Ramjitsingh v 2269 First Ave Owners, LLC
2022 NY Slip Op 33450(U)
October 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 508534/18
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of October, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JEREMY RAMJITSINGH,

Plaintiff,

-against-

2269 FIRST AVE OWNERS, LLC
and BDM SOLUTIONS LLC,

Defendants.

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2269 FIRST AVE OWNERS, LLC,

Third-Party Plaintiff,

-against-

BDM SOLUTIONS LLC and
ENERGY ELEVATOR SERVICES, INC.,

Third-Party Defendants.

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DECISION / ORDER

Index No.: 508534/18
Mot. Seq. # 7, 8, 9 & 10

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	141-142, 153-154, 176 178-179, 207-208, 232
Opposing Affidavits/Answer (Affirmations)	202, 204, 235, 239, 241, 244, 249, 252
Affidavits/ Affirmations in Reply	245, 247, 250, 251, 254, 255 258, 261, 264, 265, 266, 267

Upon the foregoing papers, third-party defendant Energy Elevator Services, Inc. (Energy) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint and any cross claims as against it (motion [mot.] sequence [seq.] number [no.] 7). Defendant/third-party defendant BDM Solutions LLC (BDM) moves for an order, pursuant to CPLR 3212, granting it: (1) summary judgment dismissing plaintiff's complaint and all cross claims against it; and (2) summary judgment in its favor on its cross claim for contractual indemnification from Energy (mot. seq. no. 8). Defendant/third-party plaintiff 2269 First Ave Owners, LLC (2269 First Ave) moves for an order, pursuant to CPLR 3212, granting it: (1) summary judgment dismissing the complaint and all cross claims and counterclaims against it; (2) summary judgment in its favor on its contractual indemnification claims against BDM and Energy; and (3) summary judgment in its favor on its breach of contract for failing to procure insurance claim against Energy (mot. seq. no. 9). Finally, plaintiff Jeremy Ramjitsingh cross-moves for an order, pursuant to CPLR 3212, granting him summary judgment with respect to liability (mot. seq. no. 10).

Background

In this action, plaintiff Jeremy Ramjitsingh (plaintiff) pleads causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) based on injuries he allegedly sustained when he was struck in the head by a 12-foot-long metal rod while walking near an elevator shaft located in a building undergoing a gut renovation. The building was owned by 2269 First Ave, which hired BDM to act as

general contractor for the renovation project. BDM, in turn, hired Energy to install new elevators in the building. Plaintiff was employed by Energy as an apprentice/helper.

According to plaintiff's deposition testimony, the accident happened shortly after plaintiff had arrived for work and entered the building, while he was walking on the first floor toward Energy's storage area where plaintiff had left his hardhat, harness, and gloves. Before he reached the storage area and obtained his hardhat and other equipment, plaintiff was struck on the head by a metal rod that he believes had fallen from, and bounced out of, the elevator shaft. At the time plaintiff was struck by the rod, there was a ceiling over the area where he was walking and he was approximately five to 10 feet from the elevator shaft opening. In addition, plaintiff testified that he heard a "clanking noise" coming from the shaft seconds before he was hit in the head. Although there was netting in the shaft opening, the netting was only waist-high. The rod that fell, which was approximately 12-feet long and weighed approximately 10 to 15 pounds, was intended to be used to hold the elevator car's emergency brakes in place. Plaintiff asserted that he had seen that rod, which was supposed to be installed on the elevator at some point later that week, lying loose on the platform of the elevator car the day before the accident. Plaintiff, however, was unaware of any other object falling down the shaft during his two weeks on the job site.

