Motion Sequence Number 008)

Whitestar moves for summary judgment dismissing Owner defendants' crossclaim for contractual indemnification.

"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]).

Here, Whitestar argues that there was no contractual agreement between it and Newmark, or any other Owner defendant, that required Whitestar to indemnify the Owner defendants. Owner defendants do not oppose this portion of Whitestar's motion.

Accordingly, as Owner defendants do not contest that there was no agreement for contractual indemnification between them and Whitestar, Whitestar is entitled to summary judgment dismissing this claim as against it.

Sandy Liu's Derivative Claims (Motion Sequence Number 008)

Whitestar moves for summary judgment dismissing the derivative claims brought on behalf of Sandy Liu on the ground that plaintiff acknowledges that Sandy Liu is not his spouse, does not live with him, does not assist him in any way, and because he does not know where she presently resides. Plaintiff does not oppose this portion of Whitestar's motion.

Accordingly, Whitestar is entitled to dismissal of the derivative claims brought in the name of Sandy Liu.

The court has considered the parties' remaining arguments and finds them unpersuasive.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Safon, LLC d/b/a The Moinian Group (Safon), Josephson LLC, d/b/a The Moinian Group (Josephson) and Newmark & Company Real Estate, Inc. d/b/a Newmark Grubb Knight Frank (Newmark) (collectively, the Owner defendants) (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them, and for summary judgment in their favor on their common law indemnification claim against defendant/third-party plaintiff/second third-party plaintiff Whitestar Consulting & Contracting, Inc. (Whitestar) is granted to the extent that plaintiff's claims against the Owner defendants are dismissed, and the remainder of the motion is denied; and it is further

ORDERED that Whitestar's motion (motion sequence number 008), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and third-party counterclaims against it is granted to the extent that plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, Sandy Liu's derivative claims, and Owner defendants' contractual indemnification counterclaim against it are dismissed, and the remainder of the motion is denied; and it is further

ORDERED that the motion of plaintiff, Noah Liu (plaintiff) (motion sequence number 009), pursuant to CPLR 3025 (b), for leave to file a supplemental summons and a third amended verified complaint is denied; and it is further

ORDERED that plaintiff's cross motion, made in connection with motion sequence number 007, pursuant to CPLR 3212, for summary judgment on his common-law negligence and Labor Law §§ 200 and 240 (1) claims against the Owner defendants is denied; and it is further

ORDERED that plaintiff's cross motion, made in connection with motion sequence number 008, pursuant to CPLR 3212, for summary judgment on his common-law negligence and Labor Law §§ 200 and 240 (1) claims against Whitestar is denied.

9/13/2022
DATE

SHLOMO S. HAGLER, 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