Joshua Whitaker, an elevator mechanic employed at the time by Energy, was plaintiff's immediate supervisor, and was the only Energy employee at the job site on the day of the accident other than plaintiff. Whitaker testified at his deposition that he did not recall what he was doing at the time of the accident. When shown a text message

received by plaintiff immediately after the accident stating, "Bro, I'm really sorry. I hope you're okay. I was removing the rigging and debris from the cartop," Whitaker, although he conceded that it was sent from his number, that it looked like his text and that it looked like something he would have sent, could not remember if that was what he was doing at the time of the accident. Whitaker also could not recall what floor he would have been working at if he had been removing debris from the cartop. While Whitaker testified that workers working in the shaft would on occasion drop material or tools, he did not recall any material falling down the shaft on the date of the accident and asserted that he would not have intentionally dropped anything down the shaft. In his time installing elevators, Whitaker did not recall an object that was dropped in an elevator shaft ever bouncing out of the shaft. Whitaker testified that part of the hardware for connecting the "safeties together" under the elevator car included a 12-foot rod, which he believed weighed approximately 5 pounds, but he did recall using that piece of equipment on the day of the accident. Whitaker did not know any other entities that would have used a 12-foot-long rod in their work and stated that, on the date of the accident, he was not aware of anyone else working in the shaft other than him. According to Whitaker, the mesh barricades in the shaft opening, which were installed by BDM, were approximately 42 inches high. While Whitaker stated that workers were supposed to wear hard hats on the site, he added that the rule was not enforced.

At his deposition, William Smith, Energy's owner and president, testified that, as of the time of the accident, the platform, which would become the floor of the elevator cab, had been installed, but the cab of the elevator had not yet been installed. There was

nothing at the edge of the platform that would stop anything from falling off it, and there was space between the shaft and all four edges of the platform. In contrast to the testimony of plaintiff and Whitaker, Smith asserted that no 12-foot-long rods were to be used for the elevator in question or used by Energy in the installation of the elevators. Since elevator installation work in a shaft entailed drilling into concrete and similar activities, Smith stated that "material is going to fall down a shaft." However, he said, since they would have to clean up any objects or material they dropped down a shaft, the workers installing an elevator would never intentionally drop anything down the shaft. In addition, Smith asserted that in his experience of installing elevators (which work he had been performing nearly his entire work-life), he was unaware of an object ever falling down an elevator shaft and bouncing out of the shaft onto the floor. Smith also stated that the only purpose for the mesh safety barricades at the shaft openings was to prevent people from falling into a shaft, and they were not designed to prevent falling objects from coming out of the shaft. Additionally, Smith asserted that Energy required that hard hats be worn at all times on the job site and that the security guards required workers to have their hard hats on when they entered the job site.

In contrast to Smith's testimony, Dionyssios Maroulis, BDM's owner, who said he was on the job site two to three times per week, testified at his deposition that BDM had installed wood frames and solid plywood "covers" which completely covered the opening to the elevator shafts on each floor. In addition, Maroulis stated that they had also set up an approximately four-foot-high barricade consisting of a frame made of a heavy eight by eight-piece of wood and two-by-fours, which was covered with safety netting that stood

approximately two feet out from each shaft opening. When Energy needed to access the shaft for its work, it would inform BDM, and BDM laborers would move the plywood shaft cover, which would open like a door, and also move the barricade covered with netting, to allow access to the shaft. This barricade covered with netting, however, would be put back into position to block off the opening and to keep anyone from getting too close to the opening or falling into the shaft. According to Maroulis, the elevator platform at issue was on the 9th floor, at the top of the shaft on the date of the accident. Finally, Maroulis asserted that, when he was on the job site, he did not observe any workers who were not wearing their hard hats.

Discussion

Labor Law § 240 (1)

Labor Law § 240 (1)[1] imposes absolute liability on owners and contractors or their agents when they fail to protect workers employed on a construction site from injuries proximately caused by risks associated with falling from a height or those associated with falling objects (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "the direct consequence of a

[1] As is relevant here, Labor Law § 240 (1) provides: "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663).[2]

Here, as noted above, plaintiff testified that he observed the rod sitting on the elevator platform the day before the accident, that there was a ceiling over the area where he was walking, and that he heard clattering from the area of the shaft before the rod struck him in the head. Although Whitaker, in his testimony, could not recall what he

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[2] There is no dispute that the work plaintiff was performing is covered, as it was work in the "erection" or "altering" of a building under Labor Law § 240 (1) (*see Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2d Dept 2009]), and that 2269 First Ave, as owner, and BMD, as general contractor, may be held liable under section 240 (1) regardless of whether they actually supervised or controlled plaintiff's work (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020]; *Yaguachi v Park City 3 & 4 Apts., Inc.*, 185 AD3d 635, 635-636 [2d Dept 2020]). In addition, the fact that plaintiff had only just entered the jobsite and was walking to the storage area to get his safety equipment is not a bar to his recovery under the Labor Law (*see Crutch v 421 Kent Dev., LLC*, 192 AD3d 977, 980 [2d Dept 2021]; *Hoyos v NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 493-495 [1st Dept 2017]; *Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 1278 [3d Dept 2009]).

was doing at the time of the accident, Whitaker's text message to plaintiff may allow an inference that Whitaker in some way caused the rod to fall while he was removing the debris and rigging from the cartop.[3] Maroulis testified that the elevator platform was positioned at the ninth floor on the date of the accident. Considered together, this evidence is sufficient to allow an inference that Whitaker bumped, or in some other way moved the rod, so it rolled off the elevator platform, fell down the shaft from the ninth to the first floor, bounced off of something, and came out from the shaft and hit plaintiff.

Plaintiff, in moving, posits that the accident was caused by the failure to secure the rod to the platform, and/or the failure of defendants to ensure that the protection at the shaft openings covered the entire height of the opening in order to prevent falling objects from coming out of the shaft. The evidence that the rod was left in a position on the platform from which it could be knocked off or moved so it would roll off, may support a finding that a Labor Law § 240 (1) securing device was needed under the circumstances (*see Outar*, 5 NY3d at 732; *Cortes v Jing Jeng Hang*, 143 AD3d 854, 855 [2d Dept 2016]; *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735 [2d Dept 2015]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 843 [2d Dept 2014]; *Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488 [2d Dept 2006]; *Orner v Port Auth.of N.Y. & N.J.*, 293 AD2d 517, 517-518 [2d Dept 2002]; *see also Wellington v Christa*

[3] It is noted that several of the parties refer to this text message, and that no party has raised any objection to its use or admissibility (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54-55 [2d Dept 2014]). Although Whitaker, in the text, stated that he was working on the "cartop," it is evident from plaintiff's testimony that plaintiff considered the "cartop" to be the same place as what plaintiff referred to as the "platform" in his own testimony (Ramjitsingh tr at 101, lines 2-8).

Constr. LLC, 161 AD3d 1278, 1280-1281 [3d Dept 2018]). However, plaintiff's testimony that the rod only weighed 10 to 15 pounds may result in a finding that it was too small to need a securing device (*see Wiski v Verizon N.Y., Inc.*, 186 AD3d 1590, 1591 [2d Dept 2020]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 964 [2d Dept 2013]). Because of the considerable distance that the rod could fall inside the shaft, the weight of the rod does not, in and of itself, preclude a finding that a securing device was necessary (*see Peters v Structure Tone, Inc.*, 204 AD3d 522, 523-524 [1st Dept 2022]; *Tropea v Tishman Constr. Corp.*, 172 AD3d 450, 451 [1st Dept 2019]; *Wellington*, 161 AD3d at 1281; *Boyle v 42nd St. Dev. Project, Inc.*, 38 AD3d 404, 405-408 [1st Dept 2007]).

With respect to the inadequacy of the protective covers over the shaft openings, as noted above, Maroulis, BDM's owner, testified that BDM had installed plywood covers that sealed the entirety of each of the shaft openings, and they also installed shorter barriers which were used when Energy needed to access the openings. The fact that BDM had installed covers over the entirety of the shaft openings, covers which would have been unnecessary if the only risk relating to the shaft openings involved that of workers falling into the shafts, suggests that there was a recognized risk of objects falling and then flying out of the elevator shafts during the course of Energy's work. While an argument could be made that having the full plywood cover over the opening to the shaft could be contrary to the objectives of the work, while Energy was actually performing work at the opening, or in the shaft at the vicinity of the opening (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 137-138 [2011]), there is nothing in the record suggesting that Energy was performing work at the time of the accident other than Whitaker, who

was working on the 9th floor (*see Dias v City of New York*, 110 AD3d 577, 577-578 [1st Dept 2013]). As such, there is a fact issue whether the absence of the full cover on the first floor shaft where plaintiff was walking at the time of his accident constituted a failure to provide adequate protection for purposes of Labor Law § 240 (1) (*see Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1092 [2d Dept 2015]; *see also Peters*, 204 AD3d at 524).

These factual issues with respect to the need for securing devices and/or protection at the shaft openings require denial of the portion of defendants' motions which seek dismissal of plaintiff's Labor Law § 240 (1) cause of action. Further, to the extent it is raised by defendants' motion papers, plaintiff's failure to wear a hardhat at the time of the accident cannot constitute the sole proximate cause of the accident, or render him a recalcitrant worker, for purposes of a section 240 (1) claim, because a hard hat is not a section 240 (1) safety device (*see Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013]; *Singh v 49 E. 96 Realty Corp.*, 291 AD2d 216, 216 [1st Dept 2002]; *see also Peters*, 204 AD3d at 524 [failure to wear safety goggles not sole proximate cause since not section 240 safety device]).

Plaintiff's cross motion, however, must also be denied with respect to his Labor Law § 240 (1) claim given that the record does not show that a securing device was required as a matter of law, particularly in view of the fact that plaintiff did not witness what caused the rod to fall, and the fact that Whitaker could not recall what he was doing at the time of the accident (*see Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 435 [1st Dept 2021]; *Henriquez v Grant*, 186 AD3d 577, 577-578 [2d Dept 2020]; *Pazmino v*

41-50 78th St. Corp., 139 AD3d 1029, 1030 [2d Dept 2016]; *Podobedov*, 133 AD3d at 735; *Wysk v New York City School Constr. Auth.*, 87 AD3d 1131, 1132 [2d Dept 2011]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2d Dept 2011]; *see also Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339-340 [2011]; *but see Humphrey v Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558, 559 [1st Dept 2014]). Likewise, in view of Smith and Whitaker's deposition testimony suggesting that it would be highly unusual for a dropped object to "bounce out" of an elevator shaft, and in view of the absence of any regulations that unequivocally require netting or a barrier covering the entirety of an opening into an elevator shaft,[4] there are issues of fact as to whether the height of the mesh barricade on the first floor violated Labor Law § 240 (1) (*cf. Sarata*, 134 AD3d at 1092).[5]

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[4] Labor Law § 241-a only applies to workers working "in or at elevator shaftways," and plaintiff, who testified that he was 5 to 10 feet from the opening, cannot be deemed to be working "in or at" a shaftway (*see also* 12 NYCRR 23-2.5 [protections for workers working in shafts]; Labor Law § 241 [6] [shaft opening for elevator in use for lifting materials protected by three to four foot high barrier). Regarding the protection of workers other than those actually working in the shaft, the focus of Industrial Code provisions relating to shafts is on protecting workers from falling into shafts, not objects bouncing out (*see* 12 NYCRR 23-2.5 [b] [6] [addressing existing elevators and requiring that the exterior doors on elevator shaft be kept closed (here the elevator shaft was newly installed, not existing, and the exterior doors had not yet been installed or if work required doors to be open, the provision of a chain or other barrier 36 to 42 inches in height or person stationed at the door opening to prevent unauthorized entrance to the opening]; *see also* 12 NYCRR 23-1.7 [a] [2]). OSHA sections addressing fall protection and protection from falling objects do not appear to require more than a 42-inch-high barricade at the opening (*see* 29 CFR §§ 1926.501 & 1926.502).

[5] This court finds that the conclusory assertions of the engineers contained in the affidavits submitted by plaintiff and BDM may not be relied upon in support of their respective claims (*see Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1039 [2022]; *Podobedov*, 133 AD3d at 735).

Labor Law § 241 (6)

Regarding plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). Here, plaintiff, in his bill of particulars, bases his section 241 (6) cause of action on violations of Industrial Code sections 12 NYCRR 23-1.5, 23-1.7 (a), 23-1.7 (b), 23-1.7 (f), 23-1.8 (c), 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.32, 23-1.33 (a) (1), (2) and (3), 23-1.33 (f), 23-2.1 (a) (1) and (2), 23-2.1 (b), 23-2.4 (a), 23-2.4 (b), 23-2.5 (a) (1) and (2), and 23-2.5 (b) (1) through (6).

With respect to 12 NYCRR 23-1.8 (c) (requiring wearing of "safety hats"), testimony that hard hats were required in all areas of the job site is sufficient to demonstrate factual issues regarding the applicability of section 23-1.8 (c) (*see McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 1095 [2d Dept 2012]; *see also Seales v Trident Structural Corp.*, 142 AD3d 1153, 1157 [2d Dept 2016]) and plaintiff's testimony that he was not instructed to wear a hard hat in all areas of the job site is sufficient to require denial of defendants' motion in this respect (*see McLean v 405 Webster Ave. Assoc.*, 26 Misc 3d 1219[A], 2010 NY Slip Op 51396[U], *13 [Sup Ct, Kings County 2010], *affd* 98 AD3d 1090 [2d Dept 2012]; *see also Sheley v Kingsfort Builders, Inc.*, 207 AD3d 1155, 1156 [4th Dept 2022]; *cf. Beshay v Eberhart L.P. No. 1*, 69 AD3d 779, 781 [2d Dept

2010]; *McCormack v Universal Carpet & Upholstery Cleaners*, 29 AD3d 542, 544 [2d Dept 2006]; *McLoud v State of New York*, 237 AD2d 783, 784-785 [3d Dept 1997]). The fact that the rod struck plaintiff in the head suggests that wearing a hard hat may have prevented or reduced his injuries. That fact alone, however, is insufficient to demonstrate the absence of factual issues as to whether the failure to wear the hard hat was a proximate cause of his injuries (*see McLean*, 98 AD3d 1090 at 1095).

Turning to 12 NYCRR 23-2.1 (a) (1) (all building materials required to be stored in safe manner), and 12 NYCRR 23-2.1 (a) (2) (material should not be placed so close to any edge of a platform so as to endanger any person beneath such edge), plaintiff's testimony that the rod was left lying on the elevator platform awaiting installation later in the week is sufficient to demonstrate factual issues as to whether the rod was properly stored within the meaning of those sections, requiring denial of defendant's motion (*see Parrino v Rauert*, 208 AD3d 672, 675 [2d Dept 2022] [addressing section 23-2.1 (a) (1)]; *Slowe v Lecesse Constr. Servs., LLC*, 192 AD3d 1645, 1646 [4th Dept 2021] [addressing section 23-2.1 (a) (1)]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *see also Ginter*, 121 AD3d at 843 [addressing section 23-2.1 (a) (2)]; *Fountaine v Juniper Assoc.*, 67 AD3d 608, 609 [1st Dept 2009]). However, given the lack of detail in plaintiff's testimony in this regard, and given that it is unclear exactly how the rod was caused to fall, plaintiff's cross motion must also be denied (*see Ortiz*, 18 NY3d at 339-340).

On the other hand, since nothing in the record suggests that the area where plaintiff was walking was "normally exposed to falling material or objects,"[6] defendants are entitled to dismissal of the Labor Law § 241 (6) claim to the extent premised on 12 NYCRR 23-1.7 (a) (1) and 23-1.7 (a) (2). In addition, plaintiff may not rely on 12 NYCRR 23-2.1 (b) because that section lacks the specificity required to support a cause of action under section 241 (6) (*see Ginter*, 121 AD3d at 844; *Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014]). Defendants have also demonstrated their prima facie entitlement to dismissal of the section 241 (6) cause of action with respect to the remaining Industrial Code sections because they either are inapplicable to the facts of the case or do not state specific standards, and plaintiff has abandoned reliance on these remaining sections by failing to address them in his moving or opposition papers (*see Debennedetto v Chetrit*, 190 AD3d 933, 935 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]). In sum, the BDM and 2269 First Ave are entitled to summary judgment dismissing the plaintiff's Labor Law section 241 (6) cause of action to the extent that it is premised on 12 NYCRR 23-1.5, 23-1.7 (a), 23-1.7 (b), 23-1.7 (f), 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.32, 23-1.33 (a) (1), (2) and (3), 23-1.33 (f), 23-2.1 (b), 23-2.4 (a), 23-2.4 (b), 23-2.5 (a) (1) and (2), and 23-2.5 (b) (1) through (6).

[6] As noted above, while Whitaker and Smith testified regarding the general risk of objects falling during elevator installation, both Whitaker and plaintiff, in their deposition testimony, asserted that they were unaware of any objects falling down the shaft, let alone into the first-floor area where plaintiff was walking, prior to plaintiff's accident.

Labor Law § 200 and Common-Law Negligence

When common-law negligence and Labor Law § 200 claims arise out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto*, 91 NY2d at 352; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]). Without more, an owner or contractor's authority to stop the work or their general supervisory authority over the injury-producing work is insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 495 [2d Dept 2022]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670-673 [2d Dept 2018]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]).

Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Here, with respect to 2269 First Ave, the adequacy of the protection at the shaft openings falls within the means and manner of work, not a dangerous property condition (*see Schwind v Mel Lany Constr. Mgt. Corp.*, 95 AD3d 1196, 1198 [2d Dept 2012], *lv*

dismissed 19 NY3d 1020 [2012]; *McKay v Weeden*, 148 AD3d 1718, 1720-1721 [4th Dept 2017]; *Gillis v Brown*, 133 AD3d 1374, 1376 [4th Dept 2015]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). The deposition testimony of plaintiff, Smith, Whitaker and Maroulis further shows that 2269 First Ave generally did not exercise supervision and control over Energy's performance of its work or over BDM's erection of and maintenance of the barricades at the shaft openings. Smith, however, testified that the security guards (who were concededly employed by 2269 First Ave) regulated the entry of persons onto the job site and required that everyone entering the job site wear a hard hat. Smith's testimony is sufficient to demonstrate factual issues regarding 2269 First Ave's control over the wearing of hard hats, and whether the security guard's failure to require plaintiff to wear a hard hat upon his entry to the job site on the date of the accident constitutes negligence for purposes of plaintiff's common-law negligence and Labor Law § 200 causes of action. Thus, the portion of 2269 First Ave's motion seeking dismissal of those claims is denied (*see Agli v 21 E. 90 Apts. Corp.*, 195 AD3d 458, 460 [1st Dept 2021]; *see also Ortiz*, 18 NY3d at 340; *cf. Dawson v Diesel Constr. Co.*, 51 AD2d 397, 399 [1st Dept 1976]).

BDM concededly assumed the responsibility to erect the protective barriers at the shaft openings. Given, as discussed with respect to plaintiff's Labor Law § 240 (1) cause of action, Maroulis testified that these barriers (except when moved for Energy's work) covered the entirety of the opening, it can be inferred that they were intended to do more than protect workers from falling into the shaft. There are thus factual issues as to whether BDM's apparent removal of the full cover on the first floor, and their failure to

replace it, created a dangerous condition. This requires denial of its motion with respect to plaintiff's Labor Law § 200 and common-law negligence claims (*see Clifton v Collins*, 202 AD3d 1476, 1477-1478 [4th Dept 2022]; *Sotarriba v 346 W. 17th St. LLC*, 179 AD3d 599, 601 [1st Dept 2020]; *McKay v Weeden*, 148 AD3d 1718, 1720-1721 [4th Dept 2017]; *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 754 [2d Dept 2014]; *cf. Poulin*, 166 AD3d at 671-672 [dangerous condition at stairway opening created by contractor's method of work]).

On the other hand, the factual issues relating to whether 2269 First Ave had assumed responsibility for supervising the wearing of hard hats, and whether BDM's failure to cover the entirety of the elevator shaft on the first floor was negligent, require the denial of the portion of plaintiff's motion for summary judgment on his common-law negligence and Labor Law § 200 causes of action.

Cross Claims and Third-Party Claims

The portion of 2269 First Ave's motion seeking summary judgment in its favor on its contractual indemnification claims against BDM and Energy must be denied in light of the above noted factual issues relating to the possibility of its own negligence (*see Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096-1097 [2d Dept 2018]). Aside from issues relating to 2269 First Ave's own negligence, BDM, in opposition, has demonstrated that its insurer accepted 2269 First Ave's tender and agreed that 2269 First Ave was an additional insured under BDM's policy, and thus, the anti-subrogation principle bars summary judgment on 2269 First Ave's contractual indemnification claim

(*see Aguilar v Graham Terrace, LLC*, 186 AD3d 1298, 1302 [2d Dept 2020]). The issues with respect to 2269 First Ave's own negligence also require denial of the portion of its motion seeking dismissal of the common-law indemnification and contribution claims against it (*see Zong Wang Yang v City of New York*, 207 AD3d 791, 796-797 [2d Dept 2022]).

BDM is not entitled to dismissal of 2269 First Ave's contractual indemnification, common-law indemnification, contribution and insurance procurement claims as against it. Notably, since BDM first raised the anti-subrogation argument in opposition to 2269 First Ave's motion, and in its reply papers, it is not entitled to summary judgment in its favor based on said argument (*see Ditech Fin., LLC v Connors*, 206 AD3d 694, 698 [2d Dept 2022]; *see also Aguilar*, 186 AD3d at 1302). Additionally, the contract between 2269 First Ave and BDM requires BDM to indemnify 2269 First Ave from any claim "caused in whole or in part by negligent act or omission of the Contractor, any subcontractor, or anyone employed by any of them . . ." In view of the factual issues regarding BDM's own negligence relating to the covering of the shaft openings, and the factual issues regarding Energy's negligence relating to the securing of the rod and plaintiff's failure to wear a hard hat (*see Ginter*, 121 AD3d at 845; *Mercado*, 104 AD3d at 578), BDM is not entitled to dismissal of the contractual indemnification claim against it. The issue with respect to BDM's own negligence also requires denial of the portion of its motion seeking summary judgment on its contractual indemnification claim against Energy (*see Graziano*, 175 AD3d at 1260; *McDonnell*, 165 AD3d at 1096-1097), and requires denial of the portion of its motion seeking dismissal of the common-law

indemnification and contribution claims against it (*see Yang*, 207 AD3d at 796-797]). Finally, while the above noted proof regarding BDM's insurer concluding that 2269 First Ave was an additional insured under BDM's policy may warrant dismissal of 2269 First Ave's breach of contract claim for failing to procure insurance, BDM did not address the insurance procurement claim in moving for summary judgment, and thus is not entitled to dismissal of that cause of action (*see Ditech Fin., LLC*, 206 AD3d at 698).

Energy has demonstrated, prima facie, that the exclusive remedy provision of the Workers' Compensation Law bars the contribution and common-law indemnification claims against it, based on plaintiff's testimony and his bill of particulars, which show that he was Energy's employee, that he received Workers' Compensation, and that he did not sustain a grave injury (*see Owens v Jea Bus Co., Inc.*, 161 AD3d 1188, 1190 [2d Dept 2018]; *Maxwell v Rockland County Community Coll.*, 78 AD3d 793, 794 [2d Dept 2010]; *Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]; Workers' Compensation Law § 11). As neither BDM nor 2269 First Ave have submitted evidentiary proof demonstrating an issue of fact in this respect, Energy is entitled to summary judgment dismissing the contribution and common-law indemnification claims against it.

Energy, however, is not entitled to dismissal of BDM's and 2269 First Ave's contractual indemnification claims against it. Energy's contract with BDM contains a broad indemnification provision requiring it to indemnify 2269 First Ave and BDM for any claim arising out of Energy's work. Contrary to Energy's contentions, the accident is deemed to arise out of Energy's work, based on the fact that plaintiff, its employee, was injured at the work site, regardless of whether or not the accident is deemed to have been

caused by any acts or omissions on the part of Energy (*see O'Connor v Serge El. Co.*, 58 NY2d 655, 657-658 [1982]; *Madkins v 22 Little W. 12th St., LLC*, 191 AD3d 434, 436 [1st Dept 2021]; *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773-774 [2d Dept 2010]; *Daily News, LP v OCS Sec.*, 280 AD2d 576, 577 [2d Dept 2001]; *Tkack v City of New York*, 278 AD2d 227, 229 [2d Dept 2000]).[7] Further, although there are factual issues relating to 2269 First Ave's and BDM's negligence, Energy has failed to demonstrate that they were negligent as a matter of law.

With respect to 2269 First Ave's insurance procurement claim against Energy, 2269 First Ave has demonstrated that Energy's policy, which covers additional insureds for "'bodily injury' . . . caused, in whole or in part by [Energy's] acts or omissions" rather than the contractually required coverage for liability "arising out of 'your work' for that insured," does not comply with the insurance procurement requirements of the contract. Energy is thus not entitled to dismissal of the claim (*see Roldan v New York Univ.*, 81 AD3d 625, 629 [2d Dept 2011]; *Bachrow v Turner Constr. Corp.*, 46 AD3d 388, 388 [1st Dept 2007]; *Clapper v County of Albany*, 188 AD3d 774, 775-776 [3d Dept 1992]). However, 2269 First Ave is not entitled to summary judgment on the claim, because Energy's insurer has not made a final determination regarding the additional insured coverage in that it has agreed to provide a defense, and has only reserved its rights with respect to its indemnification obligation. Accordingly, the insurer may still concede that

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[7] The court notes that, although it is not clear from the language of the decision in *Tkack*, the briefs on appeal show that it was undisputed that plaintiff's employer had nothing to do with the material that was blown off the roof and struck plaintiff (*see* Defendant-Appellant-Respondent brief, 2000 WL 34488651, and Defendant-Respondent/Third-Party Plaintiff brief, 2000 WL 34488653).

the accident arose out of Energy's acts or omissions, rendering it premature to determine that 2269 First Ave has suffered any damages as the result of Energy's failure to obtain a proper additional insured endorsement (*see e.g. Gonzalez v DOLP 205 Props. II, LLC*, 206 AD3d 468, 471-472 [1st Dept 2022]; *Souare v Port Auth. of N.Y. & N.J.*, 125 AD3d 494, 495 [1st Dept 2015]; *Bachrow*, 46 AD3d at 388). At this juncture, the proper remedy regarding coverage under the policy would be a declaratory judgment action against the insurer (*see Bachrow*, 46 AD3d at 388; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 402 [1st Dept 1996]).

Conclusions of Law

Energy's motion (mot. seq. no. 7) is granted only to the extent that 2269 First Ave's third-party claims and BDM's cross claims for contribution and common-law indemnification against it are dismissed. Energy's motion is otherwise denied.

BDM's motion (mot. seq. no. 8) is granted only to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed to the extent that it is based on Industrial Code sections 12 NYCRR 23-1.5, 23-1.7 (a), 23-1.7 (b), 23-1.7 (f), 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.32, 23-1.33 (a) (1), (2) & (3), 23-1.33 (f), 23-2.1 (b), 23-2.4 (a), 23-2.4 (b), 23-2.5 (a) (1) & (2) and 23-2.5 (b) (1) through (6).[8] BDM's motion is otherwise denied.

2269 First Ave's motion (mot. seq. no. 9) is granted to the extent that plaintiff's Labor Law § 241 (6) cause of action is dismissed insofar as it is based on Industrial Code

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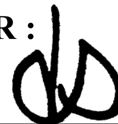
[8] The court notes that plaintiff previously withdrew his claim to the extent it was based on 12 NYCRR 23-1.30 by way of a stipulation of the parties dated May 7, 2021.

sections 12 NYCRR 23-1.5, 23-1.7 (a), 23-1.7 (b), 23-1.7 (f), 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.32, 23-1.33 (a) (1), (2) & (3), 23-1.33 (f), 23-2.1 (b), 23-2.4 (a), 23-2.4 (b), 23-2.5 (a) (1) & (2) and 23-2.5 (b) (1) through (6). 2269 First Ave's motion is otherwise denied.

Plaintiff Jeremy Ramjitsingh's motion (mot. seq. no. 10) is denied.

This constitutes the decision and order of the court.

E N T E R :



Hon. Debra Silber, J.S.C.